

## Atypical Fiscal States: Fiscal Inactivity State and the Fiscal Body Ex-Officio Cancellation of the Registration Code for VAT Purposes

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**Abstract:** *The state of fiscal inactivity of a tax payer, as well as the cancellation of the registration code for VAT purposes, generate important fiscal effects, both for the tax payers concerned and for the beneficiaries that purchase goods and services from them. In case these tax payers continue to develop economic activities, they are subject to the obligations regarding the payment of the taxes and dues stipulated by the law, but, in the respective period, they do not benefit from the right of deductibility of expenses and of the value added tax corresponding to the purchases performed. Correlatively, the beneficiaries that purchase goods and services from such persons do not have the right to deduct the value added tax corresponding to the acquisitions performed and of the respective expenses. In this article, we shall present the legal status of these atypical fiscal states, respectively: the situations that generate these states, the fiscal effects produced on the suppliers/providers; the fiscal effects on the beneficiaries; the situations of reactivating or re-registering of the tax payers, as well as the Registers organized by the National Agency for Fiscal Administration (ANAF).*

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### 1. Introduction

In an economy overwhelmed by the financial crisis which seems endless, tax payers are trying hard to maintain their business afloat. Within this context, the conduct of the tax payers is to minimize losses of any kind, including the ones arising from the possible additional tax liabilities and ancillary obligations established by the tax inspection bodies, and this is the main reason for which high attention is granted to the modality of compliance with the rigors of tax laws.

In order to inform tax payers and facilitate the increase of the compliance with tax regulations, we consider it useful to present below the legal status of fiscal inactivity of the tax payer, as well as of the situation of cancellation of the registration code for VAT purposes, taking into account the fact that, very often, due to ignorance or neglect (not always dishonesty) tax payers find themselves in these situations or have developed trade relations with such people.

These fiscal states are atypical situations for the tax payer, generated, as we shall see below, by incorrect fiscal conduct, but which generates important fiscal effects, materialized in additional tax liabilities for the budget, both for the tax payer in this situation and for the beneficiary that has purchased goods and services from them.

## 2. The state of fiscal inactivity

The state of fiscal inactivity of a tax payer is declared by the fiscal body in cases of serious violations of the fiscal discipline, respectively:

- The tax payer has not fulfilled any declarative obligation stipulated by the law, during an entire calendar semester; by declarative obligation, one should understand the obligation to submit the following statements: 100 “Statement regarding the payment obligations for the state budget”; 112 “Statement regarding the payment obligations of the social contributions, of the income tax and the nominal register of the insured persons”; 101 “Statement regarding the income tax”; 300 “Value added expense claim”; 301 “Special value added expense claim”; 390 VIES “Recapitulative statement regarding the intra-community goods’ deliveries/acquisitions”; 394 “Informative statement regarding the deliveries/services and acquisitions performed within the national territory”
- The tax payer absconds from the fiscal inspection by declaring identification data of the tax residence that do not allow the fiscal body to identify it;
- The fiscal bodies have discovered that the tax payer does not have activity at the declared tax residence.

It is important to remember the fact that all tax payers which are in one of the above mentioned situations can be declared inactive from the fiscal point of view, regardless of the fact that they are in the procedure of insolvency, reorganization or bankruptcy.

The records of the inactive people is organized by the National Agency for Fiscal Administration in the Register of the inactive/reactivated tax payers, which is a public document and is posted on the website of the National Agency for Fiscal Administration. Fiscal inactivity draws as a first consequence the cancellation of the tax payer’s registration code for VAT purposes.

The tax payers which are included in this category and develop economic activities within the period of inactivity, are subject to the obligations regarding the payment of the taxes and dues stipulated by the law, but, in the respective period, they do not benefit from the right of deductibility of expenses and of the value added tax corresponding to the purchases performed.

In order to ensure the compliance with the principle of neutrality of the value added tax, the right of the taxable person that reactivates or re-registers for VAT purposes to adjust in their favour the VAT for the acquisitions of goods and/or services performed in the period in which they don not have a valid VAT code was regulated. In order to perform this adjustment, it is necessary that these acquisitions be destined to operations that are to be performed after the date of the registration for VAT purposes. The adjustment is performed by enrolment in the first tax expense account submitted by the taxable person after the registration for VAT purposes, or, depending on the case, in a subsequent expense account. The corresponding tax is adjusted to the following:

- a) goods in stock and unused services, found based on inventory, at the moment of registration;
- b) fixed tangible assets, including capital goods, for which the period of the deductibility adjustment has not expired, as well as fixed tangible assets in progress of execution, found based on inventory, which are in its property at the moment of registration.
- c) goods and services acquisitions that are to be obtained, respectively for which the tax exigibility has appeared before the registration date and whose tax generator fact, respectively the delivery/performance, takes place after this date.

Fiscal consequences will also be borne by the beneficiaries that purchase goods/services from tax payers declared inactive from the fiscal point of view, having no right to deduct the expenses and value added tax corresponding to the respective acquisitions. By exception, the beneficiaries have the right to deduct expenses and value added tax in the following cases:

- Purchase of goods performed within the procedure of forced execution
- purchase of goods/service from taxable persons which are in the procedure of bankruptcy, in accordance with Law no. 85/2006 regarding the procedure of insolvency.

The tax payers declared inactive can reactivate if they fulfil the following cumulative conditions:

- a) They fulfil all the declarative obligations stipulated by the law;
- b) They fulfil all their payment obligations;
- c) The fiscal bodies have found that they function at the declared tax domicile.

The reactivation of the tax payers is performed on the date of communicating the decision of reactivation. The decision of reactivation becomes effective towards third parties from the date of the registration in the Register of inactive/re-activated tax payers.

The tax payers for which the simplified insolvency procedures was opened, the taxpayers that have entered bankruptcy or the tax payers for which a dissolution resolution was adopted, are reactivated by the fiscal body, at their request, after fulfilling the declarative obligations.

### **3. The ex officio cancellation of the registration code for VAT purposes by the fiscal body**

The ex officio cancellation of the registration code for VAT purposes by the fiscal body of the taxable person is another atypical fiscal state of a tax payer, which most of the times intervenes as a sanction in cases when the taxable person or their associates/administrators have violated the financial-fiscal discipline.

Thus, the fiscal body cancels the registration for VAT purposes of the taxable person, in the following situations:

- Inactivity registered at the Trade Register
- Facts written in the tax offence record of the taxable person/their associates/administrators
- The taxable persons have not submitted VAT expense accounts for a period of 6 months or two consecutive calendar quarters
- In the expense accounts submitted for 6 months or two consecutive quarters, no goods/services purchases, delivery of goods or provision of services were declared

Within the period in which the registration code for VAT purposes of the taxable person is cancelled, the taxable person does not have the right to deduct the VAT corresponding to the acquisitions, but has the obligation to collect the tax for the delivery of goods and the provision of services performed. This type of tax payer also benefits, after the re-registration for VAT purposes, of the right to adjust in its favour, the VAT for the acquisitions of goods/services performed in the period when they do not have a valid VAT code, under the same conditions as the tax payer reactivated, described above.

Correlatively, the beneficiary that has purchased goods and services from such a person does not have the right to deduct the tax corresponding to the respective acquisitions. By exception, beneficiaries can deduct the value added tax corresponding to the goods purchase performed within the procedure of forced execution or the tax

corresponding to the purchase of goods from taxable persons which are in procedure of bankruptcy according to Law no. 85/2006. We underline the fact that the tax deduction is only allowed in the case of purchase of goods (and not of providing services) and the supplier that has the registration code for VAT purposes cancelled, is in the last stage of the insolvency procedure, respectively in the procedure of bankruptcy. Thus, the deduction is not allowed if the purchase is performed from a supplier within the insolvency procedure – in the observation period or in the reorganization procedure.

After the cancellation of the registration for VAT purposes, the competent fiscal bodies will register the taxable persons for VAT purposes in the following ways:

- Ex-officio, from the date when the situation that led to the cancellation of registration has ceased, for the ones that are inactive from the fiscal point of view and for the ones that are inactive and registered at the Trade Register;
- At the request of the taxable person, in the situation of the persons whose code for facts registered in the tax offence record was cancelled, if the situation that led to the cancellation has ceased from the date of communicating the decision of registration for VAT purposes;
- At the request of the taxable person, in the situation of the persons whose code for not submitting the expense accounts was cancelled, from the date of communicating the decision of registration for VAT purposes, based on the following information/documents, provided by the taxable person: the tax accounts not submitted on time; presenting a motivated request in which they undertake to submit the tax expense accounts on the dates stipulated by the law;
- At the request of the taxable person, in the situation of the persons whose code was cancelled for not developing economic activities. The date of the registration for VAT purposes of the taxable person is the date of communicating the decision of registration for VAT purposes.

#### **4. The ex-officio cancellation of the registration code for VAT purpose, by the fiscal body, for facts registered in the tax offence record**

We consider it important to detail the case in which the registration with VAT purposes of a taxable person is cancelled for facts written in the tax offence record, given the large number of viable companies that have rigorously respected the financial-fiscal discipline, but have registration codes for VAT purposes cancelled, for facts written in the tax offence record of the associates/administrators (without taking into account the fact that frequently these registrations in the tax offence record are done easily).

The facts registered in the tax offence record that lead to the cancellation of the registration code for VAT purposes are acts that are sanctioned by the tax, financial and customs laws as well as of the ones regarding the financial discipline. Faptele inscrise in cazierul fiscal care conduc la anulara codului de inregistrare in scopuri de TVA sunt fapte sancţionate de legile fiscale, financiare, vamale, precum și cele care privesc disciplina financiară. This category includes acts that are considered offenses, regulated by the following: Law 241/2005 on the prevention and fight against fiscal evasion; Law no. 571/2003 on the Fiscal Code for the violation of the rules related to the excisable goods; Law no. 86/2006 on the Customs Code of Romania; Law no. 82/1991 on accountancy; Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for establishing certain measures for the prevention and fighting against the financing of terrorist acts; Emergency Ordinance no. 77/2009 on the organization and exploitation of gambling games; Law no 85/2006 on the

insolvency proceedings; as well as other felonies in the financial and customs domains and which regard financial discipline, sanctioned according to the criminal law. Also registered in the tax offence record are the acts that represent contraventions according to Law no. 82/1991 on accountancy, as well as the ones regulated by Government Ordinance no. 92/2003 on the Fiscal procedure code.

Also, acts of drawing joint and several liability with the debtor declared bankrupt or insolvent which are registered in the tax offence record lead to the cancellation of the registration code for VAT purposes. .

The registration of such facts both in the tax offence record of the taxable person and in that of the associates/administrators of the taxable person entails the annulment of the registration code for VAT purposes. In the case of taxable persons established as companies under Law no. 31/1990, the VAT code is cancelled if the associates that have facts registered in the tax offence record have a significant ownership in the company, that is, they are majority shareholders or sole shareholder.

It is required to mention certain terminological clarifications: insolvent is the debtor whose incomes or traceable goods have a value under the fiscal obligations or which does not have incomes or traceable goods. De facto insolvency is established by the fiscal body. The technical insolvency is that state of the debtor's patrimony characterized by the insufficiency of the cash funds available for the payment of the certain, liquid and exigible debts; this type of insolvency is pronounced by the competent court.

It is important to remember the fact that by the institution of joint and several liability, the liability is extended for the fiscal obligations unpaid by the debtor on the patrimony of those persons that, in the exercise of their duties, by means of actions or inactions, have caused there obligations not to be paid; in this way, the recovery of the prejudice produced to the state budget being realized by committing certain facts that pertaining to an incorrect fiscal behaviour.

The fiscal procedure code establishes the joint and several liabilities with the debtor with declared insolvency of the following:

- Administrators, associates, shareholders and any other persons that have caused the insolvency of the debtor legal person by means of alienation or concealment, with dishonesty, under any form, of the debtor's assets;
- Administrators which, during the exercise of their mandate, have dishonestly failed to fulfil their legal obligation of requesting the competent court, the opening of the insolvency procedure for the fiscal obligations corresponding to the respective period and left unpaid at the date of declaring the insolvency state;
- Administrators or any other persons that, have dishonestly determined the concealment or non-payment at maturity of the fiscal obligations;
- Administrators or any other persons that, have dishonestly determined the refund or reimbursement of certain amounts from the general consolidate budget, without them being owed to the debtor.
- Natural or legal persons that, previous to the date of declaring the insolvency, have acquired, with bad faith, in any way, assets from the debtors that have this way caused their insolvency;

A special case of liability is the joint and several liability of the legal person with a debtor that was declared insolvent or bankrupt. This type of liability is undertaken if:

1. The main debtor has been declared insolvent/bankrupt;
2. The legal person, directly or indirectly controls, is being controlled or is under common control with the debtor (control - the majority of the voting rights, either in the shareholders' general assembly of a company or of an association or foundation, or in the administration board of a company, or the board of directors of an association or

foundation; indirect control – activity through which a person exercises control by means of one or several persons);

3. At least one of the following conditions is fulfilled:

a) the legal person acquires, by any title, the property right on certain tangible assets from the debtor, and the book value of these assets represents at least half of the book value of all the tangible assets of the acquirer;

b) the legal person has or has had contractual trade relations with clients and/or suppliers, others than the ones for the utilities, which have or have had contractual relations with the debtor in proportion of at least half of the total value of the transactions;

c) the legal person has or has had work or civil relations of provision of services with at least half of the debtor's employees or of the services providers.

## **5. The registers of the taxable persons**

The National Agency for Fiscal Administration (ANAF) is responsible for the organization of the Register of the taxable persons registered for VAT purposes and of the Register of the taxable persons whose registration for VAT purposes has been cancelled. The registers are public and are published on the website of the National Agency for Fiscal Administration.

The registration in the Register of the taxable persons whose registration for VAT purposes has been cancelled is performed by the competent fiscal body, after the communication of the cancellation decision of the registration for VAT purposes, within 3 days from the communication date.

The cancellation of the registration for VAT purposes causes the supplier/provider the effects we have previously mentioned, from the date when the situation that has generated the cancellation appears. In the case of the beneficiary, the cancellation of the registration for VAT purposes of the supplier/provider becomes effective from the day following the date of operating the cancellation of the registration in the Register of the taxable persons whose registration for VAT purposes was cancelled.

When it is observed that the taxable person was registered for VAT purposes by the fiscal bodies as a consequence of an error, this registration is cancelled *ex officio* or at the request of the taxable person, by the competent fiscal bodies, starting with the date written in the decision for correcting the error. Within the period between the registration date and the data of the cancellation of the registration for VAT purposes:

a) the taxable person that was erroneously registered for VAT purposes acts as a person registered for VAT purposes, with the exception of the situation in which the erroneous registration was generated by the fiscal body, in which case the taxable person can apply the special treatment of exemption for small enterprises;

b) the right of deductibility of the VAT corresponding to the acquisitions performed by the beneficiaries from the respective taxable persons is usually exercised in accordance with the stipulations of the Fiscal Code.

When it is found that the registration code for VAT purposes of a taxable person was cancelled *ex officio* by the fiscal bodies, as a consequence of an error, this will be registered, *ex officio* or at the request of the taxable person, by the competent fiscal bodies. During the period between the date of the cancellation and the date of the registration for VAT purposes, the respective person maintains the quality of taxable person registered for VAT purposes, keeping the previous date of the registration for VAT purposes. The right to deductibility of the VAT corresponding to the

acquisitions performed within the same period by the beneficiaries from the respective taxable persons is usually exercised within the limits and conditions of the Fiscal Code, taking into account the fact that the acquisitions were performed by a taxable person registered for VAT purposes.

## **6. Final considerations**

In order to avoid the establishment of certain additional fiscal obligations, it is required to pay attention to the verification of the tax situation of each supplier, before a certain purchase, by means of consultation of the Register of the inactive/reactivated tax payers, as well as of the Register of the taxable persons registered with VAT purposes, especially as lately, the fiscal inspection bodies pay special attention to these aspects

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