Tax

GENERAL ASPECTS

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1. What is the legislation applicable to tax matters? Is the Romanian tax legislation fully harmonised with the EU law?

Romanian tax matters are mainly covered by Law No. 227/2015 regarding the Tax Code, as further amended and supplemented, and by Government Decision No. 1/2016 approving the Norms for the application of the Tax Code, as further amended and supplemented. Moreover, certain provisions from the Anti-Tax Avoidance Directive (i.e. deductibility limitations for exceeding borrowing costs, exit taxation, controlled foreign companies (CFC) rules, anti-abuse rules) were implemented in the Romanian tax legislation.

Also, the provisions of the Council Directive (EU) 2018/822 of 25 May 2018 (also known as DAC 6) have been implemented in the Romanian tax legislation through Government Ordinance No. 5/2020 amending and suplementing Law No. 207/2015 on the Fiscal Procedure Code, generating obligations with respect to the automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

With regard to indirect taxes, Romanian law is generally in line with European law: Title VII of the Tax Code on VAT is generally aligned with Directive 2006/112/EC, and Title VIII of the Tax Code refers to harmonised excise duties following Directive 92/12/EEC. Customs duties are governed by the Regulations of the European Commission (European Regulation No. 952/2013, as further supplemented by other Regulations and the European Regulation No. 2447/2015 laying down the Norms of application of the European Regulation No. 952/2013).

At the end of 2020, the main law governing tax procedural matters, the Fiscal Procedure Code (Law No. 207/2015) was subject to important amendments on aspects such as: the nullity of fiscal administrative acts (e.g., tax assessment decision), late payment interest and penalties, reasons for suspension of the tax audit, suspension of the statute of limitation.

2. Which are the main taxes payable by companies doing business in Romania?

The main taxes payable by the companies doing business in Romania are:

- Corporate income tax;
- Micro-enterprise tax;
- Income tax;
- Social security contributions (predominantly due by individuals, but the compliance obligations lay with the employers);
- Withholding tax;
- Value added tax;
- Excise duties;
- Customs duties;
- Local taxes.

The list is not exhaustive; it is only an indication of the most important taxes. Except for the customs duties, all the taxes mentioned above are covered by the Tax Code.

3. Who is subject to micro-enterprise tax in Romania?

Newly established companies and legal entities with a recorded annual turnover of up to EUR 1,000,000 are subject to micro-enterprise tax on their income.

Micro-enterprises with a share capital of RON 45.000 or more may opt to pay corporate tax if they have at least two employees.

The applicable tax rate is 1% on income derived for micro-companies employing at least one individual and 3% for entities with no employees.

4. Who is subject to corporate income tax in Romania?

The following taxpayers are subject to corporate income tax:

- Romanian resident companies;
- Foreign companies performing business activities in Romania through permanent establishments;
- Foreign companies which incur revenues in connection with immovable property located in Romania or from sale of shares in Romanian companies;
- Legal persons set up in accordance with European legislation, having a registered

office in Romania;
- Foreign companies which have the effective place of management located in Romania.

A company is to be considered resident in Romania if its head office is registered in Romania or if its place of effective management is located in Romania.

Special tax is applicable to taxpayers subject to corporate income tax carrying out activities related to hotels, restaurants, catering and bars, and calculated based on the surface area multiplied by a specific fixed tax base.

5. Is there a holding company regime available in Romania?

The Romanian taxpayer-favourable participation exemption regime, enforced starting 2014 for Romanian companies that hold shares in other domestic entities or in legal entities located in countries with which Romania has a double taxation treaty, is a viable option for local and regional businesses to create tax-efficient corporate structures. This holding tax regime, coupled with the wide double taxation treaty network available (close to 110) and low administrative costs, aims to grant access to Romania among the European jurisdictions with a long tradition in this area, such as The Netherlands, Luxembourg, Cyprus and Switzerland.

Similar to other jurisdictions, the participation exemption regime in Romania allows tax exemption for dividend income, capital gains and liquidation proceeds derived from subsidiaries, under certain conditions (minimum 10% participation in the subsidiary's share capital for an uninterrupted period exceeding one year at the moment when income is derived). This creates a favourable structure allowing companies to achieve a tax-efficient exit from businesses. Moreover, the provisions of the holding regime also apply in respect of subsidiaries incorporated in Romania, creating a solid incentive for local businesses to develop their own corporate holding structure.

6. What is a permanent establishment?

A permanent establishment is a taxable presence for corporate income tax purposes of a non-resident in Romania. While registration of a branch in Romania typically implies a permanent establishment, one can also be created in the absence of a registration with the Trade Registry. A permanent establishment is generally defined as the place of business through which the activity of a non-resident is conducted, fully or partially, directly or through a dependent agent. From the moment of creating the permanent establishment, Romanian authorities have the right to tax the profits of the foreign

enterprise derived from the activity performed in that permanent establishment.

The Romanian legislation explicitly states conditions which trigger a permanent establishment:

- *Fixed base permanent establishment* – created through a place of business with a certain degree of permanency through which business is conducted in Romania (with some exceptions);
- *Agency permanent establishment* – created through agents with a dependent status which operate in Romania on behalf of the foreign company.

The registration, filing and payment requirements are similar to those for a Romanian company.

7. What does opening a branch in Romania entail in terms of taxation?

Branches have to be registered with the Romanian tax authorities. The registration, filing and payment requirements are similar to those for a Romanian company.

A branch is considered to have the same legal personality as the parent company and, therefore, does not constitute a separate legal entity (no owned share capital, separate name, etc.). The branch's object of activity cannot be more extensive than that of the parent company.

Funds distribution to the head office country are not regarded as dividend distribution, therefore, no withholding tax liability should arise.

8. What are the applicable transfer pricing provisions?

All transactions carried out between related parties should be compliant with the arm's length principle. Otherwise, the Romanian tax authorities are entitled to estimate the amount of the transfer prices and perform transfer pricing adjustments at the level of taxpayer's revenues or expenses.

The arm's length principle is currently applicable in Romania to all transactions carried out between related parties, including those taking place between a non-resident legal entity and its Romanian permanent establishment.

In determining the market value of the transactions carried out between related parties,

the most appropriate method must be selected from the following:

- Comparable uncontrolled prices method;
- Cost plus method;
- Resale price method;
- Transactional net margin method;
- Profit split method;
- • Any other method recognised by the OECD Transfer Pricing Guidelines.

Although Romania is not an OECD member, the national legislation expressly stipulates that within the application of transfer pricing rules, the OECD Transfer Pricing Guidelines will also be considered.

9. What are the transfer pricing documentation requirements in Romania?

Taxpayers engaged in intra-group transactions exceeding certain thresholds have the obligation to prepare the local transfer pricing file in order to document the compliance of the transfer prices applied and the arm's length principle.

Depending on the category of the taxpayer (i.e., large, medium and small) the obligation to prepare the transfer pricing documentation can be either annual or at the specific request of the tax authorities during a tax audit.

The content of the transfer pricing documentation was approved by Order No. 442/2016 of the President of the National Agency for Tax Administration. The Order is supplemented by the OECD Transfer Pricing Guidelines and the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union.

Country-by-Country (CbC) documentation requirements are also applicable in Romania for entities part of multinational groups with a consolidated turnover higher than EUR 750,000,000. In this respect, a notification regarding the statute of the Romanian company within the Group (i.e., constituent entity or reporting entity) should be submitted to Romanian tax authorities (form R405).

Depending on the statute of the Romanian company and the country of residence of the reporting entity within the Group, the obligation to submit the CbC report (form R404) may also arise.

CbC related requirements are applicable starting with the year 2016.

10. Who must register as a VAT taxpayer?

VAT registration is mandatory for persons established in Romania carrying out taxable operations exceeding the EUR 88,500 (or RON 300.000) threshold. Below this threshold, VAT registration is optional.

If the annual turnover reaches or exceeds the EUR 88,500 / RON 300.000 threshold, VAT registration must be requested until the 10th day of the month following the one in which the threshold was reached/exceeded.

Seeking professional advice is highly recommended where the intention is to register the company as a VAT payer.

Separately, non-resident taxable persons performing specific operations in Romania are required or could opt to register for VAT purposes, as the case may be, irrespective of the value of operation.

11. What is a fixed establishment?

A company becomes established for VAT purposes in Romania either by having its place of business or by creating a VAT fixed establishment in Romania.

The notion of fixed establishment for VAT purposes is different from that of permanent establishment in terms of corporate income tax. The definition of the permanent establishment for corporate income tax is not relevant for determining the existence of a fixed establishment from a VAT perspective.

A VAT fixed establishment is a structure characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to perform the supply of goods or services in which it intervenes. For example, a branch with no human resources may not create a fixed establishment from a VAT standpoint.

12. How are capital gains computed and taxed in Romania?

Capital gains derived by Romanian resident companies are included in ordinary profit and therefore taxed at 16%. Capital losses related to sale of shares are, in general, tax deductible. Mergers, spin-offs, transfers of assets and exchanges of shares between two Romanian companies should not trigger capital gains tax as they are generally neutral from a fiscal perspective. In the case of a relocation of the registered office

of an EU based Company from Romania to another EU Member State, if certain conditions are met no tax will be imposed on the difference between the market and fiscal value of the transferred assets and liabilities. Moreover, no tax will be levied on such movements at the shareholder level. Capital gains from the sale/transfer of shares held in a Romanian or foreign legal entity located in a country that has concluded a tax treaty with Romania are exempt from tax on condition that at least 10% of its participation is held for a minimum period of one year.

13. What is the fiscal period for reporting purposes in Romania?

For corporate income tax computation, as a general rule, the fiscal year is considered to be the calendar year. The accounting year is also usually the calendar year, but entities are allowed to adopt an accounting year other than the calendar year. Taxpayers who have opted for an accounting year different from the calendar year are allowed to choose as fiscal year the same period as for their financial exercise.

For VAT purposes, the standard fiscal period is the calendar month. Quarterly VAT returns may be submitted by taxable persons with an annual turnover of less than EUR 100,000. When a taxable person performs at least one intra-Community acquisition of goods, VAT returns must be submitted monthly.

Half-yearly or annual reporting is also allowed, under special conditions.

14. Which is the level of late payment interest and penalties for tax liabilities?

Late payment of tax liabilities is subject to interest at a rate of 0.02% per day of delay, with an additional late payment penalty of 0.01% per day of delay.

Separately, a penalty for failure to declare is currently in force, of 0.08% per day, starting from the day following the due date until the date of payment. This penalty applies to the main tax obligations declared incorrectly or not declared by the taxpayer and established by a tax inspection authority decision. The penalty can be decreased by 75% upon taxpayer's request, if the main tax obligations established by decision are met by payment or compensation or the taxpayer is granted rescheduling of payment, according to the law. The penalty is increased to 100% of the main tax obligations in cases of tax evasion detected by the legal authorities according to the law.

The late payment interest and penalties could be fully annulled according to the tax

amnesty introduced in May 2020 in the COVID-19 context (through Government Emergency Ordinance No. 69/2020, as subsequently amended and supplemented).

15. What is the tax statute of limitation in Romania?

The statute of limitation period for tax matters in Romania is of five years, calculated from 1 July of the year following the year when the tax obligation arises (meaning that, in fact, the statute of limitation is up to six years).

However, the statute of limitation is extended to 10 years in the case of fraud, starting from the date when the criminal act occurred. The statute of limitation is suspended during fiscal inspections.

On the other hand, the storage period for accounting ledgers and documents is of 10 years from the end of the financial year during which they were drawn up.

Payrolls must be kept for 50 years. If business is interrupted, accounting documents must be archived or submitted to the state archives.

16. How is the salary income defined?

Salary is defined as income in cash and/or in kind received by individuals based on employment agreements and is taxed at a flat rate of 10%. Certain types of income are assimilated to salaries, including remuneration paid according to non-competition clauses and other taxable benefits such as: meal tickets, gift tickets, nursery tickets, holiday tickets, amounts representing compensatory payments, private use of company cars and telephones.

Administrator compensation, fees received by members of the General Meeting of Shareholders, the Management Council, the Board of Directors and the Supervision Council are also treated as salaries.

The compliance obligations with respect to salary income are: for employees (and directors remunerated based on mandate agreements) of Romanian companies, branches and representative offices of foreign companies, their employers are liable to calculate, withhold and transfer salary taxes on a monthly basis; for foreign individuals performing activities in Romania based on foreign employment agreements, the individuals are liable to submit a monthly income statement and pay monthly income tax.

17. What is the tax regime applicable to personal income derived from independent activities?

The income derived from independent activities is taxed at 10% tax rate (mandatory social charges are deductible) and covers, among others: income from freelance activities (authorisation needed), including income from liberal professions.

Mandatory social contributions are also due. As such, individuals earning income from independent activities are required to pay the social insurance contribution of 25% applicable on a chosen income, which cannot be lower than the national minimum gross salary.

A health insurance contribution (10%) is also payable, in certain conditions, by individuals earning income from independent activities, income generated by association with a legal entity, rental income, investment income, income from agricultural, forestry and fishery activities or income from other sources. The monthly calculation base of the contribution is the national minimum gross salary in force for the month for which the contribution is due.

18. How is the income from freelance activities assessed?

Income from freelance activities is assessed on the basis of entries in the single-entry bookkeeping ledgers that providers of independent activities are obliged to keep. The net income generated by freelance activities is calculated as gross income minus deductible expenses. Fines, late-payment penalties, donations, private scholarship, protocol expenses are considered non-deductible expenses in excess of the upper limits set by law. It is the individual's obligation to declare each year the income obtained from independent activities, based on a statement (the Single Tax Return) to be submitted by 25 May of the year following the one for which the income is calculated. It is also the individual's obligation to declare the income and to compute the correspondent income tax. The income tax is payable by the same date.

19. How is the income from intellectual property assessed?

Income from intellectual property is regulated under a separate tax regime than that applicable to income from independent activities.

The payer of the income (legal entity or other types of entity required to keep accounting records) must calculate, declare, withhold and pay the following: an income tax of 10% on a calculation base determined by deducting a flat rate of 40% from the

gross salary, as well as pension contributions and health contributions (unless the taxpayer is exempt, as is the case for retired people or individuals obtaining salary income) if the estimated level of income is at least equal to 12 national minimum gross salaries.

The filing and payment deadline for income tax and social contributions is the twenty-fifth of the month following that to which the income relates.

20. How is the rental income assessed?

Gross annual income represents the income earned by the owner during the year as stipulated in the rental agreement registered with the Romanian tax authorities. Net taxable income is determined by deducting a 40% expense allowance from the gross income and is taxed at a flat rate of 10%.

It is the individual's obligation to declare the rental income each year, based on the Single Tax Return form - to be submitted by the 15th March of the year following the one for which the income is calculated. It is also the individual's obligation to declare the income and to compute the correspondent income tax. The income tax is payable by the same date.

Moreover, revenues obtained by individuals from rental activities are subject to mandatory social contributions; i.e. rental income is also subject to a 10% health contribution applied to 12 minimum wages if the income obtained from rental income/ capital gains etc. exceeds 12 minimum wages, otherwise, health insurance contribution is not due.

21. How is the gambling income assessed?

Progressive tax rates are applicable in relation to gambling income as per these brackets:

- 1% on total amounts cashed by each participant from one gambling operator not exceeding RON 66.750;
- RON 667,5 + 16% for amounts ranging between RON 66.750 and RON 445.000; and
- RON 61.187,5 + 25% for amounts exceeding RON 445.000.

The obligation to compute, withhold and pay the tax lays with the gambling operator.

TAX CURIOSITIES

1. Is it possible to request the tax authorities' opinion on the tax implications of envisaged operations?

Companies may request a tax binding ruling be issued by the National Agency for Fiscal Administration, subject to a fee of EUR 5,000 for large taxpayers, respectively EUR 3,000 for other taxpayers. The taxpayer may propose the content of the tax binding ruling in the request submitted.

Should the requesting company not agree with the binding ruling, it may notify the issuing authority within 30 days; in this case, the tax binding ruling does not have legal effect.

Should the terms and conditions of the tax binding ruling be observed by the taxpayers, their provisions become applicable and mandatory against tax authorities.

Companies may also request a so-called "non-binding ruling". Even if it is not binding against the tax authorities, it is generally taken into consideration in practice. The advantage is that the procedure to obtain such an opinion is smoother and that the opinion could also be applicable in retrospect, if the same legislative provisions were in place.

2. Can Advance Pricing Agreements be obtained by the Romanian entities?

Taxpayers engaged in related-party transactions may request the National Agency for Tax Administration to issue an Advance Pricing Agreement (APA) for new transactions.

Generally, the APA is issued for a period of up to five years. In exceptional cases, it may be issued for a longer period for long-term agreements.

As long as there are no material changes regarding the legal presumptions, the APAs are applicable and binding on the tax authorities. In this respect, APA beneficiaries have the obligation to submit annual reports attesting to full compliance with the terms and conditions agreed.

Should the requesting party not agree with the provisions of the APA, it may notify the issuing authority within 30 days; in this case, the tax ruling does not have legal effects.

Unilateral and bilateral/multilateral APAs are available.

Under the Fiscal Procedural Code, an APA must be issued within 12 months for unilateral APAs and within 18 months for bilateral/multilateral APAs.

The fees applied by the Romanian tax authorities to issue an APA are:

- EUR 20,000, in case of large taxpayers or if the consolidated value of transactions covered in APA exceeds the equivalent of EUR 4,000,000 or if the taxpayer is classified as large taxpayer within the period of validity covered in APA.
- EUR 10,000 EUR, in case of small and medium size taxpayers.

3. Are there any tax consolidation options available in Romania for corporate income tax purposes?

The consolidation option was introduced in Romania in December 2020 through Law No. 296/2020. The profits or losses of the companies forming the tax group will be accumulated and offset, if applicable, resulting in a net position of the entire group. In this respect, a significant advantage is obtained by deducting losses from the profits of other members of the group, considerably improving the cash flow position of the group members. Law No. 296/2020 provides the conditions that must be met in order to set up the tax group, the operating rules, the period of time for which the consolidation applies, the rules on carrying forward losses and anti-abuse provisions.

Also, personal establishments triggered by the same foreign company in Romania may cumulate their fiscal results under certain conditions.

4. What provisions should be observed in respect of fiscal losses?

Fiscal losses incurred by Romanian companies may be carried forward for a period of seven years based on a first-in first-out method. The loss incurred by permanent establishments of Romanian companies, located in non-EU / EFTA Member States with which Romania does not have a Double Taxation Treaty in place, may only deducted for tax purposes from the revenues derived by that permanent establishment abroad.

As regards foreign legal persons, the fiscal losses attributable to their permanent establishment in Romania may only be carried forward for a period of five years.

5. Is the VAT group available in Romania?

The VAT group concept available in Romania is different from the European concept according to which the transactions between the members of the group are outside the scope of VAT. The Romanian VAT group simply allows consolidating the VAT positions between the members of the group by submitting a joint VAT return. Certain conditions must be fulfilled to register a VAT group of companies in Romania, such as: the group must be formed by a minimum of two taxable persons 50% owned directly or indirectly by the same persons, all members must apply the same fiscal period and the VAT group must be requested for a minimum of two years. Order No. 3006/2016 of the National Agency for Fiscal Administration, as subsequently amended and supplemented, establishes the implementation and administration procedures for such VAT group and approves specific forms in this respect.

6. Is there any special VAT treatment applicable in case of business transfers?

A business transfer (also referred to as "transfer of a going concern") can be performed without the application of VAT, as it is not considered a VAT taxable supply of goods under Romanian law (in line with the European VAT Directive). To qualify as a business transfer, the transaction must meet certain conditions provided by law, such as: (i) the transferee must be a taxable person established in Romania, (ii) the transfer is a universal transfer of assets and/or services which are not being treated individually but as a total unit by the transferor, irrespective whether the transfer of assets is total or partial, (iii) the recipient of the assets must prove his intention to continue the economic activity that has been transferred, and not to immediately liquidate such activity or sell the stocks and assets. The fulfilment of conditions should be interpreted in a flexible manner, on a case by case basis, while taking into account European jurisprudence (e.g., cases C-497/01 Zita Modes, C-440/10 Schriever, C-651/11 X). As per the VAT law, specific documentation must be prepared for the business transfer. Also, if the transferee is not registered for VAT purposes in Romania and does not intend to register for VAT purposes further to the take-over of the business, certain VAT adjustments may be required. Therefore, taking into consideration that usually large amounts are involved, attention should be paid in case of business transfers in order to comply with all the legal conditions in force.

7. Is the late payment interest rate applicable also for late refunds to the taxpayers?

Taxpayers are entitled to receive interest from the state budget for late refunds;

the interest is of 0.02% per day of delay. The procedure is provided by Order No. 1.899/2004 of the Minister of Finance. As an important reference, the European Court of Justice decided in the case C-565/11 (Mariana Irimie) that the interest granted on repayment of a tax which was levied in breach of European Union law cannot be limited to that accruing from the day following the date of the claim for repayment of that tax.

8. Are there any mechanisms available to taxpayers in order to avoid the double taxation situations arising further to transfer pricing adjustments?

In Romania, taxpayers can avoid double taxation situations arising from transfer pricing adjustments through different mechanisms depending on the fiscal residence of the counterparty involved in the intra-group transaction subject to assesment. Thus, in double taxation cases involving only related parties incorporated in Romania, this situation can be solved based on a local procedure in place through the provisions of the art. 283 of the Fiscal Procedure Code. As such, further to the tax assessment being considered final following all the administrative and judicial legal means of action, the Romanian tax authorities have the obligation to issue an Adjustment/Assessment Decision based on with the counterparty has the right to amend its corporate income tax returns for the relevant years.

If the transfer pricing adjustment is related to a transaction carried out by a Romanian taxpayer and its related party resident in another state, the double taxation situation can be eliminated through the Mutual Agreement Procedure (MAP).

Based on the current national regulations, the initiation of the MAP can be requested as follows:

- Based on the provisions of the treaty for the avoidance of double taxation concluded by Romania with other states;
- Based on the Arbitration Convention (Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises) – available for double taxation cases which involve a Romanian company and its related party, resident in another European Union Member State;
- MAP under the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union transposed into the Fiscal Procedure Code by Ordinance 19/2019 - available for double taxation cases which involve a Romanian company and its related party, resident in another European Union Member State.