

TAXATION OF PER DIEM. ROMANIAN CURRENT LIABILITIES FOR EMPLOYERS AND EMPLOYEES

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Abstract: *The accession to EU opened new opportunities in the area of transnational services, by using Romanian employees abroad. The general principle of free movement of labor allowed the employers to send their workers in another member states, under the domestic working contract. The cost for the human capital in the home country in comparison with this cost in the destination country determined fiscal implication, which were not addressed immediately by legislation. Therefore, disputes on doctrinarian level and also in practice evolved until a precise change in the legal framework became mandatory. The paper analyses these changing of the regulation, showing the limits of the regulation in force.*

Keywords: taxation, workers, mobility, free movement

JEL classification: K22; K34; J62

Introduction

The accession to the EU determined transformation also in the taxation legal framework. According to the fundamental principle of the free movement of workers, both employers and employees from Romania found opportunities for the development of their activities in other member states. The free movement of workers generates debates on the way rule of taxation apply in the transnational working contracts. There was not a general opinion on the fact that the taxation of workers' benefits should be according to the state of origin's regulation, or according to the host state regulation. The academics, the institution of the public administration, the legislative power representatives, both at domestic and at EU level, showed interest for this topic.

1. Literature review

European legal mechanism on transnational posting of workers do not provide a clear answer to the question whether there can be a single minimum wage, or rather a set of rules establishing minimum rates of pay in the case of a posted worker individually. The concept of remuneration rate appears to be crucial for the practical application and providing protective effect, starting from the

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rating that determines wages based on job classification and the qualifications or experience required. However, there is currently no clarity on the content of the concept. Moreover, there is much confusion about the standards to be used for comparing wages actually paid by the service provider to those set by the host (van Hoek *et al.*, 2011, p. 10).

Studies on the economic and social effects associated with the phenomenon of posting of workers in the EU noted effects on wages and working hours for local workers, in direct competition with posted workers. In Germany, a large number of construction workers have become unemployed in the same period when the number of foreign workers posted increased (Fellmer *et al.*, 2009, p. 130). Using the posting of workers varies from a normal mechanism and decent established long-term partnership, to totally illegal practices associated with the term mailbox used for recruitment (Cremers, 2011, p. 153). The mechanisms to regulate minimum wages was examined, based on statutory provisions or collective agreements designed to protect migrant workers and those posted against wage dumping (Alsos *et al.*, 2008, p. 441). Although declarative, EU regulatory approach seems to pay attention to aspects of the working conditions of employees and social priority over economic criteria is quite clear. The "dumped socialism" is also analyzed (Barnard, 2008).

A preliminary delineation required term worker positioning is related to diversified spectrum of labor relations, regulated by law in Romania. Simply listing the forms of typical and atypical working contract, we note the extent complexity of social relations in this field (Ghimpu *et al.*, 1995, p. 7-13; Ticlea, 2013, pp. 7-11). From a legal perspective, the incompatibility of the Labour Code concerning the assignment of the contract in a different legal system is noted (Stefanescu *et al.*, 2012, p. 225). Also, the suspension of the individual employment contract with the employer in Romania that posted workers abroad, exclude portability of social security benefits from the country of origin in the host country, because it does not maintain the employment relationship (Irimia, 2013, p. 41). Content analysis of the national institutional framework terminology in Romania revealed totally different meanings for the term of posting. For this reason, Romanian employer on its European path starts from an incorrect nationally posting concept. The level of conceptual relativity and unpredictability multiply at border crossings. If we add to these language barriers, difference in regulation and terms and peculiarities of legal regulations at national level in the EU and EEA, we have a picture of this unity in diversity heterogeneity (Tacu, 2013, p. 142).

2. Legal framework for per diem taxation in Romania

In order to obtain maximum benefit from their employees' mobility within the EU member states, the employers speculated on taxation, especially on per diem sum.

Under applicable tax regulations at the moment, the way the state per diem allowances are taxed depends on their value (Bostan, 2015, p. 230). Thus, the allowance during the delegation and posting in another locality in the country and abroad, in the interest of the service, if its value exceeds 2.5 times the legal level established for employees of public institutions:

2. is subject to income tax,
3. is included in the monthly calculation base of compulsory social contributions, regardless of the entity paying (tax payer taxable income microenterprises, individual, individual enterprise, NGO).

At the same time, the amounts granted in the limit of 2.5 times during the delegation and posting allowance granted to employees of public institution are:

- not included in salary incomes
- not taxable;
- not included in the base monthly mandatory social contributors.

The amount of compensation established for public institutions is found in the following Govern decisions: GD 1860/2006 - for travel / delegating expenses within the country; GD 518/1995 - for travel / delegating expenses abroad. The Romanian Parliament adopted the Law no. 118/2010, which decreased by 25% the value set, and the Law no. 285/2010 on staff salaries in 2011 paid of public funds by public institutions, which increased the allowance by 15%. Continuing this line, the govern adopted the urgency ordinance no. 19/2012, which came into force starting with 01.12. In 2012, the daily allowance granted to Romanian personnel sent abroad increase by 7.4% compared to the amount of the November 2012.

3. Per diem allowances regime - deductible or not

From 1 June 2013 the rule that has been valid throughout 2014 is applicable, stating the general deductibility of per diem costs. Consequently, the employers can establish any amount of money as daily allowances, considered fully deductible in calculating taxable profit. Per diem costs are free, the employer may deduce how much as he wants, under the condition that he/she is able to demonstrate that expenditures were made exclusively for business purposes.

Govern Decision no. 20/16.01.2013 and Ordinance no. 8/01.23.2013 amend Law no. 571/2003 and introduce news provisions regarding the tax treatment of per diem, so it is assimilated to wage income. Therefore, it becomes subject to taxation (by applying the unique level of 16%), whereas employees receive it during the delegation and posting in another locality of the country or abroad,

in the interest of the service and for other charges of the same nature. The taxation is calculated for the sum that exceeds 2.5 times the legal level established by Government decision for staff in public institutions (cf. art. 55, par. (2) letter i) of the Tax Code). Similarly, social contributions are due to daily subsistence exceeding this ceiling. This scheme is applicable also for non-profit legal person or other entity with non-taxable profit (including the micro-enterprises).

Table 1 - The taxation of per diem in 2013

| legal treatment of per diem | before the 1st of February 2013 | from the 1st of February 2013 to the 1st of June 2013 | starting the 1st of June 2013 |
|--------------------------------------|---|---|---|
| expenses | limited deductibility | limited deductibility | unlimited deductibility |
| salary | taxation due by the employee, for the sum that exceeds the limit for public institution | taxation due by the employee, for the sum that exceeds the limit for public institution | taxation due by the employee, for the sum that exceeds the limit for public institution |
| contributions to public funds | contributions due by the employer and by the employees, for the sum that exceeds the limit for public institution | contributions due by the employer and by the employees, for the sum that exceeds the limit for public institution | contributions due by the employer and by the employees, for the sum that exceeds the limit for public institution |

Source: Personal legislative data processing

So subsistence expense is deductible up to 2.5 times the legal level established for public institutions, under art. 21 (3) b, Tax Code. In accordance with the previously mentioned legal provisions, the mobility daily allowance in Romania is 13 lei (art. 9 of GD 1860/2006), so it results that the maximum level of deductibility is 32.5 lei (RON 13 x 2.5), which is less than 10 euro.

Starting the 1st of December 2012, the foreign per diem due to Romanian personnel sent abroad for undertaking temporary missions returned to the maximum deductibility, previously established by the Law 118/2010 on certain measures necessary to restore budgetary balance.

The daily allowance is granted in foreign currency at the level provided for each country in which the worker moves. Thus, foreign per diem valid from 01/12/2012 for mobility in EU countries starts at 32,60 euro for each day and the maximum deductible per diem is 87.5 euro. Other conditions determining the daily allowance in a foreign currency are included in art. 7 and 8 of GD 518/1995.

4. Exemplificative case study

The most important issue for the taxpayers is whereas the per diem are deductible when calculated income taxes. The rights and obligations during the delegation and posting of staff are regulated by GD 1860/2006 on the rights and obligations of public authorities and institutions during the delegation and posting in another locality, and if movement abroad, in the interest of the employer, by GO 518/1995 on certain rights and obligations of Romanian personnel sent abroad for undertaking temporary missions.

Pursuant to these laws, delegation and/or posting employees receive a daily allowance of delegation or posting, regardless of the function they perform and the public authority, institution or private company in which they work. The number of calendar days in which people are in the delegation or detachment is deemed the date and time of departure and until the return of the means of transport to the place of his permanent place of work, considering each one 24 hours day of delegation or detachment.

On leaving, the employer issues a travel order, according to the legal template, based on which the employee will receive money in advance from cashiers and under which he/she will justify the spending at returning to the permanent working place. If the amount of the expenditure is higher than the sum received for posting, the employer refunds the difference. In the opposite eventuality, the employee should return the extra-advance to the cashier. Those expenses are considered expenditures in order to obtain taxable income, deductible, in accordance with art. 21 par. (2) e) of the Tax Code and the pt. 27 of the Methodological Norms approved by Government Decision 44/2004, with subsequent amendments. The only sum received during delegation that needs no justification as spend money received is per diem.

The Fiscal Code was amended for the first time in 2013 by Government Ordinance no. 8/2013, published in MO Part I no. 54 / 01.23.2013 and rectified on 02/06/2013. The provisions of this act came in force from 1 February 2013. We recall that in the past seven years, according to the tax rules, subsistence money was considered assimilated to wages and was subject to income tax of 16%, payable by employers only for amounts awarded with this title which exceeded 2.5 times the legal limit set for the salary received during the delegation and if posting was in another town in the country or abroad. From the 1st of February 2013, the legislative probably desired to collect as much money as possible to the budget, so it kept the tax rules relating to the tax mentioned, but has extended its applicability to all categories of employees who receive compensation during the delegation and posting in another town in the country or abroad.

5. Romanian tax amnesty in 2015

After long debates, pros and cons, Law no. 209 was finally published in the Official Gazette on 20 July 2015. The law itself is named Law on cancellation of debts, but public perception is law on tax amnesty. Many will rush to appreciate that hordes of criminals benefit from its coming onto force, discouraging the proper action of taxpayers. So, it is important to establish if such effects are valid or the legislative strategy is different.

Returning to the subject itself of the tax amnesty granted by the Romanian Parliament, some might easily note that the "generosity" is present in the following provision of the law:

- the taxpayer should not pay the main tax liabilities, as well as related accessories, established by the tax decision issued and communicated to the taxpayer as a result of the reconsideration / reappointment of taxpayer activity as dependent;
- the taxpayer should not pay the main tax liabilities, as well as related accessories, established by the tax decision issued and communicated to the taxpayer as a result of considering salary the amounts received during the delegation and posting on territory of another country;
- the taxpayer should not pay the differences in value added tax on the income from intellectual property rights, and related accessories, established by tax decision issued and communicated to the taxpayer as a result of overruns and failure to register as a tax payer VAT. If the taxpayer has exercised his right to deduct, under the law, first tax return filed after the decision of value added tax, the tax authority does not cancel differences in value added tax, but related accessories to differences in value added tax.

For all three categories mentioned above, the cumulative tax obligations are included, due to fiscal periods before 1 July 2015 and not paid until the entry into force of this regulation, on July 23, 2015 respectively.

The tax amnesty is applicable also for health insurance contribution and related accessories, established by tax decision issued and communicated to the taxpayer, payable on monthly basis. This applies for the calculation of the contribution of health insurance that is less than the minimum salary in the country, for the fiscal periods between 1 January 2012 and before the coming into force of the law and not paid until the entry into force of the law. These provisions are applicable to persons who have no income and monthly basis for calculating the contribution of health insurance is the minimum wage. Also, we note that the cancellation of all tax obligations listed above are automatically

performed by the competent tax authority by issuing a decision to cancel the tax liability, which shall be communicated to the taxpayer. This is quite opposite to previously adopted amnesty regulation, which were applicable only by written request of the taxpayer.

The motivation of tax amnesty law adoption is the establishing by law of four reclassification criteria of an independent activity into a dependent one, status with deep fiscal implications. The art. 7 (2) in Tax Code presents these criteria, but we should also note that in the period prior to reclassification, the tax authorities proceeded mainly as dependent activities for subsistence and income from independent professions. The income taxes laid on salary are obviously higher than those paid as independent activity, yet the risks of business are different. An independent professional does not receive annual leave or sick leave allowance (whether paid contributions to health), although he/she pays taxes and is obliged to provide pensions. The legislative logic has entirely different nature: if income tax reclassification is already considered by the fiscal authority, so taxpayer have to pay more, on the basis of highly interpretable regulation. Clearly, taxpayers against whom the order is addressed will address to the court, demanding justice. The justice is always done in accordance to the law, so the taxpayers have to have a precise regulation saying their fiscal liabilities, above any arbitrary interpretation. And, in these circumstances, the real beneficiary of the amnesty law is precisely that tax authority that should no longer justify abusive and discretionary manner in which it acted in all these situations.

Final Remarks

As a conclusion, the Romanian regulation is force establishes that per diem money are subject to tax on salary income (rate of 16%), due to the general conception that the allowances granted to the employee should be treated as salaries. Allowance and any amount of the same nature will be included in the monthly calculation basis of individual social contributions.

On the other hand, if the allowances and any other amounts received by employees of the same nature as provided by law or contract of employment, during the delegation and posting in another town in the country or abroad in the interests of the service are " up to 2.5 times the legal level established by Government decision for staff in public institutions and those received for travel and accommodation expenses", the fiscal treatment is exactly opposite. Note, however, that to the limited deductibility of per diem expenses, as mentioned above, that subsistence beyond "the limit of 2.5 times the legal level established by Government decision for the staff of public institutions" is an expense deductible in determining taxable profit or net annual income obtained from independent

activities, as appropriate. Also, we note that laws governing the amount of per diem that are now in force establish different amount in the country (another town) and abroad.

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