

THEORETICAL CONSIDERATIONS ON INSOLVENCY AND JOINT LIABILITY ON TAX MATTERS

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Abstract

Romanian legislation stipulates incident in tax as a way of fighting outstanding tax debts in relation to certain conditionalities, the tax authorities can declare the insolvency of the debtor taxpayer and attracting joint liability of third parties on which transfer tax claims extinguish the obligation owed by the insolvent.

According to various editions of the Dictionary of the Romanian Language through insolvency means "a situation in which the debtor whose assets are worth less than all obligations would be satisfied with the goods" [DEX 1998] or "situation of the debtor to be in default of debt outstanding [DEX 2009].

From the perspective of civil law, "insolvency resulting from the inferiority of the assets may be subject by law enforcement, to the total amount of outstanding debt" [Law 287/2009 on the Civil Code, art. 1417]. From the perspective of tax law "is insolvent debtor whose income or assets are worth less than the outstanding tax obligations or who has no income or assets" [GO 92/2003 regarding the Fiscal Procedure Code, art. 176].

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1. Introduction

Fiscal Procedure Code establishes the possibility of establishing joint and several liability of the debtor subject to insolvency proceedings to a third party, whether directly or indirectly, the third party controls, is controlled by or is under common control with the debtor has acquired any title, right ownership of tangible assets of the debtor and the carrying amount of these assets is at least half of the book value of all tangible assets of the acquirer, has or had commercial contractual relationships with customers and / or suppliers other than the utility who had or have contractual relations with the debtor by at least half of the total value of transactions or has or has had employment or civil service at least half of the employees or service providers of the debtor.

2. Insolvency of a debtor taxpayer

Insolvency is established and determined by the tax administration body, which is required to undergo a specific administrative procedure [See in this respect OMEF 447/2007]. Essentially, the tax creditor performs a series of specific investigations in which the following objectives:

- **establish the legal status of the taxpayer.**

At this stage, the tax authority must require institutions that manage such information on the taxpayer if it is active in legally (if not checked firm dissolved, liquidated or canceled during such a process, if person physical check if it is alive). The main entities that cooperate to this end are the Trade Register and territorial structures of the person filing.

- **verification of operation/existence debtor on the fiscal domicile, registered office, secondary offices**

For this, tax authorities through its specialized staff, is moving to the domicile of the taxpayer and notes the stated facts. If the debtor is not identified at locations inspected by the tax administration body competent institutions require information about potential other home /office to which he or his representatives could be found. Entities to which the appeal at this stage may be police and/or the tax authorities in the area of which the taxpayer held at a time activity.

- **establish economic situation of the debtor taxpayer.**

This can be achieved by the tax authorities by two concrete ways, namely documentary and factual. In the first variant, the analysis is based on patrimonial documents, which can be of two kinds:

- own documents, of the taxpayer debtor;
- documents provided for the fiscal body by competent institutions in their management.

When assessments are based on their documents, they are the annual accounts statements, half-yearly and / or monthly (balance sheet, trial balance sheets of fixed assets etc.) and the tax authority seeks mainly [See this sen OMEF 447/2007]:

- asset value of all movable and immovable property owned by the debtor;
- aggregate value of all commercial revenues, tax or bank interest from cash deposits in government securities repurchase;

- value determined based on the daily stock quotes, holding securities (stocks, bonds);
- aggregate amount of claims of commercial bills of exchange, promissory notes or fiscal claims (amounts reimbursed or refunded amounts) that the debtor has recovered.

The conditions under which the tax administration of the taxpayer does not have the documents on which to establish his economic position, turn to institutions that manage such documents, based on assessing its heritage. Such endeavors are exchange of information with institutions such as:

- financial and banking units - bimonthly, banks send tax authorities accounts file, under which it can be held to account and / or availability of the debtor;
- administrative-territorial unit (primary) - on request, it provides data on movable and immovable property of the debtor, if they are subject to local taxes;
- Land Registry Office, institutions managing public records or other bodies (DMV Romanian, Romanian Naval Register, etc.).

The second way in which we can establish financial situation of the borrower, the fact involves researching and finding the spot made by the tax administration body, by which he obtained all the information needed to complete his approach (ie finds physical existence of movable or immovable assets, their state of functional perspective, forming an opinion about their potential value, etc.).

- **determining whether or not the state of insolvency**

Depending on the information, analyzes and the assessments made in previous steps, the tax authority finds that the debtor has income or assets, if any establishes the value, perform a comparison with the tax claims due and notes whether or not the condition of insolvency.

Insolvency is established through a procedural administrative act issued by the tax administration body and called "Minutes of declaration of insolvency".

After issuing the administrative act according to insolvent taxpayer's financial situation, the tax is still in the process of management of debts two options:

(I) if the debtor insolvent owns income or assets, tax liabilities are managed by the current filing system for recovery continues enforcement proceedings and main generating further claims accessories;

(II) if the taxpayer has no income or assets, tax receivables are transferred from the current record in a separate record, enforcement measures are interrupted and the main claims not generate claims accessories. Transfer tax liability of the debtor insolvent between the two records is performed also on the basis of an administrative procedure called "Minutes transfer tax liabilities recorded by the debtor declared insolvent". The administrative procedure requires taxpayers in this state tax enforcement body to conduct a periodic review at least once a year, their economic situation, and if it is found to obtain goods or income can be traced to recover tax receivables are transferred to their opposite, ie in a separate record in the current track and resume enforcement.

After the declaration of insolvency of the taxpayer, the tax authority can act to recover its outstanding payment obligations by triggering an extraordinary procedure fighting, called generic theoretical and practical language "the liability". This may be jointly liable with the debtor insolvent following persons [GO 92/2003 on Fiscal Procedure Code, art. 27]:

- individuals or legal persons, before declaring insolvency, bad faith, acquired in any way from debtors who caused the insolvency;
- directors, associates, shareholders and other persons who caused the insolvency of the debtor legal person by alienation or hiding, in bad faith, in any form, of the debtor's assets;
- administrators who, during their mandate, in bad faith, not fulfilled their legal obligation to request the competent court opening insolvency proceedings for tax liabilities relating to that period and remaining unpaid at the date of declaration of insolvency;
- directors or any other person who, in bad faith, determined withholding and / or non-payment of tax obligations at maturity;
- directors or any other person who, in bad faith, determined restitution or repayment of money from the general consolidated budget that they are owed to the debtor.

So, Romanian legislator states the possibility to attract liability to third parties, but requires, this administrative underlying approach, the proven by the tax authority, the dishonesty of others. This requirement is extremely difficult to argue and demonstrated within the fiscal and administrative proceedings that practice has shown that most joint liability actions were initiated and completed by fiscal institutions and validated by the courts on managers who, during their mandate, have not fulfilled their legal obligation to request the competent court opening insolvency proceedings.

In such cases the dishonesty of managers is somewhat implicit obligations because there are older than a certain period of time and impossible to cover the insolvent debtor's assets, obligates it to request the opening of insolvency proceedings within 30 days of the occurrence of this condition. Failure to practical approach presumes bad faith of the taxpayer and the tax authorities gives arguments for action. Here it should be noted that the new insolvency law (Law 85/2014) introduces a provision that gives the possibility to request the opening of insolvency proceedings only borrowers with obligations over the threshold of 40,000 lei, unlike the old legal rule in (Act 85 / 2006) which did not set any threshold for applications filed by the debtor himself.

In my opinion, this regulatory action field diminishes the tax authorities in the field of attracting liability because most taxpayers who qualify for insolvency (ie no heritage or it is limited, lower tax obligations) are small taxpayers whose obligations, usually falls below 40,000 lei context in which administrators can not jointly liable for not applying for the opening of insolvency proceedings.

Also, a legal person jointly liable with the debtor declared insolvent if, directly or indirectly, controls, is controlled by or is under common control with the debtor and, if satisfied at least one of the following conditions:

– acquire any title, ownership of the tangible assets of the debtor and the carrying amount of these assets is at least half of the book value of all tangible assets of the acquirer;

– has or had commercial contractual relationships with customers and / or suppliers other than those utilities that have had or have contractual relations with the debtor by at least half of the total value of transactions; ε has or has had employment or civil service at least half of the employees or service providers of the debtor [GO 92/2003 regarding the Fiscal Procedure Code, art. 27].

In my opinion, the liability of a legal person is an approach almost impossible in terms of its purpose to the tax authority. This is because, as required by regulation, in such cases is already talk about groups of companies or multiple companies in various ratios, but under common control, or such buildings are managed by people initiated legal situations that avoids direct control the only organ for tax administration can collect evidence and proof. Indirect control statements, that the activity in which a person exercises control by one or more persons are difficult, if not impossible, to prove to the IRS, because this control is achieved through intermediaries, formally unrelated to the person who controls In fact, the tax authorities often do not have the legal attributes and methods for proving such fact. Basically, such evidence may be collected by specialized state organs (organs of criminal investigation, information services, etc.) and provided fiscal institutions that exploit them for the procedure of attracting liability and recovery of tax claims. In order to translate the practical procedure for attracting joint liability, the competent tax authority (the administrator declared insolvent taxpayer) is implementing a series of actions and operations phase, in which pursues several objectives [See in this respect Order of National Authority for Fiscal Administration 127/2014].

In a first step, a factor analysis, the fiscal body approaches are differentiated according to the causal condition for which it is possible to attract liability as follows:

(I) when targeting third party transferee of the assets of the insolvent debtor, it aims to:

– identify natural or legal persons who in any way acquired assets from the debtor declared insolvent (sale, assignment of trade receivables, donation, exchange or any other mode of transfer of ownership) before the declaration of insolvency;

– establishing natural or legal persons who, in bad faith, has acquired assets from the debtor declared insolvent before the declaration of insolvency;

– finding that between insolvency and the transfer of ownership of assets there is a causal link.

(II) when third parties are concerned that alienated or hidden assets of the debtor insolvent, it aims to:

– identify persons who own or have owned as manager, partner, shareholder or other quality within the legal person debtor, and others such as seizure administrator, custodian or other person holding title to any movable / immovable property of the debtor declared insolvent;

– finding that the persons in question were made in bad faith, alienation or concealment of any form of movable and / or immovable property of the debtor, in fact by changing the asset so that it will no longer be subject to enforcement and in the accounting records of the debtor declared insolvent;

– finding that between insolvency and alienation or concealment of property there is a causal link;

– finding that the alienation of movable and / or immovable property was carried out either directly or indirectly mediated / facilitated by persons who are declared responsible and who acted in bad faith, thereby causing the insolvency of the debtor legal person.

(III) when not covered administrator to request the opening of insolvency, the tool:

– documentary verification of the possibility of requesting the opening of insolvency proceedings under the law, the period between the date of registration of outstanding tax obligations and the date of declaration of insolvency proceedings;

– identify persons who held as manager and who, during their mandate, have not fulfilled their legal obligation to request the competent court opening insolvency proceedings.

(IV) when third parties are concerned not declared and not paid tax obligations, it aims to:

– analyzing tax inspection report which found withholding tax obligations at maturity of the debtor declared insolvent by directors or any person who acted in bad faith;

– analysis analytical evidence showing that paying tax obligations contained in the tax audit report have not been paid by the debtor within the period prescribed by law and / or that the debtor declared insolvent, has not paid at maturity fiscal obligations they said;

– checking accounting records of the debtor or the cash book, bank statements and any other documents which, by law, resulting amounts held in cash and bank account available to the borrower on the due date of tax obligations;

– identify directors or any other person who, in bad faith, determined withholding and / or non-payment of tax obligations at maturity.

(V) when third parties are concerned that led reimbursements or refunds of amounts due, aims to:

- analyzing tax audit report, which found that were returned or refunded money from the general consolidated budget that they are owed to the debtor;

- identification of directors or any other person who, in bad faith, determined restitution or repayment amounts.

(VI) when targeting legal entities that control, are controlled by, or is under common control with insolvent, it aims to:

- finding that the debtor declared insolvent, directly or indirectly, controls, is controlled by or is under common control with a legal person;

- establish the legal entity that has acquired the assets of the debtor any way (sale, assignment of trade receivables, donation, exchange or any other mode of transfer of ownership) and the carrying value of these assets is at least half of book value of all tangible assets of the acquirer;

- check the documents which, by law, resulting contractual commercial relations taken by the borrower with customers and / or suppliers other than the utility;

- establish legal person who has or had business relations with customers and / or suppliers other than the utility, and that have contractual relations with the debtor by at least half of all legal transactions;

- check documents resulting from the existence of employment or civil service employees or service providers of the debtor;

- establish the legal entity that has or has had employment or civil service at least half of the employees or service providers of the debtor.

In a second step the tax authority is obliged to proceed with the hearing of which shall undertake joint liability, thus ensuring the democratic right of defense in administrative proceedings. Basically, the subject concerned is entitled to all available means and evidence to refute assessments fiscal body. Formally, the documentary begins hearing stage presentation by notice to the tax and continue through the issuance of a report, if the subject being given notice and a hearing takes place or finding a note, if the subject is not is presented. The person who will undertake joint and several liability may submit comments, explanations, any other documents necessary for its defense and fiscal authority in writing within 30 days of consultation documents on file.

The third stage of the procedure, the final job is to issue documents effective joint liability. Based on a report of opportunity, the tax issue and communicate "joint and several liability decision." This is a tax administrative act, has the character of a debt instrument and consequently at least the following elements [in the Order of National Authority for Fiscal Administration 127/2014]:

- name of fiscal body;

- date on which the decision was issued;

- identification of the principal debtor;

- identification of the person responsible;

- the decision of solidary liability, the nature and amount of the sums for which the liable;

- listing and brief description of the facts underlying the procedure;

- under the law of liability;

- reasons for the decision, namely the causal link between the facts presented and the laws that apply;

- conclusions relating to the tax body in his defense presented by the responsible person at the hearing;

- payment period;

- mention the fact that, if the deadline nonpayment of tax obligations imposed on the responsible person, it will be enforced;

- statement that the decision may be challenged, contesting the legal term and organs that can be challenging;

- name and signature of authorized persons of the fiscal body;

- stamp tax body.

Conclusions

In order to satisfy the public interest by making tax claims was created legislative and administrative mechanism by which it is possible to translate the principal obligation of the debtor, who is in a certain state, the third party is responsible for the state of the debtor. Is a dual mechanism, its final goals is possible only if all the conditions for the implementation of the binomial insolvency, the liability. If, in essence, verifying whether the conditions for the application of insolvency is a relatively easy approach to tax authorities, finding and proving the fundamental conditions for the liability or dishonesty and joint control operations are extremely difficult, given a normative limitations specific duties of the fiscal. In my view, conceptual, binomial insolvency - the liability has some features as follows:

- is a useful tool for public power in tax matters;

- ensure constitutional right to defense subjects report tax law, both in administrative proceedings and proceedings;

- help strengthen fiscal citizenship, inducing responsibility and good faith in the conduct of the taxpayer both principal and third parties with which it develops various ratios.

The purpose of liability established by the Fiscal Procedure Code is not to get a sufficiency of the tax claim in a proceeding individual uncollected and neconcursuală, which would render the substance insolvency proceedings, but to get a new debtor liable for the tax liability, situation occurs, for example, in insolvency proceedings when one of claims entered in the list of creditors benefit from a debtor. By the way for the implementation of joint and several liability procedure by predetermining the existence of third party culpability and causation, the practical operation of this institution is criticized in some respects.

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