

FISCAL CHARACTERISTICS REGARDING ENTITIES FOUND IN LIQUIDATION

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Abstract: On a hand, evolution at the same time, of fiscal legislation, mainly marked by the apparition and modification of Fiscal Code and the other hand of legislation and insolvability, makes difficult the interconnection of both legislative texts. On the other hand, even voluntary liquidation of trade companies has not fiscal viewpoint an easy identification regime owing to multiples modifications of pertinent legal texts. The main problem which probationers confront in interpretation and application of fiscal texts are found among following: taxing the difference between returns (incomes) and payments (charges) of liquidation period, described as profit; commissions constitution over own customers of debtor found in payment incapacity, customers with low chances to be cashed; VAT regime adherent to debts hold by debtor found in procedure over its own customers with difficult situations; characterization as income of debtor's debt confronted by creditors who didn't declare the debts, don't obtain their noting at credit mass or are made debt deliveries as part of reorganization plan; regime of some charges which made no sense at all to be counted in bankruptcy like liquidation; regime of owed accessories (interests, increases etc) for budgetary debts born after opening procedure. The fiscal aspects of voluntary liquidation and judicial are common only for certain elements which compete at established taxes and applied taxes.

1. Introduction

On a hand, evolution at the same time, of fiscal legislation, mainly marked by the apparition and modification of Fiscal Code and the other hand of legislation and insolvability, makes difficult the interconnection of both legislative texts. On the other hand, even voluntary liquidation of trade companies has not fiscal viewpoint an easy identification regime owing to multiples modifications of pertinent legal texts.

The main problem which probationers confront in interpretation and application of fiscal texts are found among following:

- taxing the difference between returns (incomes) and payments (charges) of liquidation period, described as profit;
- commissions constitution over own customers of debtor found in payment incapacity, customers with low chances to be cashed;
- VAT regime adherent to debts hold by debtor found in procedure over its own customers with difficult situations;
- characterization as income of debtor's debt confronted by creditors who didn't declare the debts, don't obtain their noting at credit mass or are made debt deliveries as part of reorganization plan;
- regime of some charges which made no sense at all to be counted in bankruptcy like liquidation;
- regime of owed accessories (interests, increases etc) for budgetary debts born after opening procedure.

The fiscal aspects of voluntary liquidation and judicial are common only for certain elements which compete at established taxes and applied taxes.

2. Taxation of operations generated by entities liquidation

Taxation of operations generated by administrative liquidation

The legal frame of voluntary liquidation is provided by Law of trade companies, and the fiscal regime of liquidation is described by Fiscal Code which however contains a series of texts which can go to confusions and necessitate some specifications for their avoidance.

In this way defining of common terms from the Fiscal Code s established very clear that from liquidation operation can't result dividends. The incomes obtained from liquidation or dissolving without liquidation of a judicial person, representing the surplus of distributions in cash or in kind over the contribution at social capital of beneficiary physical person, constitutes a taxable income from investments of resident or non-resident physical person.

The text as a rule can be applied in matters of voluntary liquidation *we consider* to be: "distribution of assets by a Romanian judicial person to his participants, or as a dividend, or as a result of the operation of liquidation, is treated like a taxable transfer." On the basis of this text "the taxable transfer", respective the value distributed clear active, it will be taxed as a surplus from liquidation.

If during liquidation operations will be obtained incomes superior to charges, this difference constitutes profit and it is taxed. To avoid any confusions, The Methodological Norms provide that: "the taxed profit in case o f liquidation is calculated like difference between incomes and charges made foe their achievement, calculated accumulated from the start of the fiscal year, taking in consideration: profit of patrimony liquidation, sums of commissions annulment, sums registered in own capital accounts from raw profit and which weren't taxed at constitution date, other elements similar to incomes and charges. In case that, in the statement of tax on profit adherent to previous year of liquidation the tax payer registered fiscal loss, this will recover from taxed profit calculated with liquidation opportunity."

The tax of legal stock

The resulted sums from the annulment of commissions constitute taxed incomes, in case which charges with commissions were taxed deductive on their constitution date or subsequent date. In the same measurement sums registered in own capital accounts made by raw profit and which weren't taxed in constitution date are, mainly, legal stocks (51% of raw profit). The theoretic basis of taxing of legal stocks at liquidation constitutes their lack of "tampon" role in covering of losses before affect the capital, role which can't be fulfilled because of company liquidation.

Reserves resulted from revaluation of corporal immobilizations

Regarding reserves resulted from revaluation of corporal immobilizations is taking into account the legal provision according to it "Reducing or annulling of any provision or reserve which was previous deduced is included in taxed incomes, indifferent if the reducing or annulling is owed to modification of destination of provision or reserve, distribution of provision or reserve to participants in any form, liquidation, dividing, fusion of tax payer or any other reason."

To interpret this text are necessary the following specifications:

- reserve (or provision) previous deduced means, in wide sense not only the constitution of a deductive fiscal provision but for example, including in costs, like liquidation form, of one part of revaluation value (revaluation impact) registered in immobilization accounts.

- the provision or reserve aren't active but passive so it can't deliver to participants (associates/ shareholders) in application field of article 27, paragraph 2 of Fiscal Code.

Rather at liquidation we are in situation of modifying of reserve (provision) destination, because of liquidation, fact shown by Methodological Norms according to "the surplus of revaluation of corporal immobilization, which was previous deductible, emphasized according to accounting regulations in "Reported result" account or "Other reserves" account, analytical different, is taxed at modification moment of reserve destination, distribution of reserve to participants as form, liquidation, division, fusion of tax payers or any other reason, inclusive of this usage for covering of accountable losses. For calculation of taxed profit this sums are elements similar to incomes."

As it knows, through revaluation in increased the registering value (stock) of immobilized assets, as the same time as equal increasing of the passive in reserve accounts (reserves from revaluation). At sale and annulment of these immobilizations, present account practice retails liquidated value and as difference till the value of stock registers charges, meaning the value rested non-liquidated. *We consider* that a correct accounting treatment would allow the debt of reserve account from revaluation with sum adherent to reserves made at each revaluation for respective fixed mean sold or annulled. Thus, the fiscal effect would disappear, because on costs will register only the value remained non-liquidated calculated as difference between sale price on a hand and the sum of differences from revaluation with cumulated liquidation on the other hand.

The reserves' taxing from revaluation at liquidation has an economic logic and obviously fiscal. *We consider* that if the active was increased and the effect of revaluation was passed in costs, to contribute at constitution of replacing stocks of immobilizations together with activity's ceasing of continuity principle it doesn't act, so it disappears the premise to which it was accepted the deducing of these sums.

Taxation of operation in case of judicial liquidation

Taxation of the previous period of procedure opening

In the previous period of procedure opening, trader's fiscal regime is of the common right. As the same time with opening of procedure the administrator has the power and obligation to verify the operations closed in the suspect period of previous 3 years, been able to annul some documents made in creditors' damage. In case that he will proceed at annulling of some kind of documents, generally transfers of goods at ridiculously low prices, he will correct the financial results of that period and the adherent taxing basis with these adjustments, operations from which can result more obligations to state, because reconsidering of some operations characterized through less incomes (ridiculously sale low price) and more deductible charges (the remained value) or the annulling of other documents.

In this case more fiscal obligations, established for the previous periods, will attract accessories (interests, increases) which adequately will go to the increasing of the passive mass.

To doesn't misrepresent the legal order of distribution, the judicial administrator will verify the regularity and sincerity of financial situations of previous 5 years; usually, in the period of previous payments ceasing, the traders try to mask the losses, registering as balance sheet assets certain sums which would be registered on charges, in this way: advance charges, clarifying sums, unfinished production (over-evaluation), etc. The probability to identify in this way of operations is very big, because usually, the insolvency is insolvability expression, of the preponderance of passive to active; in most cases of insolvency companies, lack of cash is the consequence of an adverse

activity, of cumulated losses, or the artificial maintaining these companies alive through bank credits. In this case, *we consider* that it will be adequately modified the profit and losses account. In case which are discovered such types of errors or alterations of the financial situations, the declared profit will diminish or transform in loss, with consequence of credit mass diminishing both tax difference (on profit and dividends) and adherent accessories (increases, interests etc). The budgetary debts representing duties and taxes owed to different budgets will be declared and written in credit mass, calculated until procedure opening date.

Regarding the calculation of increases, interests and penalties and the treatment of these from fiscal viewpoint should read in conjunction the provisions of Fiscal procedure code.

The interpretation of remembered texts will go to the following conclusions regarding to these accessories in the period previous to procedure opening:

- For all obligations appeared in the period previous to procedure opening can calculate interests, increases or penalties until the date of procedure of Law no. 85/2006.

- For the obligations appeared in the period previous to procedure opening and non-guaranteed/non-guaranteed parts of guaranteed obligations can't anymore calculate interests, increases or penalties from the date of opening procedure, except the case which was provided in this way through a confirmed reorganization plan.

Taxation of observing period

The observation period is that which starts with procedure opening and closes or at the reorganization start, or at the entering in bankruptcy, in case which it wasn't approved no straightening plan. Till the establishing by meeting of creditors of the continuity modality of the procedure, during the observation period the company activity can continue. In case that company activity continues in observation period, the exploration can generate profit, in sense that the incomes are in more quantum than charges made for these achievement. But any profits should serve to company creditors' satisfaction, but because of this entering in judicial reorganization procedure and bankruptcy, it can't make payments only in law terms, any distribution should respect the priority order of the debt and the proportionality of creditors' satisfaction degree of the same category. The profit achieved by the company at the end of financial exercise should be calculated taking into account the possible non-paid debts, engaged during the observation period which is constituted in the charges of adherent exploration of that year.

On the other hand, according to Fiscal Code, every year losing, established through statement of profit tax, is recovered from taxable profits obtained in the following 5 years. Unmade debts of the company from the previous years before the entering in procedure will generate fiscal loss which will be imputed at achieved profit in the year of the entering in the procedure related by Law regarding insolvency.

The obligations to treasury appeared in the observation period are non-equivocal meaning interests bearers: increases and penalties as Fiscal procedure code provides. The explanation of this regime consists of assurance of a correct and loyal competition between traders, better being presumed to be in a normal fiscal regime.

Normally, *we consider* that would impose that all debts appeared in this period to apply them the same rules in interests and increases domain- even if they are duty or not. The main argument in favour of this thesis constitutes creditors' treatment equality who sustain the activity of debtor company after procedure opening; in this way the

treasury shouldn't be neither favourable but nor unfavorable and should to have the same regime like other creditors who credit debtor's activity.

In insolvency procedure are cases which appear deficit differences between registered debts in debtor's accountancy and the sums verified and accepted in the credit mass constitution procedure. This situation is met in case which at procedure opening, a lot of debts registered in accountancy are not accepted in debts definitive chart or simply they aren't declared by creditors. Any reduction of these obligations constitutes duty income according to Fiscal code provisions.

Taxation of judicial reorganization

In the situation which, on the basis of reorganization plan confirmed by creditors, company activity continues, and a part of debts of this were diminished, the decreasing of obligations quantum are emphasized as a duty income of company, as we said. Thus, the company benefits by labour conscription or purchased good, without pay money equivalent in change which it obliged through contract to pay it, because of the fact that the creditors agreed, through reorganizing plan to renounce to debt. The problem is that when it made a reorganizing plan can't be provided the debts appeared after this elaboration. Thus, ***we consider*** that for the obligation form the debt mass (appeared previous procedure opening), the plan can provide these protection against depreciation, adding interests, increases etc.

Both observation period and reorganization, a debt company is presumed to entail like any economic agent in a normal activity, paying all taxes provided by law, TVA, excises etc.

However, some fiscal provisions seem to not recognize this normal estate.

Taxation of bankruptcy

In bankruptcy procedure- which arrive almost traders who start a reorganizing procedure- is a series of peculiar aspects which will influence the application mood of fiscal regulations, we remember the most important:

- gradual restriction and then ceasing of exploration activity; this rule is the consequence of usage restriction capacity principle, which shows that a company in liquidation can make only those necessary operations for liquidation activity can't make new trade operations;
- starting of new operations can be approved only by way of exception by creditors, when the liquidator proves documented that losing of debtor's fortune in this way registered is inferior in comparison with that it overcomes in the hypothesis of activity ending.

As a result, in bankruptcy, almost of incomes will result from financial activities (interests of sums kept in banks, in term deposits) and from activities which consist of sale goods of debtor.

In the same time takes place a restraint and a change of charges structure, in this way don't justify charges like protocol ones, sponsored etc., publicity charges can be allocated only for sale of goods, liquidation isn't necessary anymore regarding company liquidation. Also it should achieve a clear separation of registered charges on debtor's accounts, by those sustained by liquidator; taking into account that the liquidator leads debtor's activity, are frequent cases which the salaried are charged with the execution of goods sale, operation which, normally ***we consider*** it should be achieved exclusively with paid staff by liquidator. Now persists other confusion mood provoked by lack of good practices in this domain; to misrepresent the liquidation result. Even if very precise limits can't be established at the beginning of operations, on

the way, monthly or trimestrial, this diving, it is indicated to be controlled and certificated by an independent external auditor. Liquidator's activity should to develop in that way this one doesn't produce prejudices to debtor; for example, all that he sales should be immediately cashed or with provided documents. Consequently, there aren't admissible the charges with provisions for debts appeared during liquidation. Also, the charges with debts can be admitted only for guaranteed debts written in the definitive chart of debts.

Regarding *tax on profit*, the interpretation of in force legal dispositions goes to the idea that they are applicable ant at voluntary (administrative) liquidation and at bankruptcy two liquidation types. Also, it doesn't make distinction between the profit obtained in the frame of normal development of economic agent's activity and the profit resulted from liquidation.

Even if the fiscal law doesn't provide explicitly, it is obvious that in bankruptcy the immobilizations *aren't more redeemable*, so it can't admit fiscal deduction of this charges type.

An argument in this way is the provision of Fiscal Code which considers deductible the charges made in the purpose of incomes achievement; or, how in bankruptcy are mainly obtained from sale of company goods., the production (activity) being stopped or being made only the operation during finalization, liquidation doesn't constitute an adherent charge of incomes. Also in the Fiscal code is shown one of conditions which should made by a redeemable fix mean is that "it is kept **and used** in production or goods delivery or services conscription, to be rent to thirds or in administrative goals" or a bankruptcy company doesn't frame in this conditions. *We consider* and the provisions of Law about liquidation of fix means are applicable only to functional companies. Also, the principle of continuing activity doesn't act, the company following to stop its existence in the predictable future, and accountant profit is irrelevant in bankruptcy, what matters being actually surplus of liquidation operations, so incomes minus charges; this sum is delivered to creditors, and not to the profit. Or, how the liquidation is a charge but not a payment (a cash exit), its calculation or recalculation doesn't affect the distribution.

The fiscal code provides that are assimilated goods deliveries and "the transfer of property right over goods, after obliged execution" with the condition that the debtor to be registered as V.A.T. payer. The problem which appears is if goods sale and services conscription in case of Law insolvency procedures, constitutes or not an operation subdued V.A.T., because, although majority of the doctrine considers that bankruptcy constitutes a procedure of obliged execution, nowhere in the law doesn't exist a clear disposition, non-equivocal, which ratify this theoretic viewpoint. The only one provision what can be brought as argument in this way constitutes that one which defines debtor's fortune as representing "the totality of goods which can make the object of an obliged execution, in terms regulated by Civil Procedure Code". *We consider* that this text isn't sufficient for, in a systematic interpretation, the bankruptcy to be considered, in fiscal right an obliged execution.

Although we can't accept the idea that, good sale and services consumption in the procedure of Insolvency law is subdued V.A.T. on the basis of provisions mentioned above, respective that they would constitute an obliged execution.

Goods sale and services consumption in this case *we consider* that it is subdued V.A.T., although there are applied the general dispositions of Fiscal code, and not exception dispositions what regulate the obliged execution.

Consequently, *we consider* that trade debtor who is in procedure will make sale operations with V.A.T., unless are exempt operations, registering in general regime of V.A.T. From application of this regulation results that, although some goods-purchased before adopting V.A.T.- don't go to deducing right, at present day they give birth of one payment obligation of V.A.T. The fiscal regulations provides even the possibility of V.A.T. recording adherent to unpaid invoices emitted for the customers in bankruptcy; in this way, it is provided the adjustment (diminishing) possibility of taxing basis with the equivalent of delivered goods or services conscriptions which can't be cashed because of beneficiary's bankruptcy, the adjustment being allowed with date which the bankruptcy is decaled.

Regarding provisions about the deductibility of reserves constituted for debts hold by debtor in insolvency over its own debtors, these reserves meet permanent modifications. Thus, the charges are made with the purpose of charges' achievement "registered losses at drawing from evidence of unpaid debts, in the following cases: 1. bankruptcy procedure of debtors was closed on the basis of judicial decision; 2. the debtor died and the debt can't be recovered by his heirs; 3. the debtor is dissolved, in case of the company with limited responsibility with unique associate, or liquidate, without successor; 4. the debtor registers major financial difficulties which affect all his patrimony" meanwhile "registered losses at drawing into evidence of uncertain debts or litigation, unpaid, for uncovered part by reserve, as well as registered losses at drawing into evidence of uncertain debts or litigation, unpaid" are considered non-deductive charges.

As well as we showed, taking into account that in case of companies in liquidation isn't applicable the continuity of activity principle, in this period it isn't opportune the constitutions of reserves, the problem is the annulling of these reserve already created. Although "reducing or annulling of any reserve or stock which was previous deduced is included in the taxable incomes, no matter if the reducing or annulling is because of modification of reserve destination of stock, distribution of reserve or stock to the participants in any form, liquidation, division, fusion of tax payer or any other reason."

From the interpretation of these legal dispositions results that reserves become deductive only if debtor's customers are in bankruptcy too and the procedure was closed.

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