

CHANGES IN FISCAL REGULATIONS REGARDING THE DIRECT TAXES, APPLICABLE IN 2008

Brote Ioana

**FABBV, ASE, Bucharest, Address: Sibiu, str. Rahova, nr. 63, bl. 92, ap. 49, cod 550381, jud. Sibiu,
Telephone: 0726/017771**

Brief: The paper aims to highlight the major changes in fiscal regulations regarding the direct taxes, applicable in 2008. We treat the main direct taxes separately:

The dividend tax regulations, regarding the application, the taxation quota, the anticipated dividend payments.

The tax on income from investments (legal aspects, taxable income from interests vs. gains from transfer of securities, reporting obligations).

The profit tax (advance payments, contracts for provision of services, taxable base of fixed assets, elimination of the declaration of payments for non-residents).

Keywords: fiscal regulations, direct taxes, dividends, tax on income from investments, profit tax

Romania has launched a major reforming process regarding taxation, in order to eliminate the fiscal differences and exemptions, which have contributed to fiscal evasion and deferred payments, in the past.

The new Fiscal Code, meant to harmonise the legislation with the EU acquis, brings changes in the fiscal regulations, which will generate higher income for the state budget.

The dividend tax

Application

The Fiscal Code, Title I, Chapter III, art. 7 defines the dividend as „a distribution in money or in kind made by a legal person to a participant in the legal person, as a consequence of the ownership of participation titles in such legal person, except for the following:

- a) a distribution of additional participation titles which does not modify the percentage of ownership of the participation titles of any participant in the legal person;
- b) [...];
- c) a distribution in money or in kind made in connection with the liquidation of a legal person;
- d) a distribution in money or in kind made on the occasion of cutting down the registered capital actually constituted by participants.”

If the amount paid by a legal person for the goods or services supplied by a participant in the legal person exceeds the market price for such goods or services, then the difference shall be treated as a dividend. Likewise, if the amount paid by a legal person for the goods and services supplied to the advantage of a shareholder or associate of the legal person is carried out for the personal benefit of the latter, than that amount shall be treated as dividend.

The declaration and withholding of dividend tax owed by companies

The article 36 from the Fiscal Code treats the withholding of tax on dividends:

1. „A Romanian legal person which pays dividends to a Romanian legal person shall have the obligation to withhold and to pay in the withheld tax on dividends to the state budget, [...].
2. The tax on dividends shall be determined by applying a taxation quota of 10% on the gross dividend paid to a Romanian legal person.
3. The tax which must be withheld shall be paid to the state budget until the 25th of the month following the month when the dividend is paid. In case the allocated dividends have not been paid by the end of the year in which the annual financial statements have been approved, the tax on dividends shall be paid by 31 December of that year.

4. The provisions of the present article shall not apply to the dividends paid by a Romanian legal person to another Romanian legal person, if the beneficiary of the dividends holds a minimum of 25% of the participation titles in such legal person on the date when the dividend is paid, for a period of two years ending on the date when the dividend is paid. [...].
5. The quota regarding tax on dividends provided in paragraph (2) shall also apply to the amounts distributed to the open investment funds.’’

The declaration and withholding of dividend tax owed by people

Art. 65 from the Fiscal Code says that dividends shall be taxed with a 16% quota of the amount of such incomes. The legal persons shall be obliged to calculate and to withhold tax on incomes in the form of dividends at the same time with the payment of such dividends to shareholders or associates. The time limit for the payment of the tax shall be until the 25th day inclusive of the month following the month when the payment is made. In case of distributed dividends which were not paid to shareholders or associates by the end of the year when the balance sheet was approved, the time limit for the payment of dividend tax shall be until 31 December inclusive of that year.

The comparative fiscal treatment of the dividend

Companies:

- the net dividend received from another company is non-taxable income;
- the gross dividend is non-taxable at source, if the beneficiary owns at least 15% in the paying company, or 10%, since 2009.

Natural persons:

- the dividend received from a company is taxable with a 16% quota;
- the withheld tax is final.

The differences in fiscal treatment

Companies

- the dividend received by a company that owns less than 15% (10% since 2009) is taxed with 10% at source; this is not a fiscal credit for the natural persons who own interests in the company that benefits from the dividend;
- there is a double taxation of the dividend:
 - 10% at the payment to the company that holds interests in the company that pays dividends;
 - the net dividend of the beneficiary company is taxed the second time with 16% at the payment to the natural persons (share-holders or associates).

Natural persons:

- they receive the dividend in less than 6 months from the approval of the annual financial statements;
- they can receive the dividends during the fiscal year, according to the law:
 - provided there is profit;
 - the dividend distribution is the result of the approval of the share-holders or associates.

The anticipated dividend

There is a possibility to make anticipated payments of dividends, which results from art. 67 Law 31/1990, modified and harmonised with the UE acquis:

1. The share of the profits to be paid to each associate represents a dividend.
2. The dividends shall be paid to the associates in proportion with their participation quota in the registered and paid capital, provided the constitutive act does not provide otherwise.
3. Dividends can be distributed only out of real profits.
4. Dividends paid with the infringement of the above mentioned provisions shall be reimbursed.

5. The right to sue for the reimbursement of the dividends is limited to three years since the day of their distribution.
6. The dividends due after the shares changed the owner belong to the assignee provided the parties did not agree otherwise.

The payment deadline of tax for the anticipated dividend is 25 of the month following the month the dividend is received.

The tax on income from investments

The tax on income from investments owed by Romanian legal persons

The companies are subject to tax on taxable profit obtained from any source, either in Romania or from abroad, with a 16% quota; fiscal losses can be reported for the following five years.

The tax on income from investments owed by non-resident legal persons

The non-resident companies are subject to tax profit for the income obtained from selling interests in a company, if:

- the owned company is romanian;
- a minimum of 50% of the fixed assets of the transacted company is, directly or indirectly, real estate located in Romania.

The Fiscal Code says that gains obtained from investments, other than interests, obtained by a non-resident company are not taxable in Romania.

The Norms of application of the Fiscal Code say that the application of the Conventions for avoiding the double taxation is extended to gains obtained by non-resident companies from transactions with all kinds of stocks.

The internal taxation quota is 16%; the fiscal loss can be deferred for the following five years. The gain or loss is determined with the following formula:

Gain/loss = (no. of shares * market price) – (no. of shares * acquisition cost) – commissions, taxes, direct transaction costs

The deadline for the payment and declaration of the tax is 25 of the next month of the termester when the gain is obtained. For the gains obtained during the year, a declaration of profit should be submitted , until 15 April next year.

Any foreign company that obtains income from selling interests in a Romanian company has to pay profit tax and also to submit a profit tax declaration. These companies may assign a fiscal representative for these matters.

Exceptionally, the non-resident company does not have these obligations if its income is paid by a Romanian company, or by a permanent head-office of a non-resident company; in which case, the income payer has the obligation to calculate, to withhold, to declare and to pay the tax.

The Conventions for avoiding the double taxation apply, provided that the fiscal residence certificate is presented either to the income payer of the transaction gains (if this one is a Romanian company, or a permanent head-office in Romania of a non-resident company), or to the fiscal representative in Romania of the non-resident company.

Most of the Conventions for avoiding the double taxation, settled between Romania and other countries stipulate that these gains should be taxed only in the beneficiary's country. Exceptionally, some Conventions (e.g. France, Germany) stipulate that these gains should be taxed in the source-state, if most of the fixed assets of the transacted company represent, directly or indirectly, real estate located in Romania.

The Fiscal Procedure Code says that any entity/person who is subject of a fiscal transaction should be registered and have a fiscal identification code. The contributors who don't have a fiscal residence in Romania but who should submit fiscal declarations, need to assign a representative that has fiscal residence in Romania.

The tax on income from investments owed by Romanian natural persons

The Romanian natural persons are subjects of the investment income tax, for the gain obtained from selling titles.

The tax is calculated for every transaction; the net annual gain is calculated only for investments transactions, others than interests and shares in closed companies.

The calculation methods vary according to the investment type:

- gain/loss from investments transfer, other than interests = no. of shares * (sale price – acquisition price) – transaction costs
- gain/loss from interests transfer = no. of shares * (sale price – nominal value/acquisition price)
- gain/loss from the transfer of interests in open investment funds = no. of shares * (repurchase price – acquisition/subscription price)

The gain from transactions with investments in closed companies and interests is taxed with a 16% quota. The yearly fiscal loss is not recognised nor deducted or reported. The taxable person is the one who earns the gains. The deadline for the declaration and payment of the tax is 25 of the next month from the income realisation.

Except for investments in closed companies and interests, the gain from investment transactions is taxed with a 1% quota if the shares were owned more than 365 days, and 16% if they were owned for a shorter time. At the end of the fiscal year, only gains of the same nature are compensated, and annual loss is not reported. The intermediary is obliged to withhold, declare and pay the tax, until the 25 of the next month from the income realisation.

The tax on income from investments owed by non-resident persons

According to art. 115, alin. 2 from the Fiscal Code, the gains earned by non-resident natural persons from the transfer of investments in a Romanian company and from the transfer of titles, other than interests, are taxed according to the regulations applicable to Romanian natural persons.

If the beneficiary presents the fiscal residence certificate, the gains are taxed according to the Conventions for avoiding the double taxation.

Just like for the companies, most of the Conventions for avoiding the double taxation, settled between Romania and other countries stipulate that these gains should be taxed only in the beneficiary's country. Exceptionally, some treaties (e.g. France, Germany) stipulate that these gains should be taxed in the source-state, if most of the fixed assets of the transacted company represent, directly or indirectly, real estate located in Romania.

Penalties

For not submitting the fiscal declarations, including the fiscal registration, there are fees of 1.000 – 5.000 lei for companies and of 500 – 1.000 lei for persons. There are 0,1% per day penalties for not paying the tax.

The profit tax

Anticipated payments

The contributors (other than Romanian banks and non-resident bank branches) should have applied the termestrial anticipated payments of profit tax, starting 1 january 2008.

The application of this system has been delayed until 2010.

Formal requirements for service provision contracts

The fiscal regulations valid during 2007 required that the contracts for provision of services should include information on execution terms, prices, the way prices are allocated and the total value of the contract. These requirements were stipulated in order to sustain the deduction of the expenses generated by the contract.

Since 1 January 2008, these requirements are not valid any more, the mere existence of a contract being a sufficient reason for deduction.

The registration of contracts for provision of services with non-residents

Only the contracts between Romanian companies and non-residents (persons or companies who activate in Romania) that could generate a permanent head-office should be registered with the authorities.

The fiscal base of fixed assets

The fiscal value includes the revaluations of fixed assets, made on a legal basis. The reduction of the fixed assets value below the acquisition cost should not be taken into consideration for fiscal reasons.

The reduction of fixed assets value, subsequent of reevaluation, can not be deducted when calculating the profit tax. The fixed assets reevaluation should be recognised in Accountancy starting 1 January of the year following the reevaluation. Revaluations made when the company is reorganised should not be taken into consideration for fiscal reasons.

The elimination of the declaration regarding payments to non-residents. The Romanian contributors had to submit a declaration regarding payments to non-residents (both affiliates and others). This declaration is not required any more.

A similar, but not identical declaration should be submitted though, before the last day of February, in the year next to the one that payments were made (according to the regulations regarding the taxation of incomes earned by non-residents).

Accommodation and transport expenses

Accommodation and transport expenses were deducted when calculating the profit tax, provided they were made by the employees and administrators of the company.

Starting from 2008, the Fiscal Code stipulates that these expenses may be deducted also if they are made by persons assimilated to the employees (non-resident persons for delegations or temporary secondment in Romania, for business purposes, training, consultancy etc.).

The expenses made by the employees to and from their workplace are specifically mentioned as expenses that are made in order to obtain taxable income.

Technological loss

The technological loss included in the consumption norms of goods/services are expenses that are made in order to obtain taxable income.

Legal reserve

The Norms for the application of the Fiscal Code have been adjusted to the stipulations of the Fiscal Code regarding non-taxable income exempt from the calculation basis of the legal reserve, for fiscal purposes (the Fiscal Code, art. 20, lit.c).

If, subsequent to reorganisation, the legal reserve exceeds 20% of the social capital, the diminishing of the reserve is not mandatory.

Stock option plan

The difference between the market value and the preferential price of shares in stock option plan programs is defined as an expense in favour of the stock-holders (with an impact on profit tax and potentially on the dividend tax).

Sale and lease-back

The sale and lease-back operations should be considered a financing operation if the leasing operation qualifies as a financial leasing operation.

A coherent legislation on direct taxes is necessary, because there are more non-resident companies which make transactions on the Romanian capital market, and also, Romanian investors have access to titles issued on European markets.

Thus, we believe the permanent updating of the fiscal regulations will improve the income collection for the state budget and will help create a healthy economical environment.

Bibliography:

1. Law nr. 571/2003 the Fiscal Code, modified and updated;
2. HG 44/2004 the application Norms for the Fiscal Code, modified and updated;
3. Ordinance 92/2003 the Fiscal Procedure Code, modified and updated;