

PAYING UP THE FISCAL DEBTS IN ROMANIA THROUGH EXCEPTIONAL VEHICLES – DATIO IN SOLUTUM/ UNRESTRAINED PAYMENT

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Abstract

In accordance with the legal norm incidents in tax procedures, in Romania the tax debts can pay off through commissioning. Fighting procedure of tax receivables by placing in payment by the taxpayer begins by formulating the debtor, owner of real estate, a request to this effect, which addresses the tax authority that administers the claims. The debtor's right to appeal to this method is practically unlimited. Extinguishing procedure of tax receivables by placing in payment by the taxpayer begins by formulating the debtor, owner of real estate, a request to this effect, which addresses the tax authority that administers the claims. The debtor's right to appeal this way is practically unlimited. It actually arises from the time the claim becomes due and remain until its extinction, as long as the taxpayer has an active fiscal condition.

Key words: *fiscal debts, datio in solutum, fiscal obligations, unrestrained payment, fiscal body*

JEL Classification: *H60, H63*

1. Introduction

Datio in Solutum/ Unrestrained payment as a vehicle of paying up the obligations is originated in the civil law. Thus, the civil law provides that “the debtor cannot become free of obligations by fulfilling another performance than that he has to, even if the value of the fulfilled performance is equal or higher, unless the debtor agrees to it. In this latter situation, the obligation ceases when the new performance is fulfilled” [1]. Therefore, in the juridical perspective datio in solutum/ unrestrained payment represents “that vehicle of extinguishing the obligations residing in that the debtor agrees at the creditor’s suggestion to receive another performance instead that which the debtor is compelled to fulfil” [2]. In other words, datio in solutum/ unrestrained payment is a new obligation (novation, Fr.) by changing the object of the obligation, which is no longer payment kind, but through another good or another equivalent performance, according the parties’ agreement, beforehand or intervening. Datio in solutum/ unrestrained payment (i) represents an exception from the rule of paying the obligation in kind; (ii) it supposes the creditor’s agreement; (iii) it brings about extinguishing that obligation for which the creditor’s agreement exists” [3].

2. Paying up the fiscal debts in Romania through exceptional vehicles

According to the provisions of juridical rule in fiscal procedure, in Romania, the fiscal obligations may cease also through datio in solutum/ unrestrained payment. The fiscal obligations, both those associated with the national budgets and the local budgets “may cease at the creditor’s request at any time with the fiscal creditor’s agreement, by passing the immovable goods to the state’s property or appropriately to the administrative territorial unit including those subject to enforcement” [4]. The analysis upon this exceptional vehicle to extinguish the fiscal obligations shows the necessity of accomplishing beforehand a body of conditions regarding its implementation, as it follows:

→ The debtor should obtain the fiscal creditor’s agreement;

→ A request should exist concerning the taking over of the immovable good, the subject of the public law entity;

→ The character of good for public use of the respective immovable is among the conditions to be fulfilled.

All the more it is worth mentioning the possibility for the main fiscal obligations and all kinds of accessories to be extinguished except those whose collecting is provided through stoppage at source.

The procedure of extinguishing a fiscal debt by datio solutum/ unrestrained payment begins with the debtor, the owner of immovable goods drawing a special request addressed to the fiscal body managing the respective debts/ obligations. The debtor’s right to utilize this modality is unlimited. It emerges in the moment the obligation becomes exigible and it exists until it is extinguished, as long as the contributor has an active fiscal condition (under special conditions, the datio solutum, unrestrained payment may also be utilized in the case when the contributor is in the incidence of insolvency).

The request of datio solutum/ unrestrained payment is an extremely complex document supplying information such as:

- ⇒ Name, headquarters and the fiscal code as well as other identification data of the debtor's contributor;
- ⇒ Structure of the social capital of the associates or stakeholders, according to the situation;
- ⇒ Individualizing the fiscal debts required to be extinguished;
- ⇒ Presenting their quantum, type of tax or contribution that generated them is of necessity, also the budget to which it addresses, grouping them in main and accessory as well as the express mentioning that the debts to be collected by stoppage at source are not among those debts;
- ⇒ Mentioning the executive agreements under which the immovable goods are pursued by enforcement and constitute the object of the request, if this is the case;
- ⇒ Name, identification data and a short description of the immovable goods, for which passing in the state property is requested;
- ⇒ Information referring to the fiscal regime, from the standpoint of value added tax, applicable to immovable transfer;
- ⇒ Nomination of documentary evidence of the debtor-contributor's property right upon the immovable goods in discussion;
- ⇒ The express providing of the debtor's agreement concerning the value of the immovable goods;

We have to mention the fact that the evaluation of goods is accomplished by specialized natural persons or legal persons, selected through procedures specific to public acquisitions at the request of the creditor fiscal body. The counter value for these services is paid to the performers by the contracting authority, the fiscal body respectively and the payment has the value of beforehand payment, the total sum is to be recuperated from the debtor, who is going to pay it effectively.

⇒ The inventory value of immovable goods, emphasized in the contributor's book records is reassessed according to the last regulations in force;

⇒ The debtor's explicit agreement that the value of *datio in solutum*/ unrestrained agreement (the quantum of the extinguished fiscal debt) is established after the professional evaluation;

In establishing the quantum of *datio in solutum*/ unrestrained agreement, two values are taken into consideration, the value of the immovable good established by professional evaluation and the value of the immovable good registered by the contributor's book records, whereas the extinguishment is accomplished at the lowest level between the two indicators.

⇒ Nomination of the documents proving that the immovable goods are not encumbered by real rights or other duties and are not subject to some requests regarding retroceding the property or other litigations;

⇒ The debtor's mentioning that the immovable goods are not the contribution within some association in participation, a contribution to social capital of a commercial society and/ or are not rented or leased;

⇒ The debtor's mentioning that there are no requests in his name and the insolvency has not been opened;

⇒ In the case when the value of *datio in solutum* is higher than the fiscal debt for which extinguishment is required, the contributor's agreement for compensating the difference with other fiscal obligations.

At the same time the request is associated with a body of other documents such as:

➤ Authorized copies of the documents certifying the ownership of the debtor upon the immovable goods subject to the request;

➤ Original excerpt of land register certifying that the immovable does not encumber real rights and other duties;

➤ Assessment report;

➤ The document issued by the specialized institutions certifying that the immovable goods are not subject to some requests regarding retroceding the property or other litigations;

➤ Copies of the fixed means and the analytical balance of the fixed means;

➤ Certificate that in the debtor's name are not mentioning regarding the insolvency condition;

➤ The chief accountant's agreement (specialized ministry) whether the object of the extinguishment is represented by taxes or social contributions or health social contributions (Exchequer, Labour Ministry or Health Ministry);

➤ Undersigned statements of the debtor to certify the information supplied by the request;

➤ Request regarding overtaking in management by a public entity of the respective immovable goods;

The request is a report which has to be approved by the chief accountant under which the public entity is. As an exception, in the case the petitioner of management overtaking is a county/ local council, despite its quality of chief accountant, the report has to be approved by the ministry coordinator of the local public administration.

After registering in a special book record and overtaking the complex documentation previously presented, the creditor fiscal body (managing the respective contributor) analyses the file of *datio in solutum*/ unrestrained agreement, ensures its completeness and checks the data and the connection among them. The outcome is a report comprising the suggestions concerning the enforcement of the *datio in solutum* procedure and it shows the efficacy of this modality of extinguishing the fiscal debts; this report accomplishes the file of the procedure.

The competent fiscal body forwards the documents to the hierarchical superior structure (according to the new organizational form, the regional entity, the General Regional Department of Public Finance), which in turn draws an opportunity report comprising the following aspects:

▶▶ The standpoint upon the debtor's request and the proposal concerning the enforcement of the *datio in solutum*;

▶ Mentioning that the inventory value emphasized in the debtor's request is that specified in the fixed means chart and in the analytical balance of the fixed means and it is assessed in conformity with the latest regulations in force;

▶ The efficiency of the overtaking of the immovable good by comparing the extinguished fiscal debts, to which the expenses of redecoration are added, the expenses necessary for a new building or acquisition or those the rent payment as well as the supplementary source intended for redecoration, as they have been established by the petitioner public institution.

At the end of this stage, the file for *datio in solutum*, containing all the elements previously described is forwarded to the specialized structure within the National Agency for Fiscal Administration.

The specialized structure within the National Agency for Fiscal Administration/ Management analyzes the file and makes one of the decisions: (i) gives it back (in case it is incomplete, it has not been completed in 30 days starting in the moment the request was framed, the debtor gives up the request, there is no petition of overtaking the management of the immovable goods by a public entity, the request has no object) or (ii) it is forwarded to be approved or rejected by a commission constituted at the level of Exchequer (Ministry of Public Finances).

This special commission is a work group consisting of chairman, three vice-chairmen and 10 members and it is based on a technical secretariat requiring approvals from other special specialized structures within the Ministry of Exchequer and the National Agency of Fiscal Management. After ensuring the technical support within which the legality and completeness of the file of *datio in solutum* are referred to, the commission discusses the request basing its endeavour upon the analysis cost-efficiency. In essence what is referred to is to see if the *datio in solutum* is more efficient than other vehicles of extinguishing the fiscal obligations and the saving of public expenses is assessed determined by overtaking an immovable good by the state and managing a public entity comparatively to the solution of building or purchasing a similar one.

The capitalizing legal outcome of the commission becomes final through issuing an approval or rejection decision for the *datio in solutum* request.

In case the approval is obtained, as soon as it gets the decision, the fiscal body having registered the contributor's request draws up the proceeding for passing the immovable good in the state property, it having the juridical significance of a property title and operates the contributor's extinguishment of these fiscal debts in the analytical evidence, subject to the procedure.

Completing the operation is influenced by the accomplishment beforehand of the following obligations:

⇒ Obtaining and presenting a new excerpt in original of the land register, certifying that the immovable good does not encumber real rights and other duties;

⇒ Drawing up a new undersigned statement certifying that the insolvency procedure has not been open in his name, that the immovable goods are in his ownership, that they are not subject to requests for retroceding or other litigations and are not the contribution within an association in participation, contribution to the social capital of a commercial society and/ or are not to be rented or leased;

⇒ Obtaining and presenting a new certificate to demonstrate that there are no mentions regarding the insolvency statement in the debtor's name.

The Civil Law [1] provides patrimonial protection to the creditor in the *datio in solutum* situation; the debtor represents the guarantee against eviction and guarantee against the vices in case the immovable goods are subject to operation. Also the patrimonial interests of the creditor are protected through ensuring his right of petitioning from the debtor the initial performance.

To the same sense, the fiscal law ensures the protection of the fiscal creditor's rights in the face of the debtor. Therefore, there are the following possibilities for action taking by the creditor:

→ Partial or total repeal of the decision for approving the request of *datio in solutum* provided that: the goods have been claimed and returned to a third party; hidden vices, partial or total of the goods have been noticed; in the moment of the request they represented the contribution in an association in participation, contribution to the social capital of a commercial society, rented or leased; they have been encumbered of real rights or other duties in the moment of the request approval, the debtor has supplied data and incomplete information and/ or unreal until concluding the proceeding for passing the immovable good in the state property, affecting in any way the public property of the state upon the immovable goods; other aspects unknown at the moment of the *datio in solutum* existed;

→ Reinstate the fiscal debt in the contributor's duty subject to *datio in solutum*/ unrestrained agreement and ongoing the measures of enforcement for collecting it;

We have to mention that there is no possibility to calculate and require collecting the accessory debts for the sum corresponding to *datio in solutum* in the period comprised between overtaking the good by a public entity and revoking the *datio in solutum* decision, which is a right provision judging from juridical perspective, because in this period the state is the beneficiary of the respective good.

→ Retrieving from the debtor the necessary expenses done by the public entity in the period the respective immovable good has been managed.

The decisions issued by the specialized commission are procedure administrative documents against which there are means of attack, administratively and juridically speaking.

As we have mentioned in the beginning of our study, the *datio in solutum* procedure may be also applied in the case of a contributor in the insolvency procedure. In essence, the algorithm for operating is the same as in the case of

the active contributor; yet there are supplementary requirements that have to be accomplished, among which:

- Concluding or existence of a judge's sentence for opening the insolvency procedure;
- The agreement of the creditors' assembly for *datio in solutum*, either as a measure within the re-organization plan or as a means for attributing a good instead of the debt within the liquidation;
- The administrator's or judicial liquidator's approval upon the debtor's ownership right upon the immovable goods;

As a difference it is worth mentioning the fact that the extinguishing value for the fiscal debt is exclusively established based on an assessment report upon the immovable good, without taking into consideration the value in the contributor's book record.

3. Conclusions

Datio in solutum/ unrestrained agreement as an exceptional modality for collecting the fiscal debts generates, in practice, for the state many advantages but also disadvantages. Here are some advantages:

- ▶ Diminishing the volume of fiscal arrears, which although documentary positively influences the fiscal apparatus;
- ▶ Diminishing the financial effort necessary for ensuring the patrimonial needs of the public entity petitioning the immovable goods (diminishing the public expenses, in practice);

As a major disadvantage, we can mention diminishing the financial fluxes input at the level of the consolidated general budget, in other words, diminishing the volume of financial resources effectively mobilized by the state at its disposal, with negative effect upon the annual budgetary deficit (speaking of high volumes of the *datio in solutum*).

4. References:

- [1] New Civil Code
- [2] According to Juridical Dictionary, available on www.euroavocatura.ro
- [3] Gheorghe Piperea – Liberarea debitorului prin darea în plată, article available on www.juridice.ro
- [4] Government Ordinance no. 92/2003 concerning the Code of Fiscal Procedure