The Inward Investment and International Taxation Review

Second Edition

Editor
Tim Sanders

Law Business Research

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SECOND EDITION

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PUBLISHER
Gideon Roberton

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CONTENTS

EDITOR'S PREFACE

The reduction of trade barriers, the ease of moving goods and services around the globe via the internet, and modern transportation means that cross-border trading – once the preserve of a small group of multinational companies – is now part of mainstream business activity. Such cross-border activity exposes businesses and the people they employ to taxes and tax systems in the jurisdictions where customers are based, which brings not only opportunity but also potential issues and conflict between tax systems.

Tax considerations play a significant role in shaping the business and financing structures used by cross-border traders. As taxpayers consider how to optimise their tax positions, they do so against a backdrop of a rapidly changing tax landscape as jurisdictions compete to encourage inward investment on the one hand and, on the other, to introduce increasingly complex rules designed to discourage any diversion of profit from their tax nets. The downturn in the world economy has exaggerated this trend, and while most governments have chosen to reform their tax systems to make their jurisdictions more competitive and attractive to businesses, others have chosen a different approach and introduced penalties and disincentives for existing domestic businesses that seek to move jobs and activity elsewhere.

The changes have made the role of the international tax adviser ever more crucial in helping businesses reach their desired destinations and avoiding the hazards. The aim of this book is to provide businesses and their advisers with topical and current insights of leading experts on the tax issues and opportunities in their respective jurisdictions, or in one case, offered by the European Union. While specific tax advice is always essential, the starting point in any journey is to have a broad understanding of the nature of the potential issues and advantages that lay ahead, and this book aims to provide a guide to these.

I would like to thank the contributors to this book for their time, their effort and, above all, their expertise. I should also like to thank the publisher and the team for their support and patience. I hope that you find the work useful, and any comments or suggestions for improvement that can be incorporated into any future editions will be gratefully received.

The views expressed in this book are those of the authors and not those of their firms, the editor or publishers. Every endeavour has been made to include updates until the last possible moment before publication to ensure that what you read is the latest intelligence.

Tim Sanders
Skadden, Arps, Slate, Meagher & Flom LLP
London
January 2012

Chapter 31

ROMANIA

Gabriel Biriş and Ruxandra Jianu[1]

I INTRODUCTION

Although Romania continues to be an attractive location for important investors, due to its reduced flat-rate tax of 16 per cent both for individuals and corporations, cheaper labour force, strategic location, natural resources, the recent downturn in the economy has adversely affected the level of foreign investment. Investors are also discouraged by factors such as the unstable tax legislation or level of bureaucracy – which is indicated by the relatively high number of taxes and declarations a business must comply with.

II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT

i Corporate

In Romania investors usually set up their businesses as corporate entities, the most common forms chosen being either limited liability companies or joint-stock companies. The decision between the two forms of entities is generally driven by the type of activity to be carried out (e.g., only joint-stock companies may carry out banking, insurance or non-banking financial activities).

The difference between the two forms is that joint-stock companies are required to have a minimum share capital of 90,000 lei and at least two shareholders, while limited liability companies must have a minimum share capital of 200 lei and between one and 50 shareholders. In certain cases the minimum share capital of joint-stock companies must be higher (e.g., leasing companies must have a minimum share capital of €200,000).

1 Gabriel Biriş and Ruxandra Jianu are partners at Biriş Goran.

ii Non-corporate

The Romanian legislation on non-corporate entities (e.g., partnerships) is very limited and poorly drafted. Therefore, unless strictly necessary (e.g., due to the nature of the activity, like the presence in Romania for short to medium-term projects that would not justify the need to set-up a legal entity, or in case of businesses that are traditionally operated in this way), it is not recommended to carry out business activities in Romania using non-corporate entities.

The tax and accounting implications derived from operating through non-corporate entities should be carefully analysed on a case-by-case basis.

III DIRECT TAXATION OF BUSINESSES

Romanian legal entities, legal entities incorporated as per the European legislation that have their headquarters in Romania, as well as foreign entities carrying on business activities in Romania (i.e., through a permanent establishment or through a partnership) are subject to corporate tax in Romania. While in the case of resident legal entities (i.e., incorporated as per the Romanian or European legislation) corporate tax applies on their worldwide profits; in the case of non-resident entities, corporate tax is levied only on the profits derived in Romania.

i Tax on profits

Determination of taxable profit

Taxable profits are computed on an accruals basis, in accordance with Romanian accounting standards (i.e., harmonised with the IVth and the VIIth EU Directives). For tax purposes, profits are adjusted for specific non-taxable revenues and non-deductible expenses. Further, on 30 December 2011, Emergency Ordinance No. 125/2011 brought additional amendments to the Romanian Fiscal Code. Based on these amendments, new rules have been implemented for credit institutions that apply accounting regulations in accordance with international financial reporting standards. These rules detail aspects regarding the calculation of non-deductible expenses, specific provisions, adjustments for depreciation, revaluation reserves for intangible assets, etc. Also, income from differed profits tax at the level of credit institutions is considered as non-taxable.

As a general rule, expenses are treated as deductible to the extent that they are incurred for the purpose of generating taxable revenue. Exceptions are made for certain types of expenses, where the Romanian Fiscal Code[2] provides for limitations or restrictions in respect of deductibility (e.g., protocol expenses, *per diem* expenses, social expenses, bad debt write-offs, provisions and reserves).

Non-deductible expenses include late payment penalties and fines payable to the authorities, corporate tax expenses, sponsorships (tax credit available – the lower of 3 per mil of the turnover and 20 per cent of the corporate tax liability), expenses representing negative differences of value of the participation titles held in other entities and expenses with no supporting documentation.

2 Law No. 571/2003, Part I of the Official Gazette of Romania No. 927 of 23 December 2003.

Tax and accounting depreciation or amortisation can differ. From a tax perspective, non-current assets should be depreciated over a period determined by law. Intangible assets (e.g., patents, licences and copyrights) are amortised over the period during which they are used or over the period of the contract, as the case may be – except for software, which should be amortised over a three-year period.

The depreciation method depends on the type of the asset. In the case of buildings, the depreciation instalments should be determined through the straight-line method, but in the case of equipment, plant, machinery, computers and peripherals, taxpayers can choose between the straight-line method, the reducing balance method, or the accelerated method. As regards intangible assets (except for patents, which can be amortised by using each of the aforementioned methods), amortisation instalments must be determined by using the straight-line method.

Capital and income

The Fiscal Code makes no distinction between operational income and capital gains. For the purpose of determining the corporate tax liability, operational income and capital gains are pooled together.

Losses

Tax losses incurred starting with the year 2009 onwards can be carried forward for seven consecutive years. Older tax losses can be carried forward for five consecutive years. Non-resident entities are allowed to carry forward only the tax losses that are attributable to their permanent establishments in Romania. The offset of tax losses is calculated based on the first-in, first-out (FIFO) method.

As income and capital gains are pooled together for tax purposes, it follows that income losses can be offset against capital gains and vice versa.

A change of ownership should not have an effect on the right to carry forward tax losses; however, tax losses incurred by legal entities that cease to exist, due to a spin-off or a merger, may not be recovered by the new entity or the absorbing one (as the case may be). In case of partial spin-offs, the remaining entity would only be able to carry forward a part of its tax losses before the spin-off, which would be determined proportionally with the rights and obligations kept by that entity.

Rates

The corporate tax rate is currently set at 16 per cent. In case of corporate taxpayers that run bars, night clubs and casinos, or carry out sports-betting activities, corporate tax liability cannot be lower than 5 per cent of the revenues derived from such activities.

Further, a special regime is applicable to microenterprises (entities that have between one and nine employees and that realise income up to €100,000) where they are taxed with a rate of 3 per cent applicable to the realised income.

Administration

Romanian legal entities (except banks and branches of foreign banks) must calculate, declare and pay corporate income tax on a quarterly basis, on the 25th of the month following the respective quarter for which the tax has been calculated. Tax is calculated based on accounting figures, with the exception of the corporate income tax due for the last quarter. This amount is equal with the tax paid for the third quarter, while the annual tax settlement must be made on the date of submission of the annual corporate income tax statement.

As an exception to the foregoing, Romanian banks or branches of foreign banks pay corporate income tax annually, with quarterly intermediary advanced payments, updated with the inflation index.

From 2013, taxpayers that apply the normal taxation regime can opt to apply the advance payment mechanism. This option must be exercised at the beginning of the fiscal year and is then mandatory for at least two consecutive fiscal years.

Annual corporate income tax returns should be submitted to the tax authorities by 25 April for the previous year, except where companies have elected to close the financial year on 25 February; in this case, a tax return must be submitted by 25 February of the year following the reporting year. Failure to submit a return, or to pay any taxes in a timely manner, will result in interest and late payment penalties.

Starting in 2012, for profits realised, the corporate income tax return must be submitted by the 25 March of the year following the reporting year.

Generally, all taxes are managed by the National Agency for Fiscal Administration, but local administrations manage the local taxes due (tax on buildings, land taxes, publicity and advertising taxes, tax on vehicles, etc.).

As regards fiscal audits, there is no specific rule regarding their regularity; however, the statute of limitation for fiscal liabilities is of five years, therefore, the tax authorities need to verify the correctness of the calculations applied by taxpayers at least during the past five fiscal years.

Also, in accordance with the provisions of the Romanian Fiscal Procedure Code,[3] the tax authorities should offer assistance to taxpayers in relation to the application of fiscal legislation, either at their request or automatically.

In addition, taxpayers that want to determine the exact treatment of a specific operation or activity envisaged to be performed in the future can ask the National Agency for Fiscal Administration for the issuance of an individual tax ruling. The issuance of a tax ruling takes approximately three months and costs €1,000.

Advanced pricing agreements ('APAs') can also be obtained upon request, at prices that range between €10,000 and €20,000 (for large taxpayers). The terms for the issuance of agreements is 12 months for unilateral agreements and 18 months for bilateral or multilateral agreements. Also, the price for the amendment of an APA ranges between €6,000 and €15,000.

Where administrative documents confirming tax liabilities are considered incorrect by the taxpayer, administrative appeals can be filed within 30 days of the date of the communication of the fiscal document. If the answer received is not satisfactory for the taxpayer, an appeal in court can be filed in a period of six months since the answer is received.

3 Ordinance No. 92/ 24 December 2003, republished in Official Gazette No. 513/ 31 July 2007

Tax grouping
Tax grouping rules are only available in respect of VAT and are applicable only for large taxpayers (provision applicable until 1 January 2012).

ii Other relevant taxes

VAT
The VAT rules are in line with the Directive 2006/112/EC on the common system of value added tax ('VAT').

The standard VAT rate is 24 per cent. A reduced rate of 9 per cent applies to certain goods and services (medicines for human and veterinarian use; accommodation; tickets for cinemas, museums, historical monuments, fairs and exhibitions; supply of prostheses and orthopaedic products; books, newspapers, periodicals, etc.).

Also, a reduced rate of 5 per cent applies to the supply of buildings that have been constructed for social housing purposes, including the underlying land (social housing includes buildings used as retirement houses, foster homes and recovery centres for minors with handicaps, or buildings with a maximum usable area of 120 square metres and a value not exceeding 380,000 lei).

Generally, a fiscal period is a calendar month, except for taxable persons who have realised turnover of less than €100,000 during the previous fiscal year, in which case the fiscal period is a calendar quarter.

Non-resident taxable persons have a right to reimbursement of the VAT paid in Romania either based on Council Directive 2008/9/EEC (in case of taxable persons established in another EU Member State) or based on Directive 86/560/EEC (in case of non-EU taxable persons).

Payroll
Salary income is defined as all the income received as cash or in-kind by an individual performing an activity based on an individual labour contract.

Benefits obtained by individuals and considered as salary income include:

a use of goods or vehicles belonging to the employer for personal purposes;
b non-reimbursement of loans;
c the cancellation of a receivable held by the employer with respect to the employee;
d telephone expenses or public transportation costs incurred for personal purposes; and
e voluntary insurance premiums paid on behalf of employees.

For monthly salaries below 3,000 lei personal deductions are also allowed based on the number of dependants.

The taxable base is determined by deducting from the gross income mandatory social security contributions, the allowed personal deduction, trade union contributions and the contributions to private pension funds (capped at €400 per year). For each secondary job, taxable income is assessed as the difference between the gross income and the mandatory social security contributions.

Employers are liable to calculate and withhold the income tax at the point when salaries are paid and pay it to the state by the 25th of the following month. Social security contributions are payable both by employers and employees. The employee's portion is withheld by the employer and remitted to the social security authorities together with the employer's portion.

Social contributions are calculated on the gross income, and are deductible for individual income tax purposes. Summarised below are the main social contributions.

a health insurance: employee 5.5 per cent; employer 5.2 per cent;

b pension insurance: employee 10.5 per cent; employer 20.8 per cent, 25.8 per cent or 30.8 per cent depending on the work conditions;

c unemployment fund: employee 0.5 per cent; employer 0.5 per cent; and

d other taxes – between 1.25 per cent and 1.95 per cent.

Capital duty

There is no capital duty in Romania.

Local taxes

Entities owning buildings are subject to building tax. The tax is due annually, in two equal instalments, payable by the 31 March and 30 September.

Building tax is calculated as a percentage between 0.25 per cent and 1.5 per cent of the gross book value (inventory value) of the building.

From 1 January 2012, for buildings that have not been revalued, the building tax rate will increase by between 10 per cent and 40 per cent (for buildings that have not been revalued in the past five years).

Local taxes are also due by taxpayers owning land. The tax on land is established by taking into consideration the number of square metres of the land, the range of the area where the land is situated and usage category of the land, determined in accordance with the rules established by the local councils. The tax shall be calculated by multiplying the surface of the land with a specific amount established by law.

Customs duties

Upon its accession to the European Union, Romania became obliged to apply the Community Customs Code and the Code's implementing provisions.

Goods imported from an EU Member State are generally not subject to any customs duties. For goods coming into Romania from non-EU countries, the EU's TARIC (Integrated Tariff of the European Communities) would be applicable.

Stamp duty

Stamp duty is generally payable on judicial claims, the issue of certificates and licences, and transactions requiring authentication. Stamp duty is also payable in case of IP rights claims, incorporation, amendments to the articles of association, exclusion of shareholders, dissolution or liquidation of companies, as well as in case of notarisations of deeds concerning property.

IV TAX RESIDENCE AND FISCAL DOMICILE

i Corporate residence

An entity is considered resident in Romania for tax purposes provided that:

a it is incorporated under Romanian law;
b is a foreign legal entity having the place of effective management in Romania; or
c is a legal entity established according to European law that has its headquarters in Romania.

Entities that do not exercise management functions in Romania will not to be considered resident for tax purposes.

ii Branch or permanent establishment

A permanent establishment ('PE') is considered to be the location where a non-resident carries out its activity, entirely or partially, either directly or through a dependent agent. From a tax legislation perspective, a branch is considered to be a permanent establishment of a foreign legal entity and consequently has all the liabilities of a regular permanent establishment (payment of profits tax, submission of statements, etc).

Generally, the Romanian tax legislation follows the OECD model tax convention definition and its commentaries regarding permanent establishments. As such, all the rules and conditions regarding the existence of a PE are implemented into the Fiscal Code (the carrying on of the business through the fixed place of business, the qualification of the 'dependent agent', etc). A PE is liable to pay profits tax for the profits obtained that are attributable to its activity.

Further, Romanian legal entities are required to register with the relevant tax authorities those contracts concluded with foreign legal entities or non-resident individuals for the provision of construction, consultancy, technical assistance or other similar types of service that may result in a PE in Romania.

From 2012, the aforementioned requirement also applies to resident individuals and PEs of foreign legal entities situated in Romania.

As regards the double-taxation treaties concluded by Romania with other states, they generally follow the OECD model convention provisions and respect the tie-breakers rules for solving double-residency cases.

V TAX INCENTIVES, SPECIAL REGIMES AND RELIEF THAT MAY ENCOURAGE INWARD INVESTMENT

i Holding company regimes

Romania has not adopted any special regulations regarding holding entities. However, various proposals on this matter have been envisaged.

ii IP regimes

Romania does not have any special IP regimes; the IP income earned by corporate taxpayers is taxed at the standard rate of 16 per cent. The taxable income earned by individuals is subject to the same tax rate and is determined by deducting from the gross income a lump sum of 20 per cent (25 per cent in case of income derived from monumental art works). Optionally, the net taxable income can be determined based on the single-entry accounting principles.

iii State aid

The Romanian Ministry of Finance currently runs two specific state aid schemes:

a schemes securing durable economic growth, for investments of at least €5 million and creating at least 50 new jobs; and

b regional development schemes aiming to stimulate investment, for investments over €100 million and creating at least 500 new jobs.

Both schemes have the stated objective of regional development through stimulation of investment; the first is available until 2013, while the second one is only available until 2012.

iv General

Despite the latest economic developments, Romania has maintained the flat tax rate at 16 per cent, both for companies and for individuals.

Romania also benefits from a large network of tax treaties, some of them concluded with well-known jurisdictions (e.g., Luxembourg, Netherlands, Cyprus, Malta, etc.).

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding outward-bound payments (domestic law)

In accordance with Romanian tax legislation, types of income paid to non-residents are subject to Romanian withholding tax include:

a dividends;

b interest;

c royalties;

d commissions received from a resident;

e income received from a Romanian resident in respect of management and consultancy services, irrespective of the place of provision of such services;

f income from services provided in Romania;

g income from the liquidation of a Romanian legal entity; and

h income from prizes granted in contests organised in Romania.

The general withholding tax rate is 16 per cent; however, various exemptions and facilities are granted for specific types of payments performed in relation to non-residents, especially in accordance with EU legislation.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

As Romania is a member of the European Union, it has adopted and implemented the relevant EU Directives into domestic legislation (see below). If the minimum two-year holding period is not fulfilled when payments are made, the normal tax regime applies; however, non-residents are able to claim back the taxes paid when the period is reached.

In order for non-residents to benefit from the provisions of the following Directives, they must provide the Romanian payers of income with valid fiscal residency certificates issued by the competent tax authorities from their states of residence and affidavits that prove compliance with the regulations of the Directives.

Parent-Subsidiary Directive

Dividends paid by a Romanian legal entity to an entity resident in another EU Member State or in a state member of the European Free Trade Association ('EFTA'), or to a PE pertaining to a company resident in an EU Member State or a state member of the EFTA, are exempt from withholding tax provided that the entity representing the beneficial owner of the dividends satisfies the conditions set out by the Directive.[4]

Interest and Royalties Directive

Since 1 January 2011, interest and royalties payments made towards a legal entity resident of a state of the EU or of the EFTA, or to a permanent establishment pertaining to a company resident in an EU member state or a state member of the EFTA, have been exempt from withholding tax provided that the beneficial owner of such income has held at least 25 per cent of the value or number of the participation titles of the Romanian entity for an uninterrupted period of at least two years, up to the point when the interest or royalties payment is performed.

iii Double-taxation treaties

In accordance with domestic regulations, the provisions of the Fiscal Code will be coordinated with the provisions of any double-taxation treaty concluded between Romania and the state of residence of the foreign income beneficiary and the most favourable tax regime will apply.

Generally, the tax treaties concluded between Romania and foreign countries provide for more favourable taxation rates in case of dividends, interest or royalties; however, in order for the provisions of the treaties to be applicable, the beneficial owner of the income derived from Romania must provide the Romanian entity with a valid fiscal residency certificate.

For a detailed list of the withholding tax rates applicable for interest, royalties and dividend payments in accordance with the double-taxation treaties concluded by Romania with various jurisdictions, please refer to Appendix I, *infra*.

4 Regarding the form of the enterprise, the residency conditions, the payment of the corporate income tax, the holding by the parent company of a percentage of minimum 10 per cent of the capital of the Romanian legal entity for an uninterrupted period of at least two years.

iv Taxation on receipt

If a Romanian legal entity receives income from a foreign state (e.g., dividends) subject to both withholding tax in that foreign state and to domestic taxation, then it will obtain a tax credit in Romania up to the level of the corporate income tax to be paid in accordance with the domestic regulations.

These provisions are applicable if the provisions of the double-taxation treaty concluded between Romania and the residency state of the foreign income payer are applicable, and if the Romanian legal entity is able to provide the corresponding documentation, in accordance with the legal provisions in force.

VII TAXATION OF FUNDING STRUCTURES

Entities are generally funded through a combination of debt and equity funding. The funds are obtained either from the shareholders or from financial institutions.

i Thin capitalisation

The Fiscal Code provides that interest expenses and net losses derived from foreign-exchange differences related to loans received from non-financial institutions (e.g., inter-company loans) is deductible for corporate tax purposes provided the following conditions are cumulatively met:

a The rate of interest per each loan agreement should not exceed 6 per cent. The amount of interest that is beyond the 6 per cent limit is non-deductible and cannot be carried forward for relief against future profits. The 6 per cent interest cap is related to loans denominated in foreign currency. Where the loans are denominated in Romanian lei, the interest rate is capped at the interest rate issued by the National Bank of Romania that corresponds to the last month of every quarter.

b The amount of interest that falls within the limit of 6 per cent is fully deductible provided that the debt-equity ratio is no higher than 3:1. If the ratio exceeds the 3:1 threshold or has a negative value, the interest expenses and the net foreign exchange losses generated by such loans are not deductible, but they may be carried forward indefinitely to future fiscal years (i.e., the calendar year).

The first limitation (i.e., the 6 per cent cap) mentioned above shall apply separately for each loan.

According to the Tax Code the debt-equity ratio shall be determined as the proportion of loan capital with a cumulated period of reimbursement of more than one year to the equity. The debt part as well as the equity part of the ratio is determined as being the average of the brought forward balance and the carried forward balance of the year in question.

For thin capitalisation purposes, the term loan capital means the total value of loans with a cumulated period of reimbursement of more than one year granted by non-financial institutions. The loans granted by banking institutions and other financial institutions are not subject to the thin capitalisation rules, and therefore not included in the debt part of the ratio.

The term equity comprises share capital, legal reserves, other reserves, retained earnings, the result of the current financial year and other equity elements constituted according to the legal provisions.

ii Deduction of finance costs

For the deductibility regime of interest expenses, please see above.

As regards other types of expenses, such as bank arrangement fees, commissions, etc., these are deductible provided that the general deductibility rule is observed (incurred with the view of obtaining taxable income).

iii Restrictions on payments

In accordance with the legal provisions in force, no distribution of interim dividends is allowed. Consequently, dividends are determined only by taking into consideration year-end profits.

Dividends shall be distributed within the time frame determined by the general shareholders meeting, but no longer than six months since the approval of the annual financial statements corresponding to the previous financial year.

iv Return of capital

Share capital can be repaid to the shareholders up to the limit of the minimum share capital required by law. This has no tax implications provided that the repayment is performed to each shareholder within the limit of its initial contribution. Any additional repayment shall be taxed (capital gain tax of 16 per cent).

VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

In practice, local businesses are generally acquired through either an asset deal or a share deal. Through an asset deal, the assets of an entity or the entire business performed by an entity are transferred to the buyer. This structure usually generates corporate income tax implications; however, in case that an entire branch of activity is transferred, this operation would not be taxable from a VAT perspective.

Through a share deal, the participation titles held in a Romanian business can be transferred to foreign buyers. Generally, the sale of shares held in local entities is taxed in Romania; however, in case of foreign shareholders alienating their participation titles held in local entities, the provisions of the double-taxation treaties concluded between Romania and the state of residence of the foreign seller can be applied. Generally, the treaty grants taxation to the state of residency of the seller.

ii Reorganisation

The Romanian tax legislation has implemented the provisions of European Directive No. 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different

Member States and to the transfer of the registered office of a European company or cooperative European company between Member States.

As such, reorganisations are usually performed by taking into consideration the rules set up by this Directive. Therefore, mergers and demergers are generally tax-neutral, unless they have as a main objective tax evasion or avoidance (which is generally not the situation in practice); however, there have only been few examples of cross-border mergers that were finalised in Romania.

iii Exit

An entity can choose to establish its activity in a foreign state. In this respect, it shall close the local business and open another one in the foreign country or open a branch into that respective state.

Entities established in accordance with the European legislation, as per the provisions of the Mergers Directive, can transfer their headquarters from Romania to another Member State. This operation would not result in taxation of the difference between the market value of the assets transferred and their fiscal value for those assets that would still pertain to a PE of the European entity in Romania and that would contribute to the fiscal result of the entity.

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

The Romanian tax legislation on transfer pricing aims to be in line with the OECD transfer pricing guidelines. Additionally, domestic rules stipulate that tax authorities might disregard a transaction realised by taxpayers if it does not have economic substance or might reassess prices used in order to reflect market prices. The reassessment does not affect the financial situation of the Romanian company, but only the tax position.

Separately, note that according to the provisions of the Fiscal Procedural Code, in order to determine the transfer prices, taxpayers entering transactions with related parties have the obligation, upon the request of the fiscal authorities, to present the transfer pricing documentation file.

ii Controlled foreign corporations

The Romanian tax legislation in force does not currently provide any rules on controlled foreign corporations.

iii Transfer pricing

Please see our comments to Section III.i.v and Section IX, *supra*.

Further, in determining the market price of a specific transaction, the taxpayers may use one of the following methods:

a comparable uncontrolled prices method;
b cost-plus method;
c resale price method; and

d any other method that is in line with the OECD regulations regarding transfer pricing.

iv Tax clearances and rulings

Please see Section III.i.v, *supra.*

The Romanian tax legislation does not provide any obligation regarding tax clearances or rulings required to acquire a local business.

X YEAR IN REVIEW

From a tax standpoint, one of the most important changes of the past year includes the introduction of the mandatory social contributions applicable to income from dependent activities (i.e., wages and other types of income assimilated for tax purposes to wages) in the Romanian Tax Code. Until then, the social contributions applicable to dependent activities were dealt with by separate specific legislation. Although this change was generally seen as a step towards simpler and more efficient tax legislation, it has only been applied to the provisions related to the applicable rates and the taxable base – all other provisions regarding social contributions were kept in the specific legislation. In practice, this approach has proved to be rather cumbersome.

Also, since 1 January 2011, the income tax for microcompanies has been reintroduced in the Tax Code. The current rate is 3 per cent and is generally applicable to the income from any source.

Another important change is the adoption of a new Civil Code, which has generated the introduction of new concepts into the Fiscal Code (e.g., the introduction for the first time of the concept of 'fiduciary agreement').

XI OUTLOOK AND CONCLUSIONS

There have been several debates in the past year about the introduction of legislation regarding holding companies. Several legislative proposals have also been brought up by interested parties for discussions; therefore, it is to be expected that in the near future the Ministry of Finance would issue legislative proposals in this respect.

Appendix I: Domestic and treaty rates for dividends, interest and royalties

	Dividends		Interest	Royalties
	Individuals, corporations	*Qualifying corporations*		
Domestic rates	%	%	%	%
Companies	16	0	0/16	0/16
Individuals	16	n/a	0/16	16
Treaty rates	%	%	%	%
Albania	15	10	10	15
Algeria	15	15	15	15
Armenia	10	5	10	10
Australia	15	5	10	10
Austria	5	0	0/3	3
Azerbaijan	10	5	8	10
Bangladesh	15	10	10	10
Belarus	10	10	10	15
Belgium	15	5	10	5
Bosnia and Herzegovina	5	5	7.5	10
Bulgaria	15	10	15	15
Canada	15	5	0/10	5/10
China	10	10	10	7
Croatia	5	5	10	10
Cyprus	10	10	10	5
Czech Republic	10	10	7	10
Denmark	15	10	10	10
Ecuador	15	15	10	10
Egypt	10	10	15	15
Estonia	10	10	10	10
Ethiopia	10	10	15	15
Finland	5	5	5	2.5/5
France	10	10	10	10
Georgia	8	8	10	5
Germany	15	5	0/3	3
Greece	20	20	10	5/7
Hungary	15	5	15	10
Iceland	10	5	3	5
India	20	15	15	22.5
Indonesia	15	12.5	12.5	12.5/15
Iran	10	10	8	10
Ireland	3	3	3	0/3[12]
Israel	15	15	5/10	10
Italy	10	10	0/10	10
Japan	10	10	10	10/15
Jordan	15	15	12.5	15

	Dividends		Interest	Royalties
	Individuals, corporations	*Qualifying corporations*		
Kazakhstan	10	10	10	10
Kuwait	1	0/1	0/1	20
Latvia	10	10	10	10
Lebanon	5	5	5	5
Lithuania	10	10	10	10
Luxembourg	15	5	10	10
Macedonia (FYR)	5	5	10	10
Malaysia	10	10	15	12
Malta	5	5	5	5
Mexico	10	10	15	15
Moldova	10	10	10	10/15
Morocco	10	10	10	10
Namibia	15	15	15	15
Netherlands	15	0/5	0/3	0/3
Nigeria	12.5	12.5	12.5	12.5
North Korea	10	10	10	10
Norway	10	10	10	10
Pakistan	10	10	10	12.5
Philippines	15	10	10/15	10/15/25
Poland	15	5	10	10
Portugal	15	10	0/10	10
Qatar	3	3	3	5
Russia	15	15	15	10
San Marino	10	0/5	3	3
Serbia	10	10	10	10
Singapore	5	5	5	5
Slovak Republic	10	10	10	10/15
Slovenia	5	5	5	5
South Africa	15	15	15	15
South Korea	10	7	10	7/10
Spain	15	10	10	10
Sri Lanka	12.5	12.5	10	10
Sudan	10	5	5	5
Sweden	10	10	10	10
Switzerland	10	10	10	0/10
Syria	15	5	10	12
Thailand	20	15	20/10/25	15
Tunisia	12	12	10	12
Turkey	15	15	10	10
Turkmenistan	10	10	10	15
Ukraine	15	10	10	10/15
United Arab Emirates	0/3	3	3	3
United Kingdom	15	10	10	10/15
United States	10	10	10	10/15

	Dividends		**Interest**	**Royalties**
	Individuals, corporations	*Qualifying corporations*		
Uzbekistan	10	10	10	10
Vietnam	15	15	10	15
Zambia	10	10	10	15

Appendix 1

ABOUT THE AUTHORS

GABRIEL BIRIŞ

Biriş Goran

Gabriel Biriş is a founding partner of Biriş Goran, and is widely regarded as one of the leading tax experts in the country, with experience of over 14 years within the sector. He focuses on all aspects of taxation such as advising on optimum tax structures (both onshore and offshore), customs and leasing; he is also an experienced tax litigator. Mr Biriş participated in consultations with the Romanian Ministry of Finance with respect to the drafting of amendments to the Fiscal Code and its implementing legislation. Prior to founding Biriş Goran in 2006, he previously worked for international law firms Salans and Haarmann Hemmelrath, also as a tax lawyer.

He is regularly interviewed by Romanian television channels on taxation and general economic matters; he also regularly appears in the printed media, presents at numerous conferences and regularly publishes articles on tax issues in local and international publications.

Clients appreciate his business-oriented and innovative advice (which is not lost in disclaimers), which allows them to take clear decisions that respect institutional standards. The 2009 edition of *Chambers Europe* affirms his formidable reputation, stating that he is 'universally acclaimed as the market leader… saluted by peers for being "almost single-handedly responsible for all the standard documentation in the field"'. He also is the only Romanian tax lawyer to be ranked as 'highly recommended' in the 2009 edition of PLC *Which Lawyer?*

RUXANDRA JIANU

Biriş Goran

Ruxandra Jianu is a leading tax expert able to advise, from a business and legal perspective, on all aspects of taxation and routinely advises on tax structuring matters. Before joining Biriş Goran in January 2008, Ms Jianu began her career in 2000 with

PricewaterhouseCoopers in Bucharest, where she started as a tax consultant and became tax assistant manager. In 2005 she moved to Philip Morris Romania as tax manager, and for a short time she was also a tax partner with TPA Horwath Quintus.

Besides her knowledge of Romanian tax legislation, Ms Jianu has developed a very strong knowledge of statutory Romanian accounting, IFRS and US GAAP, as well as offshore tax structures. She is a tax consultant registered with the Romanian Chamber of Tax Consultants and has been ACCA-qualified since 2005.

BIRIŞ GORAN SCPA

77 Emanoil Porumbaru Street
011424
Bucharest
Romania
Tel: +40 21 260 07 10
Fax: +40 21 260 07 20
office@birisgoran.ro
www.birisgoran.ro