

# Tax & Legal Weekly Alert

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## Articles in this issue:

### **The Methodological norms for applying the New Fiscal Code have been published in the Official Gazette**

Please note that on 13 January 2016 the Methodological norms for the application of Law no. 227/2015 regarding the Fiscal Code were published. As such, you will find in the document attached below the most important modifications.

### **Order no. 3769/2015 of ANAF for the approval of the domestic supplies and purchases list (394) regarding transactions carried out on the national territory**

On 7 January 2016 the order regarding the approval of the new form for reporting the deliveries/supplies and acquisitions carried out on national territory (domestic supplies and purchases list 394) was published.



## Methodological norms for the application of Law no. 227/2015 regarding the Fiscal Code

### Title I General Framework

- Clarifications regarding the classification of an independent activity have been introduced.
- The term “control” utilized in the definition of related parties has been defined.
- Clarifications concerning the affiliate relationship between two legal persons have been introduced.
- A transaction without economic purpose is defined as any activity/ transaction that is not intended to bring economic advantages, benefits or profits and which leads, in an artificial manner, to a more favorable fiscal situation.
- New clarifications concerning the adjustment/estimation of evidence with the aim of mirroring the market principle of products, merchandise and services have been introduced.
- For transactions concluded between two affiliated parties, clarifications have been introduced regarding the performance of adjustments/estimates by the tax authority with the aim of reflecting the arm’s length principle. Adjustments/estimates imposed by the tax authority will also be reflected at the level of the other affiliated person, being subject to the mutual agreement procedure for Romanian affiliated parties or non-resident affiliated parties.
- The notion “central market tendency” has been defined and the procedure regarding transfer pricing adjustments/estimates performed by the tax authority at the level of central market tendency has been described.

### Title II Corporate income tax

- Definitions of some types of taxpayers subject to corporate income tax have been introduced.
- In the case of non-profit organizations, clarifications have been brought concerning the computation of the fiscal result (e.g., when computing fiscal results, elements similar to revenues, expenses, fiscal deductions, as well as fiscal losses that are recoverable are taken into consideration).
- Clarifications have been brought regarding taxpayers that receive special tax treatment in relation to computing fiscal results when such taxpayers undertake activities such as night bars, clubs, discos and casinos.
- New categories of elements similar to revenues and to expenses have been introduced.
- Clarifications are brought concerning the computation of fiscal results for taxpayers with a modified fiscal year comprising both periods from 2015 as well as 2016.
- Clarifications have been brought for how a Romanian legal entity accounts for transfer pricing adjustments/estimates made by the tax authorities (i.e. revenues or expenses) when the entity determines the tax result for the period to which the transaction is related.
- Clarifications have been made regarding the computation of cumulated gross profit for applying tax exemptions for reinvested profit. It is also stated that when assets are acquired through financial leasing, the user can apply the tax incentive.
- Examples regarding non-taxable income in relation to new shares or amounts representing the increase of the nominal value of existing shares have been introduced.

- Regarding the value of the share capital increase at the level of the entity in which shares are held the following should be taken into consideration:
  - ✓ The value at which the new shares have been booked;
  - ✓ The amounts representing the increase of the existing shares' nominal value are added to the acquisition / contribution value.
- New clarifications are brought concerning the computation of non-taxable revenues expressly mentioned in agreements and memoranda, when the revenues and expenses related to the exempt activity are not clearly defined in accounting.
- For qualifying as non-taxable income from the reduction of share capital, the following are taken into consideration:
  - ✓ The capital brought by the shareholders/associates beneficiaries of the capital reduction in cash or kind, must have been contributed from their personal patrimony;
  - ✓ For the shareholders/ associates that subsequently acquired shares, the non-taxable income will amount to maximum the acquisition cost of the shares.
- The deductible expenses stipulated in the Fiscal Code applicable until 31.12.2015, are included in the Methodological Norms for the application of the New Fiscal Code, as a clarification to the general rule for deductibility referred to in the art. 25, alin. (1).
- Social expenses carried out according to the collective work agreement represent social expenses established within the framework of the collective labor agreements at national level, branch level, unit and subunit level.
- The clarifications regarding the justification of the use of vehicles for business purposes that existed in the Methodological Norms for applying the Fiscal Code applicable until 31.12.2015 in Title VI – VAT, are now also included as clarification in the Methodological Norms for applying the New Fiscal Code applicable starting from 01.01.2016, in Title II – Corporate Income Tax.
- Regarding missing or damaged inventories/fixed assets, such goods are considered destroyed by the Company or handed over to specialized units.
- A non-exhaustive list of examples has been introduced regarding the expenses borne in the shareholders'/associates' benefit or associates.
- Clarifications have been brought concerning the deductibility of adjustments for receivables.
- If reserves and adjustments are transferred during a reorganization process, this transfer should be performed based on an internal document prepared by the transferring entity.
- The depreciation period for expenses incurred by investments in fixed assets subject to lease agreements, concession or location management is:
  - ✓ The duration remaining until the expiry of the initial period left of the agreement, irrespective of any extension of the agreement's duration, if the investment was performed during the initial period;
  - ✓ The duration remaining until the expiry of the agreement's extension, if the investment was performed during the extension period of the agreement,  
OR
  - ✓ The normal utilization period, if the investment may be identified according to the Fixed Assets' Catalogue.
- Clarifications have been brought concerning the computation of the fiscal value of fixed assets.
- Clarifications have been brought concerning the taxpayer's option to recover through depreciation the value of tangible assets that have an initial value lower than the one established through Government Decision.

- During reorganization transactions, the fiscal loss is computed and transferred through an internal document prepared by the transferring company. The beneficiary company recaptures the fiscal loss based on the document and includes it in the tax registry.
- Clarifications have been brought regarding the computation method of the gains derived from selling real estate situated in Romania and obtained by non-resident legal persons.

### **Title III Personal income tax**

- Further information has been provided regarding the types of income under the nontaxable income category.
- Clarifications are brought regarding the types of income included in the gross salary income, as well as of the personal deductions applicable in establishing the taxable base.
- The rule for determining the taxable income derived by individuals from operations as a result of the liquidation of a legal entity is established, as follows:
  - ✓ The difference between the value of assets and liabilities;
  - ✓ The surplus of the difference between the assets and liabilities of the legal person over the company's share capital.
- Investment income: interest income and derivatives are defined by example and methods of establishing the taxable income are set.
- Clarifications have been brought regarding the manner of computing the taxable base for income derived from independent activities.
- Exemplification of income obtained from other sources (e.g. gift vouchers derived outside of a revenue generating relationship).

### **Title IV Mandatory social charges contributions**

- Clarifications have been made regarding the definition of taxpayers / payers of income to the pension system.
- The methods of establishing the taxable basis of the mandatory social charges due by the employers or by assimilated individuals and by the individuals that derive income from independent activities and that determine their annual net income based on income quotas are specified.
- The notion of foreign citizen is correlated with the specific immigration legislation.

### **Title VI Withholding tax**

- It is stated that the amounts paid as negative interest are not considered an income payment for taxation purposes under Chapter I of Title VI.
- As regards the taxation of dividends distributed but not paid to shareholders/associates until the end of the year in which the annual financial statements were approved, the non-resident must provide the fiscal residency certificate valid for the year in which the annual financial statements were approved in order to apply the most favourable tax rate provided under the Fiscal Code or the double taxation treaty.
- Clarifications are made in relation to the tax compensation option for interest income derived from Romania by legal persons resident in an EU or EEA state (e.g. documents, types of expenses taken into consideration for determining the fiscal result related to interest income).

- An amendment has been made as regards the person which may request the reimbursement of extra-paid tax (once the minimum holding condition is met), that being the non-resident beneficial owner.
- Clarifications are made regarding the application of the provisions under title II and IV of the Fiscal Code in relation to the fiscal result of the sale/assignment of shares (i.e. the conditions in which these apply, the obligation for submitting the income/corporate income tax return belong to the non-resident).

## Title VII Value Added Tax

- The contiguous zone and the Exclusive Economic Zone of Romania are included in the VAT territorial scope.
- Clarification regarding the transactions where a taxable person is acting in his own name, but on behalf of a third party, and the recharge of costs. It is mentioned that in the case of a recharge of costs, the taxable person should keep the tax regime of the initial transaction, regarding the place of supply of goods/services, VAT rate, exemptions etc.
- Removal of the requirement that taxable persons that want to form a tax group should be managed by the same tax authority – the tax group will be managed by the tax body of the group leader.
- Clarifications on the VAT treatment applicable to donations of infrastructure work to public authorities.
- Provision regarding tooling contracts (putting goods free of charge at the disposal of a service provider does not attract the adjustment of the VAT deduction right or the VAT self-collection).
- For medicines that are subject to a cost-volume-result agreement, the chargeable event occurs when the medical result is recorded, as defined in the agreement between the parties. This provision applies to the whole chain of supply.
- Definitions included for single purpose and multi-purpose vouchers and details regarding the VAT treatment applicable when these are sold.
- The taxable base for expired food products that are donated to non-profit organizations is zero.
- The chargeable event for subscription services occurs at the date specified in the contract for payment and it is conditioned by the effective use of the services within the subscription.
- The conditions for applying the reduced rate of 5% for housing are detailed. It is provided that the new provisions also apply to contracts signed by 31 December 2015, but the actual supply takes place after 1 January 2016.
- Several examples are introduced to clarify the VAT treatment applicable to operations started in 2015 and finalised in 2016 - invoices issued for services rendered in 2015, advance payments received in 2015 for supplies of goods/services made in 2016 etc.
- The taxable base adjustment is allowed for bad debts at the date when the reorganization plan is approved only for the reorganization decisions issued after 1st of January 2016.
- Clarification of the concept of unused services - intangible assets that are not fully depreciated when the adjustment right/ liability occurs.
- A definition for scrapping (for VAT purposes) was introduced - decommissioning of an asset followed by its dismantling, regardless if the resulting parts are sold.
- Clarifications, including examples, on the VAT treatment applied to joint ventures.
- Details on the application of the reverse charge mechanism applicable in case of goods such as laptops, mobile phones, tablets and devices with integrated circuits.

## Title VIII - Excise duties and other special charges

- Registered consignees who receive energy products in bulk, must make proof of holding, in any form, of fixed tanks, standardized and calibrated by the Romanian Bureau of Legal Metrology in which the energy products will be received.
- It will be allowed to conduct other production activities in the fiscal warehouse of production that are related to the main activities performed and lead to the use of raw and auxiliary materials, of by-products obtained or contributing to production.
- Authorized warehouse that is also a registered consignee must constitute a guarantee for registered consignee only for excisable products moving to other locations than own tax warehouses.
- The way of constituting guarantees for the end user and the registered consignee has simplified. In this regard, the guarantee of the end-user also covers the guarantee of the registered consignee.
- The validity of the tax warehouse licenses issued before 31 December 2015 and which are valid to January 1, 2016 extends up to 5 years.
- The procedures regarding the marking operation with bands for registered consignees, have been revised.
- A model of declaration has been implemented which small independent breweries and small distilleries have to submit in order to establish / keep this status.
- The situations in which the excises for goods reintroduced in fiscal warehouses in Romania have been clarified.

## Title IX Local taxes

- The notion “economic activity” is defined and additional clarifications are rendered regarding its meaning. As such, it is qualified as “economic activity” any activity consisting of the rendering of goods and services as well as works done on certain markets and comprise the activity of producers, merchants and service providers, including mining activities, agriculture and independent activities or others similar to the latter. As an example, the norms mention the case of a high-school that despite its non-profit activities, can still render economic activities (e.g. renting the gym or the diner).
- An additional clarification is made concerning the definition of the building with a particular emphasis on its permanence character (i.e. any building fixed in the earth with permanent character). In this regard, some practical examples are presented. Containers used for selling newspapers will be considered buildings for the purpose of taxation, as long as they are maintained in the same place for more than one year. Containers used for sheltering workers on a working site will not be considered buildings and neither will a public toilet placed on a concert site nor a balloon used for covering a sports field.
- Additional clarifications are made concerning annexed buildings. They are defined as outbuildings of residential buildings. Thus, if economic activities are carried into an outbuilding, that outbuilding will not be considered an annexed building for the purpose of this article.
- The regulations closely follow the changes in the Fiscal Code concerning the computation method for the building tax (i.e. depending on its purpose). Additional clarifications are made for all of the three categories:
  - ✓ **Non-residential buildings:** buildings used for administrative, leisure, economic, cultural, educational, touristic activities, etc. If a part of the building represents a working place or a secondary domicile for an enterprise, it will be considered a non-residential building
  - ✓ **Residential buildings:** buildings used for the purpose of sheltering individuals, consisting in one or more rooms and outbuildings, equipped with

necessary utilities, which satisfy the needs of living for one person or an entire family and that is not used for rendering economic activities

- ✓ If a building has elements which are included in both categories above, such building will be considered a **mixed building**.
- It is specified that in the case in which no activity is undergone in some buildings, the purpose of the building is given by its construction authorization.
- Explanations are given concerning some terms such as: roof, balcony, finalized building, loggia, level, wall, etc.
- Details are rendered in what concerns the bearer of the payment obligations regarding the building/land tax following the changes in the Fiscal Code:
  - ✓ the owner of the building at 31st of December of the previous fiscal year;
  - ✓ the tenant, if at the 31st of December of the previous fiscal year, the building is subjected to a financial leasing contract;
  - ✓ the fiduciary, if at the 31st of December of the previous fiscal year, the building is subjected to the fiduciary contract.
- Procedural clarifications are made concerning a common property of one or more persons and the demarcation of each owner.
- Procedural details are presented together with computation examples for the building tax for each building category depending on its purpose.
- It is specified that in the case of non-residential buildings, the revaluation report must contain the proof that the evaluation has been registered in the ANEVAR database and they do not have to be booked in the accounting records.
- Additional clarifications are made together with examples concerning the tax exemptions.
- Additional procedural clarifications are made concerning the implementation of tax exemption for buildings used for seasonal tourist services (e.g. supporting documentation).
- It is mentioned that in the case in which buildings without building permit are not reported by the owner, the fiscal authorities can register the building in its records, with the aim of tax imposition based on the minutes prepared by the designated structures.
- It is specified that in the case in which the date for the building construction predates 2016, the building tax due on the 31st of December 2015 is established based on the legal framework in effect until that date.
- Explanations are given concerning the notion of “land area covered by buildings”, this being a surface built at ground-floor level, as well as concerning the tax computation for the terrain involved in this situation.
- Concerning the means of transport, additional clarifications are made in relation to the reporting obligation and its payment (i.e. the owner for the entire year, no matter if the property is alienated).
- Clarifications are made concerning the terminology used in the Fiscal Code (e.g. “used for the transportation of individuals” which refers not only to family necessities, but also to leisure activities).
- Additional clarifications are brought concerning financial lease contracts. As such, after concluding the contract, the lessee has to submit the tax return registering the vehicle. After the contract’s deadline, the lessor has the compliance obligations; in the event the contract ends based on the lessee’s fault, the latter is obliged to ask for the vehicle’s radiation and he will render the lessor a copy of the certificate.
- Additional details are given for the new categories of tax exemptions and their implementation in the case of means of transportation (e.g. river vessels).

## Title X Construction tax

- For tax payers that apply IFRS and accounting policies appropriate for the depreciation of fixed assets related to the exploration and production of oil, natural gas and minerals, the discarded constructions are not subject to the construction tax.
- The regulations also state that tangibles under construction are not considered constructions.

## Order no. 3769/2015 of ANAF for the approval of the domestic supplies and purchases list (394) regarding transactions carried out on the national territory

In the Official Gazette no. 11 dated 7<sup>th</sup> January 2016, Order no. 3769/ 2015 was published governing the reporting of operations carried out on national territory by persons registered for VAT purposes. It applies starting 1<sup>st</sup> April 2016 (i.e. for March 2016).

For January and February 2016 the taxable person will submit the form 394 that is currently in force. Until 25<sup>th</sup> April taxable persons must submit the new form also for the first two months of 2016. These forms will replace the statements previously submitted for January and February 2016.

The main changes brought to the form are the following:

- All the supplies performed on the national territory will be reported, even if the recipient is not registered for VAT purposes. Also, one should report all the purchases made on the national territory that are subject to VAT in Romania.
- The following additional information must also be reported:
  - ✓ The total value of the tax receipts issued and the total value of the purchases made based on a simplified invoice showing the VAT identification number of the taxable person;
  - ✓ The total amount of self-invoices issued;
  - ✓ Transactions with taxable persons applying VAT cash-accounting system;
  - ✓ The allocated series and numbers of the invoices, credit notes, canceled and self-invoices issued.
- The transactions will be reported by each VAT rate and VAT system applied (normal / VAT cash-accounting system).
- For transactions with grains and technical plants subject to the reverse-charge mechanism the value of supplies / acquisitions should be reported by each code from the Combined Nomenclature.
- If one requests for refund the VAT via the VAT return, the nature of the operations that give rise to the refundable amount must be detailed in the form.
- The domestic supplies and purchases list will be filed even if no transaction took place in the respective fiscal period.

For further questions regarding the aspects mentioned in this alert, please contact us.

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