

CONSIDERATIONS REGARDING THE QUALITY OF TAXABLE PERSON IN RESPECT OF VAT FOR NATURAL PERSONS

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1. Introduction

It is known the fact that acquiring the quality of taxable person in terms of added value generates for the taxpayer – natural person a series of rights and specific obligations, but the lack of clarity in the regulations of this field, as we shall show below, makes extremely difficult for the good faith taxpayers to comply with the legal requirements. Equally, given the tax authorities tendency to interpret the unclear legal texts in the most favourable sense for the budget and unfavourable for the taxpayer, this fact allowed them to apply the law in an absolute arbitrary manner.

In what follows, we intend to shape the scope of those activities which, being performed by the natural person, calls for them the quality of taxable person, with all the consequences arising, and to mention the deficiencies of the incident legal texts.

From the interpretation of the art. 127 par. (1) in conjunction with the art. 125 ind. 1, section 18 of the Tax Code, it results that the natural person acquires the quality of taxable person if two conditions are met at the same time, namely: the natural person performs an activity defined by the Tax Code as being an "economic activity", and the activity is independently performed.

In what follows, we shall elaborate in detail each of these conditions.

2. Economic activity

The Tax Code does not define the term of "economic activity". The tax

legislator chose, in order to delimit the activities qualified as "economic", to resort to an enumeration. Thus, according to the art. 127 par. (2) of the Tax Code, economic activities are:

- the activities of manufacturers, traders or providers of services, including mining, agricultural activities and the activities of independent professions or assimilated to them;
- the exploitation of tangible or intangible assets to obtain continuous incomes.

A mention which must be made is that the economic activity for VAT purposes does not strictly engages over the trade facts trade regulated by the Commercial Code, but contrariwise it includes them, considering that in the legal enumeration there are also found essentially civil documents. We only illustrate the activities developed by the independent professions, because traditionally it is recognized that the persons performing liberal professions (doctors, lawyers, architects, and so on) do not have the quality of trader¹.

Also, making a parallel with the independent activities for which it must be paid an income tax, it is noted that the scope of economic activities for VAT purposes includes this category of activities.

Under section 232 of the G.D. no. 44/2004, the natural persons who obtain incomes from rentals resulting from running a number larger than 5 lease contracts at the end of the reference tax

¹St. D. Cărpenaru, Romanian Commercial Law, IV-th issue, Bucharest, 2002, page 73.

year, fall under taxable persons who obtain incomes from independent activities.

As we show below, the rental activity performed under a single contract can represent the economic activity in terms of VAT.

Referring to the operating activity of tangible or intangible assets, in section 3, par. (1) of the G.D. no. 44/2004, it is mentioned that the natural persons obtaining incomes from the sale of housing which is their personal property or other assets used by them for private purposes, will not be considered economic activity, except for the cases when it is found that the respective activity is performed to obtain continuous incomes.

In the activity category consisting in operating assets, either tangible or intangible, there are included both the operations by which the right of use of such property is transferred (eg. The lease of movable and immovable assets, the license granted for the use of a patent, a trademark) but also the operations by which a property right upon such assets is transferred (eg. The sale and purchase of tangible assets, the transfer of intellectual property rights on patents, trademarks), as it results from the *per a contrario* interpretation (when something is asserted that denies the contrary) of the section 3, par. (1) of the G.D. no. 44/2004, previously mentioned.

Occasionally versus continuity

We emphasize the fact that the activity performed by the natural person is qualified as an economic activity if it has a character of continuity. For the activities it carries out occasionally, the natural person does not become a taxable person.

Related to this aspect, difficulties of interpretation generated the collocation "in order to obtain continuous incomes". It is questioned if continuity requires several performed actions or a single continuous action over a certain period.

We present two cases where we aim to qualify the activity performed by the natural person.

In the first case, the natural person - the owner of a freight car, rents the vehicle, the duration of the contract being of 2 years, and the annual rent is of 40,000 euros.

In the second case, the natural person - the owner of two freight cars, simultaneously concludes two lease contracts, having as an object the respective vehicles, the duration of each contract being of 2 years, and the annual rent for each vehicle is of 20,000 euros.

In both cases, the natural person obtains incomes deriving from the operation of movable assets, the annual income is the same (40,000 euros), the difference consisting in the number of contracts under which the incomes are obtained.

If the legal text does not distinguish, meaning to settle as a criterion a number of contracts, in order to ensure the same tax treatment considering that the obtained incomes are equal, the conclusion that it must be is that in both cases the natural person performs an economic activity, becoming a taxable person starting with the date of setting in the activity, having the obligation to register for VAT purposes at 35,000 euros overruns.

However, the examples presented above are simplistic, "the continuity" remains an issue which will be examined in each case, in relation to the circumstances specific to the development of the activity. The tax authorities, and ultimately the jurisprudence, will have to outline the content of this notion. But, until a unified practice will be crystallized, in the absence of some strict legal criteria, the position of the taxpayers is vulnerable.

3. The performance of the independent activity

Secondly, so that the activity to be classified as an economic activity, it must

be performed independently. Also, it is not defined the notion of independent activity, but the Tax Code establishes that the dependent activity is not an economic activity, and it defines the latter. Thus, according to the art. 127, par. (3), "the employees or any other persons relating to the employer by an individual employment contract or any other legal instruments that create an employer / employee report regarding the working conditions, remuneration or other obligations of the employer not acting in an independent manner".

The conclusion that it must be is that, if an activity is not qualified as dependent, respectively it is not performed under an individual employment contract or other legal instruments which create an employer / employee report, the activity is independent and, therefore, may engage over the quality of taxable person of the natural person. And in this situation we are in difficulty, since it is not defined the concept of "other legal instruments that create an employer / employee report". We identified in the category of persons who perform a dependent activity based upon other legal instruments other than the individual employment contracts, the following categories of persons: civil servants, persons who develop their activity in elective positions or appointed within the executive, legislative or judicial authority. Basically, also in order to check the condition regarding the performance of the independent activity there will be considered the circumstances in which the activity under review is performed.

4. The concomitant development of several economic activities by the natural person

According to the art. 125, ind. 1, par. (1) section 4 of the Tax Code, when a person carries out several economic activities, an economic activity means all economic activities performed by it. Basically, in this case, in terms of VAT, it

is considered that the taxable person performs only one economic activity.

This implies that, when calculating the limit for the application of the special exemption regimen, there will be taken into account the cumulative revenues from all activities; the calculation will not be made on each activity severally. This conclusion is logical just because it would be absurd for a person to have several registration codes for VAT purposes.

5. The development of the economic activity by the natural person, individually or in association

According to the art. 125 ind. 1, section 18, the taxable person is the natural person, group of persons, public institution, legal person as well as any entity able to pursue an economic activity. Therefore, the quality of distinct taxable person may have various associations which do not have legal personality (the legislator identifies the group of persons, any entities without legal personality). The quality of taxable person is not conditioned by the existence of the legal personality.

The legislator expressly excludes only joint ventures, associations of joint venture type, consortium or other association forms for business purposes, providing that they do not give rise to a separate taxable person².

For joint ventures or other associations treated as joint ventures, the legal rights and obligations regarding the added value tax (the obligation to issue invoices to the beneficiary and to collect the tax for the taxable transactions), fall on the associate which accounts the incomes and expenditures, under the contract between the parties.

These rules apply only if the associate who accounts the incomes and expenditures makes purchases on his behalf and issues invoices on his own name to third parties for the supply of

²art. 127 par. (10) of the Tax Code

goods and providing services obtained by the association, going that the incomes and expenditures to be allocated to each associate, according to the contribution quota in association.

If the associate members act in their own name with third parties and other associate members, each person will be treated as a separate taxable person and the respective transactions shall be taxed separately.

6. Final considerations

As shown above, the legislation, in terms of employment of the natural person as a taxable person for VAT purposes, is imperfect, the regulations being principles, clear and rigorous definitions missing. This is allowed in countries with tradition in the interpretation and enforcement of tax law or which have a relatively unanimous jurisprudence, but not in Romania, where the work of interpretation is made difficultly, and the solutions of the law courts are the most diverse.

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