

## SANTA CLAUSE COMES EARLIER THIS YEAR WITH A MESSAGE FROM THE NATIONAL TAX AUTHORITY (ANAF)

*Author: George Trantea (counsel Filip & Company, specialising in tax issues)*

At the end of October, kids are waiting for Halloween, grown-ups for Oktoberfest and companies ... for ANAF to come visit. Some of these events are long waited for, others rather scary.

Although the end was expected on the October 26<sup>th</sup>, 2020, Emergency Ordinance 181/2020 (Official Gazette no. 988/26.10.2020) was published and contains a significant amendment relative to the previously published draft: **the extension of ANAF's break by another 2 months, until 25.12.2020.**

However, as of 26 October 2020, companies should evaluate their tax situation to ensure a somewhat serene year end. The most important actions to be taken concern interests and penalties accrued in relation to tax liabilities owed prior to March 2020, but the recently passed **instalment plan** offer is not bad at all either.

**Here are some of the aspects that an accountant should consider after 26.10.2020.**

### **1. Interests and penalties**

#### **1.1. The amounts recorded between 21.03.2020 and 25.10.2020 will generate interests and penalties after 25.12.2020**

Throughout the state of emergency and the state of alert, taxpayers benefited from a tax facility: they had the obligation to submit tax returns but were not sanctioned for not paying their tax liabilities on time.

These amounts should be paid by **25.12.2020** because they will generate interests and penalties after that date and the tax pardon presented below (point 1.2) will **not** be applicable to them.

In addition, the amounts may be subject to **the instalment plan approved under the Emergency Ordinance 181/2020**. It allows the establishment of a repayment plan in relation to the debts accrued in 2020. This year's outstanding tax returns will have to be submitted by 25.12.2020 and further on:

- **the interests, penalties and enforcement proceedings will be suspended until 25.12.2020**, and
- ANAF will propose to each interested taxpayer an instalment plan for these sums that will spread over a period of no more than 12 months

With respect to these amounts, **December is the new October. Be careful:** the instalment plan is **not free**. Interests will be due for the period between the communication of the instalment plan decision and the date of the instalments indicated in the payment schedule, as well as penalties if the taxpayer does not meet the payment deadlines in the payment schedule.

The facilities in the Emergency Ordinance 181/2020 will also be applicable to the **tax decisions** communicated after the completion of currently ongoing tax inspections **irrespective of the tax period under inspection** (therefore we are talking about **outstanding amounts** of any previous period).

The wording in the ordinance is not clear on this aspect: **on the one side**, as a general rule the application must be submitted until 15.12.2020 – art. 1 par. 8 of the Emergency Ordinance and, on the other side, for the tax decisions, the application can be submitted within no more than 30 days as of the communication of the tax decision – art. 1 par. 11.

Consequently, if you receive the tax decision during the period 25.10.2020 – 15.11.2020, you must observe the 30 days term. If the tax decision arrives after that term, but no later than 15.12.2020, you must submit the application by 15.12.2020. If you receive notices of assessment after 15.12.2020, remain calm ... there's nothing more you can do based on the Emergency Ordinance 181/2020, the amounts will be due and other suspension mechanisms must be sought!

#### 1.2. *The pardon of interest and penalties accrued in relation to the taxes and levies owed before 31 March 2020*

Probably the most important tax provision of this year was the complete annulment of interests and penalties of the last 5 years. Almost irrespective of why you owe interests and penalties over the last five years, they **can be annulled**.

In order to obtain this annulment, a few simple steps must be pursued:

- Examine your tax records – the records you are holding as well as those obtained from the financial administrations – in order to identify the amounts paid as interest and penalties during the last 5 years
- Send a notice to the tax authority informing it that you intend to benefit from the pardon of ancillary liabilities (Annex 1 to the Procedure approved under Order 2100/2020)
- Send an application by 15 December 2020

Although the notice is not mandatory, it is the main element by reference to **25 October 2020**, as it triggers the **suspension of enforcement in relation to these ancillary liabilities**.

Therefore, **submit your pardon notice if you have any ancillary liabilities accrued over the last 5 years which are outstanding as per your tax records, no matter if tax decisions have been issued in this respect or not, and especially if you deem that such liabilities might be due**.

## 2. Enforcement

Enforcements by seizure (art. VII para. 3 of GEO 29/2020) or by realisation of assets (art. XII para. 4 of GEO 48/2020) are suspended until 25.12.2020 according to art. 24 para. 1 of GEO 181/2020.

A little respite for the following two months, a period in which companies can manage their activity disrupted by the effects of the pandemic.

Please note that, although enforcement is suspended, voluntary payments made for the settlement of debts will be valid. Therefore, it is necessary to indicate very precisely which debts are extinguished by each individual payment.

### 3. Statute of limitations

Based on the Emergency Ordinance 181/2020, as of 25 December 2020 the **limitation periods that have been suspended start to elapse again** both in relation to ANAF as well as to the taxpayer. From ANAF's perspective, the **8 months and 10 days** suspension represent an additional period during which it could create or enforce tax receivables. Combining that suspension with the provisions of the Fiscal Procedure Code regulating that the statute of limitations begins on 1 July of the following year, the limitation terms are extended as follows:

- i. the liabilities of 2014 have been time barred as of 01 January 2020
- ii. the liabilities of 2015 will be time barred within 5 years, 8 months and 10 days as of 01 January 2016 – **10 September 2021**
- iii. the liabilities of 2016 will be time barred within 5 years, 8 months and 10 days as of 01 January 2017 – **10 March 2023**

The best part is that companies too will have the right to claim payment returns, reimbursements and **interest** within the same deadlines.

We consider that the well-deserved break should not be seen as a blank check but, taking into consideration the limitation period, it should be used to settle and clarify any past issues that remained ambiguous, in particular by taking advantage of the possibility to annul the interest and penalties related to the debts prior to March 2020. The tax facility is granted for to interests and penalties related to the amounts included in the **rectification statements also. Therefore, a thorough examination** of the previous tax returns would be useful and could lead to the submission of an amendment statement for the amounts where the interpretation of the taxpayer does not prove to be substantiated. Such amendment could be of use if compared to the risk of paying late penalties throughout the limitation period.

### 4. Settlement of VAT returns

Until 25 October 2020, ANAF has settled returns with a negative VAT amount without a prior verification, and the risk assessment and VAT inspection were performed subsequently. In this case, **January is the new October**, as the Emergency Ordinance of 22.10.2020 **extends** the deadline for the application of the measure until **25.01.2021**.

We remind you that there are several exceptions, situations in which a VAT return is settled after the performance of an ex-ante inspection. The most important ones, in terms of the margin of appreciation of ANAF, concern:

- large taxpayers, if the central tax authority, based on the information it holds, finds that there is a risk of undue reimbursement
- the other taxpayers, where there is a risk of undue reimbursement, if the taxpayer submits the first return with negative VAT amounts with the option of refund, after registering for VAT purposes **or** if the balance of the negative VAT amount for which reimbursement is requested stems from more than 12 reporting periods

### 5. The issue of already paid interest and penalties

We seize the opportunity created by the attention paid to the Emergency Ordinance to tackle the issue of how legislation regulating facilities granted for interests and penalties is drafted and implemented. Let's look at the issue of already paid ancillary liabilities.

In order to make Emergency Ordinance 69/2020 even more attractive, we point out that, as it appears from the way it was drafted, relative also to its underlying principles, the regulated **annulment** should also include **ancillary liabilities already paid in relation to the main debt** (a debt of the last 5 years, which may or may not be already settled). The application procedure **however** tempers the wording of the Ordinance and limits the annulment to the **interest which is either outstanding or paid after 14 May 2020**. The situation can be summarized as follows:

- Company A declares profit tax in 2018 and pays it with delay, in 2019, while also **paying** the related interest and penalties.
- Company B declares profit tax in 2018, pays it in 2019 **but fails to pay** the related interest and penalties.

Evidently, it is Company A that should be encouraged, as it was late, yet diligent in paying its ancillary liabilities. However, GEO 69/2020, just like Ordinance 6/2019 before it, **only annuls the interest and penalties of Company B**.

From our point of view, GEO 69/2020 should be applied (and GEO 6/2019 should be interpreted) in **the sense that the facility applies to both companies, as regulating a distinct treatment could be deemed unconstitutional or anti-competitive**.

The Constitutional Court has had the opportunity to examine the limits of tax *leniency acts* and deemed that no discriminatory treatment can be attributed to the state. According to decision 367/2019, no *discrimination* is made between those who had not deemed that they owed VAT on the income derived from copyright (and had not paid it) and those who interpreted the law the same way as ANAF and had paid the VAT. Although only the former benefited from the annulment of the VAT, the judge decided that the state has the right to *offer leniency* at will, as long as the beneficiaries are not established on arbitrary criteria. The Court holds that “*no constitutional norm prohibits the granting of tax facilities to certain categories of taxpayers, for the proper implementation of the economic, fiscal and social policy of the state. Likewise, the Court held that no constitutional norm prohibits the establishment of conditions for granting or withdrawing tax facilities provided for the benefit of certain taxpayers according to the needs of the reference period.*”

The considerations of the Constitutional Court seem correct given that the respective *act of leniency* was due to the lack of a consistent interpretation of the law and as such, it could have also been considered the *fault* of the benefactor.

**However, the situation is not the same when it comes to the pardon of ancillary liabilities during the pandemic.** In this particular situation, the only difference between companies A and B above is that one of them **managed to find a way around**. Company A was *sanctioned* with interest and penalties but does not benefit from any support although, just like Company B, it faces difficult times.

Under these circumstances, GEO 69/2020, **unlike** its predecessors, does not appear to be an *act of leniency*, but a **support** measure that should have benefitted, at least at declarative level, **all those affected**. The explanatory memorandum seems to create such a framework:

*bearing in mind the need to adopt tools to protect the business environment and the economic system and to inject into the economy not only money but also trust and mobilisation, contractual loyalty and willingness to adapt business relationships to the severe challenges and difficulties the whole nation is facing ...*

*considering that ancillary liabilities make it difficult to comply with budgetary obligations, in the current context of the financial difficulties faced by the taxpayers directly or indirectly affected by the SARS-CoV-2 crisis,*

If the purpose of legislation is to give support and given that support is not an *act of leniency*, but a **facility**, why would we eliminate support for those who have already paid these interests and penalties? They too would need assistance, and the amounts paid as ancillary liabilities could now be used to help their economic recovery.

Moreover, if the state decides to apply a facility to only one category of taxpayers, doesn't it risk creating **a state aid** incompatible with Community law? The measure is obviously not intended for just one category of taxpayers, but doesn't the elimination of another category have the same effect?

Beyond these rhetorical and legal questions, we are left feeling that the state is interested in conveying *trust and mobilization, contractual loyalty and willingness to adapt business relations* only to those who have found a way to get around the rules.