FISCAL TREATMENT OF RESERVES DERIVED FROM FISCAL FACILITIES IN THE INSOLVENCY PROCEDURE

REGIMUL FISCAL AL REZERVELOR PROVENITE DIN FACILITĂŢI FISCALE ÎN PROCEDURA INSOLVENŢEI

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Abstract: *An entity's entry into insolvency procedure, determines in accordance with the provisions of the Fiscal Code the recalculation of budgetary obligations, determined during the activity, when this entity has benefited from fiscal incentives, respectively the reduction of the profit tax determined in accordance with the fiscal legislation at that management time.*

Key words: *insolvency procedure, reserves, fiscal incentives*

In the period prior to the opening of the insolvency procedure, the fiscal regime applicable to entities is the common law.

With the opening of the insolvency procedure, the designated manager has the obligation to verify the operations carried out during the three years prior to the opening of the insolvency procedure, with the possibility to cancel any operation carried out to the prejudice of creditors.

When cancellations of certain acts occur, their correction will involve the rectification of the entity's financial results with operations which may result in obligations higher or lower to the State, characterized by higher or lower revenues and expenses.

If there are determined higher fiscal obligations, established in the prior periods, they will lead to increased liabilities mass, and properly of the fiscal accessories, respectively interests and penalties.

In order not to distort the legal order of the creditors' obligations in the debt, the judicial administrator will verify the regularity and fairness of the financial statements of those 5 years prior to the opening of the

insolvency procedure, typically from the period prior to one in which payments have ceased.

In practice, this situation is not applicable because the declaration of fiscal obligation by the debtor remains the same during the bankruptcy period; the correction is usually achieved through fiscal control.

As regards to accessories according to article 41 of the Law 85/2006 provides:

"(1) No interest, increase or penalty or expense of any kind, generically called accessories, will not be added to claims arising before the date of the opening of the procedure.

(2) By exception to the paragraph (1), the guaranteed claims enroll in the final table and/or in the consolidated final table, as appropriate, at the value of guarantees, assessed in accordance with art. 39. paragraph (1) letter (a), but not higher than the total amount of the claim secured by that guarantee. The distribution of the guaranteed price, the guaranteed creditor will be entitled to calculate the accessories at the secured claim not later than on the date of the asset's sale, provided that the price of the asset is higher than the initially assessed value. If the price will be lower than the assessed value, at distribution the ratio between the guaranteed part and un-guaranteed part of the claim will be adjusted properly.

(3) In the event that a reorganization plan is confirmed, interests, increases or penalties of any kind or expenses that are accessories to obligations arising after the opening date of the general procedure, will be paid in accordance with the documents from which they derive and with the provisions of the program of payments. If the plan fails, the provisions of paragraph (1) and (2) will apply accordingly for the calculation of accessories included in the program of payments, from the date of entry into bankruptcy.

(4) No interest, increase or penalty or expense of any kind, generically called accessories, will not be added to claims arising after the date of opening the simplified as well as the general procedure, where no reorganization plan is confirmed."[92]

[92] Legea 85/2006 privind procedura insolventei consolidate in anul 2010 art.41. (Law 85/2006 on the insolvency procedure consolidated in 2010 article 41.)

In conjunction with article 122 of the OG 92/2003 which concludes that "for the fiscal claims that arise before or after the date of opening the insolvency procedure, delay increases are not due and won't be calculated after the date of the commencement of the insolvency procedure."[93]

From the mentioned legislative texts, emerges the conclusion that for all obligations arising during the period prior to the opening, interest, increases or penalties can be calculated up to the date of initiation of the procedure, for the guaranteed obligations, interest, increases or penalties can be calculated up to the date of the goods' sale.

To the obligations arising from the period prior to the initiation of the procedure and unsecured, accessories can no longer be calculated from the date of opening the procedure, except where provided for by a confirmed reorganization plan.

Voluntary liquidation is achieved as specified by Law 31/1990 of the commercial companies, and the fiscal regime is specified by the fiscal code, namely that establishes clearly that dividends can not result from the liquidation operation, the dividend being treated in the fiscal code as an investment income of individuals.

The difference resulting from the liquidation, respectively the amount received by shareholders, besides the subscribed and paid capital to the company is considered fiscally as a source of income for any Romanian legal person or any investment income of individuals.

If in the course of the liquidation operations there will be obtained incomes greater than expenses this difference is profit and is taxable.

According to the Fiscal Code Methodological Norms[94], in case of liquidation the taxable profit is calculated as the difference between the revenues and the expenses performed for their achievement, cumulatively calculated from the beginning of the fiscal year, taking into account: profit from the patrimony's liquidation, amounts from cancellation of provisions, amounts registered in the equity accounts consisting of gross profit and

[93] OG 92/2003 privind codul de procedură fiscală art.122. (OG 92/2003 concerning the fiscal procedure code, article 122.)

[94] HG 44/2004 Normele Metodologice la codul fiscal pct.81. (GD 44/2004 Methodological Norms for Fiscal Code point 81.

which have not been taxed at the time of their formation, other elements similar to revenues and expenses.

In accordance with the fiscal code's provisions, the reduction or cancellation of a provision or reserve which was previously deducted, are included in taxable incomes regardless of whether the reduction or cancellation is due to the change in the destination of the provision or reserve, the distribution of the provision or reserve to participants in any form, liquidation, merger, splitting of the taxpayer or any other reason.

The provisions in question will not apply if another taxpayer takes over a provision or reserve regarding a division or merger, the rules of this article still being applied to that provision or reserve.

In the interpretation of the legislator some clarifications are required, as follows:

- reserve or provision previously deducted means not only the establishment of a deductible fiscal provision but also for example the inclusion in costs of depreciation for the revalued assets.
- provision or reserve are liabilities, they can not be distributed to the participants, therefore the taxation is questionable.

So in accordance with section 57 of the methodological rules the following are provided:

"In applying the provisions of article 22 paragraph (5) in conjunction with the provisions of article 19 of the fiscal code, the surplus from the revaluation of tangible assets, which was previously deductible, revealed according to accounting regulations in the "reported result" account or the "other reserves" account, distinct analytical, are taxed when modifying the reserve's destination, reserve's distribution to participants in any form, liquidation, merger, splitting of the taxpayer or any other reason, including its use for covering accounting losses. To calculate the taxable profits of such amounts are used similar income items."[95]

[95] HG 44/2004 pentru aplicarea Normelor metodologice la Codul fiscal actualizată la 2011 (GD 44/2004 for the implementation of the methodological rules to the fiscal code updated to 2011)

Through revaluation the registration or inventory value of tangible assets will be increased, simultaneously increasing with the same amount the liabilities in reserve accounts.

On the sale or disposal of these assets, the current accounting practice also debits the depreciated value as a difference; up to the inventory value it registers expenses, respectively the remaining unredeemed value.

The amounts registered in the legal reserves accounts and reserves representing fiscal incentives cannot be used to increase equity or to cover losses.

If the legislative provision in question is not respected, the taxpayer is obliged to recalculation of the profit tax with the application of interests and penalties of delay from the date of the application of fiscal incentives.

Also in the legislator acceptation, under provisions of legal regulations are included following amounts:

• the amounts representing the net differences arising from the assessment of foreign currency availability, in accordance with the normative acts in force that were not taxable.

• exemptions and reductions in profit tax on the reinvested profit applied under the provisions of the law, including the reinvested profit amount, the difference between the reduced tax rate for the export of goods/services and the standard rate, as well as those provided in special laws.

Another legislative indication respectively point 58 of the methodological rules on the fiscal code makes the following statement:

"When calculating the profit tax of taxpayers who cease to exist after the liquidation operations, the reserves constituted from net profit are not taxed, including the amounts corresponding to the tax rate's reduction, distributed as own sources of funding during the operation period, according to the law, they will be treated in accordance with the provisions of article 22."[96]

[96] HG 44/2004 pentru aprobarea Normelor metodologice la Codul fiscal pct.58 (GD 44/2004 on approving the Methodological Norms of the Fiscal Code point 58)

Through the combination of the two texts we note that the only unquestionable situation is the one where the company being liquidation has no losses, in this case the reserve being non-taxable.

If the reserves would be used to cover losses, the rules of the fiscal code are applicable only to the fiscal facilities constituted after the entry into force of the fiscal code at 01.01.2004.

In conclusion the recalculation of the obligations to the State budget, in the case of the fiscal reserves and facilities is absolutely necessary, depending on how the obligations have been established in the last five years prior to the opening of the insolvency procedure.

CONCLUSIONS

The recalculation of tax on profit leads to an increase of the list of creditors, in which case the entity may enter in the simplified procedure without the possibility of redressing financially, thus increasing the claim of the budgetary creditor and entity's debts.

If during the activity of the entity it has benefited from exemption in paying the profit tax, its recalculation is a measure which seeks to penalize the entity because it hasn't maintained a steady and efficient activity.

REFERENCES

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3. ***Legea 85/2006 privind procedura insolvenţei
4.OG 92/2003 privind codul de procedură fiscală cu modificările şi completările ulterioare.