

## Summary

**Emergency Ordinance no. 79/2017** regarding the amendment of the Tax Code was published in the **Official Gazette** on 10 November 2017. In close connection with this ordinance, on 16 November 2017, the Emergency Ordinance no 82/2017 was published in the **Official Gazette**, creating an impact for employers in the next period.

The main amendments of these ordinances include:



### Emergency Ordinance no. 79/2017

#### 1. Corporate Tax

##### Limitation of the leverage costs

GEO 79/8 November 2017 implements in the local legislation Directive 2016/1164/EU laying down rules against tax avoidance practices that directly affect the functioning of the internal market or ATAD Directive (Anti Tax Avoidance Directive).

Article 27 of the Tax Code setting forth that the tax treatment of the expenses related to interest and exchange rate differences is repealed and replaced by Chapter III1 – Rules against tax avoidance practices with direct incidence on the functioning of the internal market, which includes provisions regarding the deductibility of interest and other equivalent interest costs. As regards these provisions we make the following mentions:

- The taxpayers have the right to deduct the excess leverage costs up to the deductible threshold represented by the RON equivalent of EUR 200,000, calculated at the exchange rate communicated by NBR valid for the last day of the quarter / fiscal year;
- This threshold is also applicable to banks, non-banking financial institutions, as well as to all companies which have “associated enterprises” (a more or less equivalent definition of the “affiliation” term), even if they do not have transactions (loans) with /from them;
- The excess leverage costs exceeding the said threshold may be deducted with limitation, in the tax period when they are incurred, up to 10% of the calculation base;
- The calculation base for determining the excess

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leverage costs, deductible in the calculation of the tax result, shall be the difference between the income and expenditure recorded according to the law, less the non-taxable income and plus the corporate tax expenses, the excess leverage costs, as well as the deductible amounts representing the tax depreciation;

- If the calculation base has a negative or zero value, the excess leverage costs are non-deductible in the reference tax period and are carried forward, with no time limitation, in the following tax years under the same deduction conditions;
- As an exception, the taxpayers which are independent entities (which are not part of the consolidated group for financial accounting purposes and do not have associated enterprises or permanent establishments), fully deduct the excess leverage costs, in the tax period when such are incurred;
- The above-mentioned provisions are also applicable to interest and net losses deriving from exchange rate differences according to the former article 27. In case of independent entities, these are fully deductible.

### Provisions regarding the exit tax

GEO 79/8 November 2017 also includes provisions regarding the tax regime of transfers of assets, tax residence and / or economic activity carried out in a permanent establishment for which Romania loses the taxation right.

The difference between the market value and the tax value of the assets subject to the following transfers shall be taxable by 16%:

- The transfer of assets from the permanent establishment in Romania to its headquarters or to another permanent establishment in a member state or a third party state, if Romania loses the right to tax the transferred assets;
- The transfer of assets from the headquarters in Romania to its permanent establishment in a member state or a third party state, if Romania loses the right to tax the transferred assets;
- The transfer of the tax residence from Romania into another member state or into a third party state, except for the assets which remain effectively related to a permanent establishment in Romania;
- The transfer of the economic activity carried out in Romania through a permanent establishment to another member state or third party state, to the extent that Romania loses the right to tax the transferred assets.

The taxpayers which apply the taxation rules according to the above provisions benefit from payment rescheduling through the payment in installments in 5 years, under certain conditions related in particular to the capacity of the state where the transfer occurs (which is party or not to the Agreement on the European Economic Area).

### General anti-abuse rule

The newly introduced chapter in the Tax Code contains the general anti-abuse rule according to which, for the purposes of calculating the tax obligations, no action or series of action are being considered, which are undertaken in order to obtain a tax advantage and do not reflect the economic reality. In this case, the tax obligation is calculated according to the title regarding the corporate tax.

### Rules regarding the controlled foreign companies (CFC rules)

According to these rules, the Romanian taxpayer which pays corporate tax shall include in the calculation base of the corporate tax certain types of non-distributed income (interest, royalties, dividends, financial leasing income, insurance income and other income) pro rata to the shares held in the controlled entity.

It is considered that a Romanian taxpayer which pays corporate tax has controlled foreign entities in case that:

- The taxpayer, alone or together with its associated enterprises, has a direct or indirect shareholding of more than 50% of the voting rights or holds directly or indirectly more than 50% of the capital of the entity or has the right to receive more than 50% of the profits of such entity;
- The corporate tax effectively paid for its profits by the foreign entity or the permanent establishment is lower than the difference between the corporate tax which would have been charged to the entity or the permanent establishment, calculated in accordance to title II regarding the corporate tax in the Tax Code and the corporate tax effectively paid for its profits by the foreign entity or by the permanent establishment in the other country.

The above provisions do NOT apply in case the controlled foreign company carries out a "significant" economic activity, supported by personnel, equipment, assets and premises, as well as in case the controlled foreign company has its tax residence or is located in a

third party state which is a party to the EEA Agreement. Furthermore, certain exceptions from the definition of the controlled entity/permanent establishment are laid down.

### 2. Tax on microenterprises' income

The cap on the turnover for the application of the microenterprise taxation regime increases from EUR 500,000 in the current form of the Tax Code to EUR 1,000,000.

The 1% tax rate is maintained for companies with one or more employees and the 3% tax rate is maintained for companies with no employees.

In addition to the companies which currently apply this regime, the tax on microenterprises' income shall be also paid by:

- companies in the banking, insurance, gambling, exploitation of oil and gas resources industries, as well as companies which obtain income from consultancy and management activities in any extent, which were previously exempted from application;
- companies with a share capital of at least RON 45,000, which may no longer opt for the payment of the corporate income tax starting with 1 January 2018;
- companies with a share capital of at least RON 45,000 which opted in previous years for the payment of the corporate income tax.

The following are exempted from application:

- Guarantee funds of deposits, private pensions, insured persons and the Investor Compensation Fund;
- Tax transparent entities – any association, joint-venture, group of economic interest or civil company where each participant is a distinct taxation subject for the purposes of the corporate income tax or personal income tax.

### 3. Personal Income tax

The personal income tax rate decreases from 16% to 10%. The rate will be applied to individuals who obtain salary income or salary assimilated income, income from rent, income from investments, income from agricultural activities, income from prizes and income from other sources indicated under art. 114 par. (2) of the Tax Code.

At the level of the income from independent activities:

- The expenditure related to the social health insurance contribution shall no longer be a deductible expense. The deduction of such expenses is performed by the competent tax authority when recalculating the annual net income/annual net loss.
- If it is opted for the taxation of the gross income from intellectual property rights through early payments, the applied tax rate decreases from 10% to 7%;
- If it is opted for the assessment of the tax on the income from intellectual property rights as a final tax, the 10% tax rate is applied to the gross income diminished by the 40% flat allowance.

At the level of salary income and salary assimilated income:

- The level of gross income up to which the personal deductions are granted to persons obtaining salary income increases from a gross income of up to RON 1,500 to a gross income of RON 1,950;
- The level of gross income for which personal deductions are granted degressively also increases, from gross income between RON 1,501 and RON 3,000 to gross income between RON 1,951 and RON 3,600.

### 4. Social contributions

The following social contributions were eliminated:

- Unemployment contributions;
- Contribution for medical leaves;
- Contribution for risk and accidents;
- Contribution to the Salary Guarantee Fund.

The employment insurance contribution was introduced. The taxpayers for whom the contribution is due are:

- Natural persons and legal entities that are employers or assimilated to employers;
- Romanian natural persons, the citizens of other states or stateless persons, for the period when their domicile or residence is in Romania, and who obtain salary income or salary assimilated income in Romania from employers in states which do not fall under the incidence of the applicable European social security legislation, as well as the agreements regarding the social security systems of which Romania is part.

The contribution is due for salary income or salary assimilated income, the applicable rate being 2.25%. The monthly taxable base is the amount of the gross salary and salary assimilated earnings. The monthly taxable base does not include the

amounts provided by art. 142 of the Tax Code – salary income or salary assimilated income, which are not included into the taxable base of the social security contribution (CAS) and social health insurance contribution (CASS).

Natural persons and legal entities that are employers, shall declare and pay the contribution until the 25th of the month following the one for which the income is paid or until the 25th of the month following the quarter for which the income is paid, as the case may be (depending on the tax period used). The persons mentioned in the second category above, shall declare and pay the contribution until the 25th of the month following the one for which the income is paid. The contribution shall be declared by filing the 112 form.

As an exception, natural persons carrying out their activity in Romania and obtaining salary income from employers which do not have a registered office, permanent establishment or representative office in Romania and which owe the mandatory social contributions for their employees, according to the international legal instruments of which Romania is a part, have the obligation to calculate the employment insurance contribution, and to pay it on a monthly basis, until the 25th inclusively of the month following the one for which the income is paid, only if there is an agreement concluded with the employer in this respect.

### Social security contribution (CAS)

**The rates applicable as of 1 January 2018 are the following:**

- **25%** due by the persons that are employees or for whom there is the obligation to pay the contribution;
- **4%** due in case of particular work conditions, by natural persons and legal entities that are employers or are assimilated to employers;
- **8%** due in case of special work conditions, by natural persons and legal entities that are employers or are assimilated to employers.

**In case of natural persons obtaining salary income or salary assimilated income**, the monthly calculation base of the contribution is the gross salary and salary assimilated earnings obtained in the country and abroad. CAS due by natural persons obtaining salary income or salary assimilated income, based on a full-time or part-time individual employment contract, cannot be lower than the amount of the contribution calculated by applying the rate (25%) to the national minimum gross base salary in force in the month for which CAS is due.

**In case of natural persons and legal entities that are employers or are assimilated to employers**, the monthly calculation base of the contribution is the amount of the gross salary and salary assimilated earnings obtained by natural persons, for the activity carried out in particular, special or other work conditions.

**In case of natural persons who obtain income from independent activities**, CAS is due if the net income obtained in the previous year, excluding the social security contribution, by reference to the numbers of months of activity in such year, is at least equal to the level of the national minimum gross base salary in force in the month of January of the year for which the contribution is assessed. In this respect, the persons who in the previous year obtained cumulated income at least equal to the minimum threshold shall have the obligation to submit the tax statement regarding the income for which the contribution is due, until 31 January of the current year. Based on this statement, the tax authorities shall determine the CAS due, by means of a tax decision. The calculation base of the contribution is the income chosen by the taxpayer, which may not be lower than the level of the national minimum gross base salary, in force in the month for which the contribution is due. The applicable rate shall be 25%, and the payment of the contribution shall be performed on a quarterly basis, in 4 equal installments, until the 25th day of the last month of each quarter.

### Social health insurance contribution (CASS)

The applicable rate as of 1 January 2018 is 10%, being due by persons who are employees or by other natural persons for which there is the obligation to pay the contribution. The CASS is due by persons obtaining annual cumulated income equal to at least 12 national minimum gross base salaries from one or several income sources in the following categories:

- Income from independent activities;
- Income from the association with a legal entity;
- Income from rent;
- Income from investments;
- Income from agricultural activities;
- Income from other sources.

The fulfillment of the condition regarding the threshold of 12 national minimum gross base salaries is determined based on the income obtained in the previous year.

In case of salary income or salary assimilated income, the natural persons and legal entities that are employers or are assimilated to employers, have the obligation to calculate and withhold the CASS

due by the employees. The calculation base is the gross earnings obtained. The contribution shall be declared and paid (by the employers) until the 25th of the month following the one for which the income is paid or until the 25th of the month following the quarter for which the contribution is due.

In case of the persons listed above, the monthly calculation base for CASS is the national minimum gross base salary in force in the month for which the contribution is due. Such persons shall have the obligation to submit annually, until 31 January of the year for which the contribution is assessed, the tax statement regarding the compliance of the income obtained with the monthly threshold. Based on this statement, the tax authorities shall determine, by means of a tax decision, the contribution due for the current year, and afterwards the payment of the contribution shall be performed on a quarterly basis, in 4 equal installments, until the 25th of the last month of each quarter.

### 5. VAT

A new paragraph is introduced under art. 297, according to which the tax authorities have the right to refuse the VAT deduction if, after producing the means of evidence according to the law, they may prove beyond any doubt that the taxable person was aware or should have been aware that the operation invoked in order to justify the right to deduction was involved in a value added tax fraud which occurred upstream or downstream in the delivery/service chain.

### Emergency Government Ordinance no. 82 / 2017

The adoption of this legislative act is in close relation to Emergency Government Ordinance no. 79 / 2017 for the amendment and supplementation of Law no. 227 / 2015 regarding the Tax Code, having the declared purpose of “ensuring the normative framework for the stimulation of the collective negotiation at unit level for all categories of employers”.

The main provisions are:

- All employers (irrespective of the number of employees) are obliged to commence the collective negotiations for the conclusion of a collective employment agreement at unit level for the purposes of implementing the proper amendments to the employment relations, in consideration of the provisions of EGO 79/2017 regarding contributions' transfer;
- Should there already be a collective employment agreement in force, collective negotiations shall be initiated for the purposes of concluding an addendum thereto;
- The provisions of EGO 82/2017 derogate from the general rules in the field of collective negotiation provided by Law 62/2011 on social dialogue regarding: the mandatory nature of the negotiations by reference to a minimum number of 21 employees, the mandatory nature of the commencement of the re-negotiation of collective employment agreements at least 45 days before expiry, the maximum term of collective negotiations of 60 calendar days and those regarding the representation during the negotiations.
- The provisions regarding collective negotiation are applicable in the period between 20 November and 20 December 2017.

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