



EMERGENCY LEGAL KIT FOR BUSINESS SERIES

Year 6, Issue 23, September 2019

Solving tax disputes for the avoidance of double taxation

1. Introduction

The Government Ordinance no. 19/2019 amending and supplementing the Law no. 207/2015 on the Fiscal Procedure Code (the “**Government Ordinance 19/2019**”) brings a new mechanism for resolving tax disputes for the avoidance of double taxation.

This new mechanism is the result of transposing the Council Directive (EU) 2017/1852 regarding the mechanisms for settlement of tax disputes in the European Union (the “**Directive 2017/1852**”).

The main scope of Directive 2017/1852 (and as a result, of Government Ordinance 19/2019) is to establish a unitary mechanism on how to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital.. Below you may find certain highlights on the same.

2. Mechanisms

At the moment in Romanian legislation there are three mechanisms designed as amiable procedures for the avoidance of double taxation that can be employed by any natural person and legal entity whose rights are affected, as follows:

- (i) the amiable procedure transposing the provisions of the Directive 2017/1852;
- (ii) agreements and conventions to which Romania is a signatory;

- (iii) Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises.

This Emergency Legal Kit for Business will focus on the amiable procedure for tax disputes resolution mechanisms indicated at point (i) above.

3. The procedure under the umbrella of Directive 2017/1852

This procedure has been designed to be used by persons affected by a decision of double taxation which involves a question in dispute and it can be used both by natural persons and legal persons.

The novelty element that this procedure brings is the involvement of the European Commission. Its role is ensuring the independence of the persons involved in the procedure and the fairness of the procedure.

3.1. Conditions

In order to benefit from this new procedure, the affected person must file a complaint against a decision of double taxation which involves a question in dispute within three years from the communication of the relevant decision even when the affected person has already used the other remedies available under the applicable legislation.

Furthermore, such complaint must be submitted simultaneously before every competent tax authority of each Member States involved in the case and it must contain (i) the identification data of the affected person, (ii) the tax periods envisaged, (iii) facts and circumstances relevant to the case, (iv) a reference to the legal provisions in force and the applicable agreements or conventions and furthermore (v) copies of the supporting documents and other relevant information.

Within 180 days since filing of the complaint or from the last term in which additional information or supporting documents were provided by the affected person (the National Agency for Fiscal Administration may request such information and/or documents within 90 days from receipt of the complaint and the affected person has 90 days at its disposal to provide such information and/or documents from the receipt of the request), the National Agency for Fiscal Administration is requested to issue a decision in accordance with the merits of the case (whether to accept or reject to analyze the case).

The case may be rejected (i) when the complaint does not contain the relevant information and documents, (ii) when the affected person does not provide the information and/or documents requested by the National Agency for Fiscal Administration or (iii) when there is no question in dispute.

When accepting to analyze the complaint, the National Agency for Fiscal Administration may either start off the amiable procedure detailed under Section 3.2. below or may decide to settle the complaint on its own, without involving other competent tax authorities.

We will provide relevant information on the most important scenarios in the sections below.

3.2. The complaint is accepted for analysis by the National Agency for Fiscal Administration

As a matter of principle, if the National Agency for Fiscal Administration and the counterpart tax authority involved in the case admit the complaint then they should consider solving the dispute through the amiable procedure within two years from the date of the last notification sent by either authorities accepting to analyze the complaint (in duly justified cases, the two-year deadline may be extended by up to one year at the request of any competent authority involved in the proceedings addressed to all other involved authorities).

The decision to settle the amiable procedure becomes binding and enforceable provided that the affected person accepts it and waives any appeals.

3.3. The complaint is rejected from analysis by the National Agency for Fiscal Administration or not settled in the two-year deadline

If the complaint has been rejected from analysis, the affected person may proceed as follows:

- (i) if the complaint is rejected by all the competent authorities concerned, the affected person may approach directly the competent court within 30 days from the date of receipt of the notification;
- (ii) if the complaint is rejected by at least one authority, but not by all and no appeal can be made, no appeal is pending or the affected person has formally renounced his right to appeal, the affected person may submit a request to the National Agency for Fiscal Administration requesting the establishment of an advisory commission which will issue an opinion on the complaint (the “**Advisory Commission**”).

The same process mentioned at point (2) above will apply when the affected person has lodged the complaint at the right time and it was accepted by the competent authorities, but they have failed to reach an agreement on the settlement of the disputed matter within the time limit set by two years.

As permitted by the Directive 2017/1852, Government Ordinance 19/2019 allows the National Agency for Tax Administration to not apply the settlement procedure involving the Advisory Commission when sanctions for deeds such as tax evasion have been applied in Romania in relation to the adjusted income or capital tax relevant to the complaint.

The Advisory Commission, which is the responsible body for issuing an opinion to resolve the dispute, is composed of a chairman, a representative from each authority and an independent person named by each competent authority of the involved Member States. Notably, if the European Commission has objections and evidence regarding the lack of independence of one of the independent persons nominated in the commission, it draws the attention of the National Agency for Fiscal Administration to exclude the respective person from the list.

The complaint will be settled as detailed under Section 3.6. below.

3.4. Alternatives

When the competent authorities have not reached an agreement on the solution to the complaint within the time limit of two years, the same have the prerogative to decide whether they wish to resort to an alternative dispute resolution commission, called the Alternative Dispute Resolution Commission, instead of the Advisory Commission, or to an Alternative Dispute Resolution Commission organized in the form of a standing committee which has a permanent nature.

The last two above mentioned bodies, as opposed to the Advisory Committee, may apply any dispute settlement procedure to solve the disputed matter with binding effect, such as the independent opinion process and any other type of dispute resolution procedures, including arbitration procedures.

3.5. Regulation

The competent authorities of each Member State involved shall draft and approve a regulation for the operation for every establishment of the aforementioned bodies and shall include among others:

- a description of the litigation issue;
- the form of the dispute settlement body;
- a calendar for settling the litigation issue;
- legal and practical terms of reference that need to be clarified;
- composition of the Advisory Commission / Alternative Dispute Resolution Commission, plus details regarding their competences and qualifications;

- the rules governing the participation of the affected person and the third parties in the procedure, exchanges of notes, information, evidence, costs and any other relevant procedural or organizational aspects.

3.6. The decision

The Advisory Commission or Alternative Dispute Resolution Commission established will deliver its opinion to the competent authorities of the Member States within 180 days from its establishment (this term may be extended by up to 90 days when the relevant commission considers that this extension is needed to settle the question in dispute).

Subsequently, within 180 days from the notification of the opinion of the Advisory Commission or the Alternative Dispute Resolution Commission, the National Agency for Fiscal Administration together with the competent authorities of the Member States involved, have at their discretion several ways to solve the disputed issue.

They can agree on the solution and issue a final decision in accordance with the opinion issued by the Advisory Commission/Alternative Dispute Resolution Commission, but to the same extent, the competent authorities can jointly issue a final decision without respecting this opinion. In addition, there is also the situation when the competent authorities do not agree on how to solve the dispute and issue a final decision in accordance with the opinion of the Advisory Commission/Alternative Dispute Resolution Commission, as the case may be.

Overall, the final decision is binding to the Member States concerned and this does not qualify as precedent. Likewise, the decision shall be implemented provided that the person concerned accepts and disclaims in writing the right to appeal at national level within 60 days after the decision was notified.

4. Other mechanisms

The procedures stated at paragraph 2., point (ii) and point (iii) have not been amended.



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