LEGAL UPDATE

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FISCAL CODE

Amendment of the Fiscal Code

Starting with January 1, 2005 the amendments and completions brought to the Fiscal Code by the Government Emergency Ordinance no. 138/2004, published in the Official Gazette no. 1281 of December 12, 2004, have entered into force.

This new enactment brings a significant adjustment of the internal fiscal regime, by restructuring the main categories of duties and taxes, in view of a fiscal relaxation with respect to certain incomes and in view of regulating in a more specific manner their implementation, as follows:

Reduction of profit tax rate

The profit tax rate due by legal persons for taxable profit has been reduced from 25% to 16%.

Instituting a unique income tax rate

Income tax has been reconsidered, by eliminating the progressive taxation of the incomes, by different quotas based on their level, and by instituting the unique income tax rate set at 16% of the taxable income.

Amendment to taxation of intellectual property rights income

The quota set for deductions granted in case of intellectual property rights income has been reduced from 60% to 40% of the gross income.

Such deduction quota has also been reduced from 70% to 50% of the gross income for incomes obtained from creation of monumental art works.

The taxation quota has been reduced from 15% to 10% for the intellectual property rights income and shall be withheld at source by the income payers.

Expounding the taxes due by company directors

The new enactment provides that the revenues obtained by company directors and the amounts of the net profit received by them according to the constitutive act or set by the general meeting of shareholders shall fall in the same category as wages and shall be subject to taxation accordingly.

The provisions above mentioned do not amend the Fiscal Code norms, but only expound them, as, until the present, such incomes were also included in the same category as the wages according to the provision setting that the amounts received by representatives in the general meeting of shareholders, in the board of directors, in the management committee and in the auditors' committee also fall in the same category as wages.

Increase of taxation limit for gifts offered to the employees or to their children

The limit up to which gifts offered to the employees' children for Christmas, Easter or 1st of June or offered to the employees on 8th of March has been increased from ROL 1,200,000 to ROL 1,500,000.

Amendment of personal deduction amounts

The personal deduction amounts monthly granted to the taxpayers shall be granted differently depending on income level.

Therefore, for taxpayers having a monthly income lower than ROL 10,000,000, a personal deduction amount of ROL 2,500,000 has been set, which shall be increased by ROL 1,000,000 for each family member that is provided for by the taxpayer, up to maximum ROL 6,500,000.

Taxpayers with incomes ranging between ROL 10,000,001 and ROL 30,000,000 shall benefit from personal deduction amounts set by a minister of public finance order in a degressive manner as per above mentioned.

For incomes over ROL 30,000,000 no personal deduction amount is granted.

Increase of taxation rate for capital gains tax

The taxation rate applicable in case of capital gains has been increased at the general level of the income tax, namely 16%.

At the same time, the basis of taxation for such incomes has been increased by reducing the quota of deductible expenses at a unique level of 25% (as per the previous level of 50% for the constructions and 30% in the other cases).

Increase of dividend tax

The tax due for dividends has been doubled from 5% to 10%.

Incomes obtained from winding-up included in investment incomes

The new legal provision sets out that incomes obtained from winding-up or dissolution shall be considered as investment incomes.

Such incomes represent the positive balance between the amounts distributed in cash or in kind and the value of the contribution to the share capital brought by the natural person beneficiary.

The tax on such incomes is calculated by applying a taxation quota of 10%.

Increase of the threshold from which pensions are subject to taxation

The limit up from which pensions become subject to taxation is increased from ROL 8,000,000 to ROL 9,000,000.

At the same time, the taxation rate for such incomes shall be reduced by applying a unique taxation quota of 16%.

Increase of the tax on agricultural incomes

The tax on agricultural incomes has been increased from 15% to the unique taxation quota of 16%.

Increase of tax on prizes and gambling incomes

The incomes obtained as prizes are subject to taxation in case that the prize amount received in cash and/or in kind is higher than ROL 8,000,000 for each contest.

The taxation quota has been increased from 10% to the level of the unique taxation quota of 16%.

The tax on gambling incomes has been maintained at 20%; however, the basis of taxation has been modified. Such tax shall be withheld at source by the income payer from the value of the gross income and not from the value of the net income, as previously provided.

Decrease in the volume of deductible expenses

The new enactment excludes from the expenses previously deemed as deductible the expenses incurred for refurbishing the residence house, meant to reduce the heat losses in view of improving the thermal comfort, and the insurance premiums for the residence house.

Increase of micro-enterprises income tax

The taxation quota applicable to micro-enterprises incomes has been increased from 1.5% to 3%.

ADMINISTRATIVE DISPUTES

New Law on Administrative Disputes

After fifteen years from enacting the Law on Administrative Disputes no. 29/1990, one of the first post-revolutionary Romania's organic laws that has preceded as applicability even the Romanian Constitution of 1991, and especially after the revised constitutional provisions have entered into force at the end of 2003, a new regulation pertaining to the protection of the aggrieved persons rights from public authorities abuse has become imperative.

The late materialization of such desideratum has been carried out by the new Law on Administrative Disputes no. 554/2004 (the "**Law**") passed by the Romanian Parliament and published in the Official Gazette no. 1154 of December 7, 2004. The provisions of the said law have entered into force after the first week of January 2005, but they shall not apply to the cases pending with the courts upon its entrance into force, as such cases shall be settled according to the applicable law at the time when the case has been referred to court.

The new regulation has not only replaced the old provisions in the matter, but it has also brought numerous new law concepts instituting considerable derogations from the normative acts in force, especially those in the concessions, public-private partnership and public procurements field.

Extending administrative disputes

The most important amendment brought by the new Law consists of the extension of the frame within which the administrative disputes procedure may be used. Therefore, as requirement of the revised Constitution, at the present, a person may decide to initiate an administrative disputes procedure not only if one of its *rights* acknowledged by the law is infringed, but also in case that its rightful interest (that may be *public* or *private*) is infringed. Consequently, for the first time *the interest of*

a group of natural persons or *the public interest of certain social bodies* is protected. Moreover, it is permitted to a person to refer to the administrative disputes court even in case that one of its rights or rightful interests has been infringed by an administrative act *addressed to another subject of law*.

By derogation from the right to dispose principle, according to which the parties are entirely free to decide both the subject matter of the case and the procedural means permitted by the law – including to decide or not to initiate and to carry on a civil trial – the new Law also acknowledges the right to initiate an administrative disputes claim for other persons than the aggrieved person, such as *the Public Ministry, the Romanian Ombudsman, the National Agency of Public Officers*. Unfortunately, the conditions under which such right has been acknowledged are not clear and shall give rise to numerous interpretations. Moreover, the provision of the new Law according to which the claims filed by the Romanian Ombudsman, the Public Ministry, the prefect or the National Agency of Public Officers *may not be withdrawn* has already been the subject matter of a Decision passed by the Constitutional Court in view of reviewing their compatibility with the access to justice and the right to dispose principle.

Relevant provisions in the matter of public property and public interest services

At the same time, the administrative disputes field has been extended by redefining the essential terms, such as *administrative act, public authority, public interest service, public interest and action ultra vires*. Therefore, all the agreements concluded by the public authorities, having as subject matter (i) the valorisation of public property; (ii) the execution of public interest works; (iii) the provision of public interest services and (iv) the public procurements, generally referred as "*administrative agreements*", have been included within the acts that may be reviewed in view of being revoked or may be cancelled, including by paying damages.

Furthermore, according to the new Law, the disputes arising during the *phases that precede the conclusion of an administrative agreement*, as well as any disputes pertaining to the *implementation* and the *performance* of such agreements shall fall under the jurisdiction of the administrative disputes courts. For the first time, the rule according to which upon settling the disputes related to such *administrative agreements* the principle of contractual freedom should be subordinated to the principle of public interest priority has been expressly established, which shall allow the courts to reinterpret certain commercial terms and conditions provided by the said agreements.

Term for filing the administrative disputes claim and preliminary proceeding

The obligation to perform a preliminary proceeding has been also maintained by the new Law, the term being still of 30 days as from the date when the administrative act challenged has been communicated, period during which the public authority having issued the said act must be informed prior to filing the administrative disputes claim. For well-grounded reasons, the preliminary

petition should be also filed after the said period, but not later than 6 months as from the date the challenged act has been issued.

Nevertheless, in case that the initiator of the administrative disputes claim is an aggrieved person infringed by an administrative act addressed to another subject of law, the preliminary proceeding must be performed within 6 months.

An administrative disputes claim may be referred to the administrative disputes courts in view of cancelling an individual administrative act or acknowledging the alleged right and compensating the damages caused within 6 months, period that commences in a different manner depending on the outcome of the preliminary proceeding. For well-grounded reasons, in case of the unilateral administrative act, the claim may be also filed after the said period, but not later than one year as from the challenged act has been issued.

Competent Court

The competent courts in the administrative disputes matter shall further on be the administrative and fiscal district courts, the administrative and fiscal disputes chambers within the courts of appeal and the administrative and fiscal Disputes Chamber within the High Court of Cassation and Justice. However, the novelty brought by the Law is that the subject matter jurisdiction has been divided by also using a value criterion. Subsequently, the district courts shall settle as first instance courts the disputes related to the administrative acts issued or concluded by the local and district public authorities, as well as the disputes related to duties and taxes, contributions, customs debts and their accessories, amounting up to ROL 5 billion, and the courts of appeal shall settle on the merits of the case the disputes related to the administrative acts issued or concluded by the central public authorities, as well as the disputes related to duties and taxes, contributions, customs debts and their accessories, amounting higher than ROL 5 billion.

Plea of illegality

One of the traditional means for claiming the illegality of an administrative act, in case that the settlement of a dispute on the merits of the case depends on the respective act, is the plea of illegality, procedure that has been detailed by the Law, as a new procedural obligation of the court before which such an objection is raised to suspend the case and to refer it to the competent administrative disputes court, in view of settling the respective case. Thus, in case that the latter has ascertained the illegality of the respective act, the judgment in the case in which it has been invoked shall be rendered without taking into account the illegal act.

Administrative – jurisdictional acts

First of all, the new Law expressly defines the *administrative – jurisdictional act* notion and then applies the constitutional principle according to which following a special administrative jurisdiction is optional and free of charge. Therefore, in case that the

aggrieved person does not want to make use of the administrative and jurisdictional procedures provided by the respective special law, the administrative act initially obtained may be directly challenged before the administrative disputes courts, within 15 days as from the date when the respective act has been communicated.

Suspending the challenged act

The Law succeeds in settling the procedural provisions related to the suspension of enforcement of the administrative act challenged, which have been differently implemented by the courts and public authorities based on the previous regulation.

At the present, it is expressly provided that in well-grounded cases and in view of preventing an imminent damage, at the same time the preliminary proceeding is initiated before the public authority that has issued the act, the aggrieved person may request the competent court to order the suspension of enforcement of the administrative act until the court has rendered its judgment on the merits of the case. Moreover, if the pending case refers to a major public interest, likely to seriously perturb the operation of an administrative public service of national importance, the claim requesting the suspension of the normative administrative act may be also filed by the Public Ministry, ex officio or upon notice.

On the other hand, the suspension of enforcement of the administrative act challenged may be also requested by the claimant by the claim filed with the competent court (either at the same time with the main claim or by a distinct claim), and, in such case, the court may order the suspension of the administrative act challenged, until the case is finally and irrevocably settled.

Stamp fees

Another novelty in the administrative disputes matter is the fact that from now on the administrative disputes claims whose subject matter is challenging the so-called *administrative agreements*, in case their subject matter may be assessed in money, shall be subject to stamp fees depending on their value. According to the rules applicable in the administrative disputes matter by the present, even in case that certain damages were claimed, the stamp fee could not exceed a fixed amount that has in fact become modest.

Judgments rendered by the administrative disputes courts

The Law describes the possible judgments that administrative disputes courts may render (entire or partial cancellation of the act challenged, compelling the authority to issue the said act, estimating the legality of the act or estimating the damages), but for the first time it is expressly provided that an administrative disputes court ruling upon an *administrative agreement* shall be also entitled to: (i) *compel the public authority to conclude* the agreement to which the claimant is entitled; (ii) *impose* to one of the parties *to fulfil a certain obligation*; (iii) *substitute the assent* of one of the parties in case that the public interest requires it.

Other new procedural issues

The new Law has also provided the rule according to which all the claims filed with the administrative disputes courts shall be *urgently and pre-eminently* settled. Apart from regulating a specific procedure for the "*final appeal in particular circumstances*", it is also to be noted as a novelty the fact that the final and irrevocable judgments in the administrative disputes matter represent *writs of execution*, in the sense that they must not follow the preceding procedure related to the executory formula in order to be enforced.

Moreover, by exception from the rule according to which the effects of judgments rendered by the courts are opposable only to the parties, it is provided that the final and irrevocable judgments, based on which administrative acts having a normative character have been cancelled, are generally required and are binding only for the future, following to be published in the Romanian Official Gazette, Part I, or, as the case may be, in the district official gazettes or in the Bucharest Official Gazette.

Challenging the provisions of unconstitutional Government ordinances

A distinct procedure has been also set for regulating the constitutional right of the persons aggrieved by Government ordinances deemed as unconstitutional. Therefore, in case that a legitimate right or interest is infringed by the provisions of a Government ordinance deemed as unconstitutional, the aggrieved person is entitled to refer to administrative disputes court at any time. The administrative disputes court shall refer the unconstitutionality claim to the Constitutional Court and shall suspend the trial in front of the administrative disputes court until settlement of the constitutional dispute. After the respective provisions of the Government ordinance have been deemed as being unconstitutional, the administrative disputes court shall rule again upon the case and shall decide on the grievance invoked.

JUDICIAL SYSTEM

New amendments in the judicial organisation field

Less than 2 months as from the legislative package on the judicial system reform has entered into force and after temporarily closing the negotiations with the European Union for chapter 24 on the Justice and Internal Affairs, the Romanian Government has amended the respective organic laws by the Government Emergency Ordinance no. 124/2004 published in the Official Gazette of December 9, 2004. The subject matter of the said enactment was the amendment to the Law no. 303/2004 on the statute of magistrates, as well as to the Law no. 304/2004 on judicial organisation with respect to the structure of the judge panels.

Therefore, although the international recommendations on the judicial independence sustain, as a principle, a collegial structure of the judge panels, which brings as advantage the chance of a high professional training, but also the

anonymity of the decision that makes the magistrates more resistant to corruption, the collegiality of judge panels within the first tier court that would have been implemented as from January 1, 2005, as well as the obligation that intermediate appeals and the final appeals are ruled upon by panels consisting of 3 judges have been cancelled by the new emergency ordinance.

Subsequently, based on the regulations in force, the cases falling, according to the law, under the jurisdiction of the local courts, of the district courts and of the courts of appeal as first instance courts shall be ruled upon by a sole judge. The intermediate appeals shall be ruled upon by panels consisting of 2 judges, and the final appeals by panels consisting of 3 judges.

Another correlative amendment brought by the new ordinance refers to the jurisdiction of the trainee judges, irremovable judges who under the collegial system initially proposed had the right to join the panel only together with an irremovable judge. At the present, the jurisdiction that had been granted to the sole judge has been acknowledged to the trainee judge who, furthermore, shall rule over from now on all the patrimonial disputes having as subject matter the payment of an amount of money or the handing over of an asset in case the value of the dispute subject matter does not exceed ROL 100 millions.

PUBLIC-PRIVATE PARTNERSHIP AND CONCESSIONS

Amendment to the public-private partnership and concessions regime

The legal public-private partnership and concessions regime has been recently substantially amended by adopting the Law no. 528/2004 on the amendment and completion of the Government Ordinance no. 16/2002 concerning the public-private partnership agreements, as well of the Law no. 219/1998 on the concessions regime.

Such new enactment brings significant structural amendments, materialised by a reconsideration of the main notions used by the present with respect to the execution, operation or carrying out of activities related to the public assets (public-private partnership and concession), which have also triggered an appropriate amendment to the provisions on public procurements.

Public-private partnership

Changing the public-private partnership notion

The Law no. 528/2004 performs the terminological and content change of the public-private partnership legal institution into *„public-private partnership for concession of works"*.

According to the new meaning, the public-private partnership for concession of works represents an agreement concluded between a public authority and an investor (concessionaire) based on which the latter executes construction works over a public

asset, obtaining in exchange the right to totally or partially operate the result of the works and, potentially, the payment of an amount of money.

In such circumstances, the public-private partnership has been turned from a legal institution alternative to the concessions and public procurements regime, distinctly regulated and having its own meaning, into a simple form of concession (concession of works).

This has been realised by cumulating in a sole enactment the legal provisions related to the concession of works, previously provided by the Law no. 219/1998 on the concessions regime and by the Government Emergency Ordinance no. 60/2001 on public procurements.

In fact, excluding from public procurements the public procurements for construction works, as well as all the related provisions, set forth by the Government Emergency Ordinance no. 60/2001, represents the main amendment to the public procurements regime.

Reducing the application field of public-private partnership

The application field of the norms on the public-private partnership has been reduced, being forbidden to conclude such type of agreements with respect to activities other than the execution of construction works.

Setting the principles for selecting the bidders

The new enactment sets forth the principles based on which the bidders are selected and the public-private partnership agreements are concluded, as follows: (i) transparency in providing information on the agreements assigning procedure; (ii) applying an equal treatment to all bidders; (iii) proportionality of the measures required by the public authority with the nature of the agreement; (iv) mutual acknowledgment of the foreign candidates' products and services and (v) ensuring the free competition conditions.

Amendment to the procedure of granting the public-private partnership agreements

As a procedure for selecting the bidders, the competitive dialog method has been introduced, which entitles the contracting authority to initiate, after selecting the best letters of intent submitted by the investors, consultation meeting with each of them, in view of developing one or more versions able to meet the requirements of the contracting authority and based on which the candidates are invited to participate to the tender.

Such procedure represents a substantial change, as all the pre-selected candidates are allowed to submit their tenders in view of executing the project, even if the version elected for the execution of the project has not been proposed by them.

Obligation to subcontract the works

The new enactment entirely takes over the provisions of the Government Emergency Ordinance no. 60/2001 on public procurements based on which the contracting authority is entitled to impose to the investor involved in the public-private partnership (the concessionaire) to assign to third parties works agreements representing

minimum 30% of the entire works related to the respective project.

The contracting authority also has the right to impose to investors to mention, within their offers, the percent value of the works that they intend to subcontract to third parties.

Procedure for challenging the public-private partnership process

According to the new law, the illegal acts issued within the public-private partnership procedure may be challenged by administrative way or by instituting legal proceedings before the court, by way of an administrative dispute.

In case of challenging by administrative way, the petitions shall be addressed to the contracting authority, which shall suspend the procedure for distributing the public-private partnership agreement until settlement.

The law provides two cases in which the authority may refuse the suspension of the procedure for distributing the said agreement in case of challenge: (i) in case that by suspending the agreement there is an imminent danger to seriously affect a major public interest and (ii) in case that the petition is ungrounded.

Concessions

Restructuring the concession categories

The concession institution has been modified, being restructured, depending on its object matter, in concession of activities, services and assets.

Therefore, the conclusion of concession agreements is provided in the following cases: (i) for activities and public services of national of local interest, in exchange of a royalty; (ii) for services, in exchange of a remuneration or (iii) for the State or public property assets of other territorial and administrative units, in exchange of a royalty.

Furthermore, it has been expressly provided the exclusion from the concession law application field of the concession of works that is the subject matter of the public-private partnership, as set forth above.

More specifically, concession is not applicable for the design, financing, construction, operation, maintenance and assignment agreements for any public asset, such agreements being concluded according to the public-private partnership procedure.

Bidder selecting principles, challenging procedure and introduction of the competitive dialog as concession procedure

As in case of the public-private partnership, the new amendment of the concession regime has introduced the same bidder selecting principles and a similar procedure for challenging the concession procedure.

The competitive dialog procedure has been also introduced in view of granting concession agreements, based on which the contracting authority may initiate consultation meetings with the candidates in view of developing one or more alternatives able to meet the requirements set forth by the said authority and based on which the candidates are invited to participate to the tender.

INSURANCE MARKET

New regulations in the insurance field

It is to be noted that new regulations have been set forth the last month in the insurance field, in view of adopting the acquis communitaire, including by harmonising the secondary legislation issued by the Insurance Supervisory Commission. Therefore, the Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings has been transposed be the Law no. 503/2004 on the insurance companies' financial reorganisation and bankruptcy.

At the same time, the Insurance Supervisory Commission has issued three orders approving the norms related to: (i) the minimum limit of the insurers' paid up share capital; (ii) the authorisation of the insurance and/or reinsurance brokers and (iii) the information that the insurers and insurance intermediaries must provide with the clients.

AUTHENTICATED ELECTRONIC DEEDS

Law no. 589/2004 on the legal status of the electronic notary activities

Law no. 589/2004, published in the Official Gazette no. 1227 of December 20th 2004, introduces a new way of exercising the notary activity, establishing the legal status applicable to the authenticated electronic deeds.

Authenticated Electronic Deeds

The new law essentially allows the electronic drafting of the following authenticated deeds: (i) certifying electronic copies of authenticated deeds; (ii) certifying the date by granting temporal marking; (iii) attesting the place of execution; (iv) receiving and electronically archiving certain documents; (v) certifying electronic translations; (vi) issuing duplicates.

As regards the certification of electronic copies of authenticated deeds, the law sets forth the obligation to confront the electronic copy with the hard original in the archive of the notary public or presented as original by the parties.

As regards electronic translations, please note that they can be certified by the notary public provided that they bear the extended electronic signature of a certified translator, according to the law on electronic signature.

Validity Requirements for Authenticated Electronic Deeds

Under sanction of being declared void, the authenticated electronic deeds instrumented by the notary public shall: (i) be drafted electronically; (ii) be signed with its extended electronic signature, based on a qualified certificate, issued by an accredited supplier of certification services; (iii) meet the substance requirements provided by the law on the legal operation they endorse.

The validity abroad of the authenticated electronic deeds is settled in the

international conventions Romania is a party to.

The electronic deeds issued by foreign authorities or notaries public can be taken into account by Romanian notaries public in instrumenting electronic deeds provided that the foreign electronic signatures set on the said documents are based on a qualified certificate, issued by an accredited supplier of certification services.

Authorisation of notaries public for the drafting of electronic deeds

Solely the notary public offices authorised in this respect by the Authority for regulation and supervision of certification services suppliers within the Ministry of Communications and Information Technology are allowed to draft authenticated electronic deeds.

In order to be granted the said authorisation, the office shall have the financial, material, technical and human resources adequate to guarantee the safety, reliability and continuity of services. Among other requirements, a notary public office interested in getting this authorisation shall use homologated software, in accordance with the norms issued by the regulation authority and the services of qualified certification services suppliers, accredited according to the law.

Providing electronic notary services

The requests for drafting authenticated electronic deeds may be sent by e-mail to the notary public on electronic form, in which case they shall bear the extended electronic signature of the applicant.

Upon receiving the acknowledgement regarding the payment of stamp duties and notary fees, the notary shall draft the requested authenticated deed in 24 hours, time that may be reduced by paying an emergency fee.

Registration of authenticated deeds on electronic form

The public notary authorised to perform such deeds has the obligation to create an archive and a general register on electronic form in view of registering and preserving all the authenticated deeds made under such form, as well as to keep the financial and accounting books on electronic form

As an effect of the new law, the regulatory authority shall create and permanently update a public register of public notaries authorised to perform authenticated deeds on electronic form, which may be available for any concerned person.