TAXATION OF PERFORMERS' RIGHTS IN ROMANIA

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Abstract

*In accordance with the Law no. 8/1996 („**the Law**"), the performers are required to exercise their rights through **collective management** for a range of economic rights provided for in article 123[1] of the Law. A number of non-profit associations of various intellectual property right holders were established in this sense.*

*Among them, CREDIDAM is the **Performers'** Association, apart from that of authors (UCMR-ADA) or of that of phonogram producers (UPFR). Thorough a series of ORDA's Decisions, these Associations have each of them received a certain role in the collection of the rights which must be collectively managed.*

CREDIDAM activity is strictly regulated by Law; the duties and activities that it can carry on are performed under the provisions of the special law, the Law 8/1996 on copyright and related rights, and under their own Articles of Association. As a trustee, CREDIDAM activity consists in collecting the remuneration due to performers by the companies that use their artistic performances, and distribution of the appropriate remuneration to the artists, depending on the actual use of the Repertoire based on which they empowered CREDIDAM."

Keywords: *Performers' Association, intellectual property right, collecting the remuneration, artistic performances, distribution of the appropriate remuneration to the artists.*

1. Introduction

The rights related to copyright or "neighboring rights" as they were referred to in the French doctrine and jurisprudence, were regulated for the first time by the Romanian law by Law no. 8/1996 on copyright and related rights[1]. Romanian Legislator was inspired by the provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed in Rome on October

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[1] Published in the „Official Gazette of Romania", Part I, no. 60 of March 26th, 1996, as amended and supplemented by Law no. 285/2004, published in the „Official Gazette of Romania", Part I, no. 587 of June 30th, 2004, as amended and supplemented by Government's Emergency Ordinance no. 123/2005, published in the „Official Gazette of Romania", Part I, no. 843 of September 19th, 2005, as amended and supplemented by Law no. 329/2006 on the approval of Government's Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 on copyright and related rights, published in the „Official Gazette of Romania", Part I no. 657 of July 31st, 2006. (All the remarks hereinafter referred to regarding the Law no. 8/1996 shall always refer to its form as amended and supplemented by Law no. 329/2006).

26th, 1961[2] and the Convention for the Protection of Phonogram Producers against Unauthorized Copy of their Phonograms, signed in Geneva on October 29th, 1971[3].

The rights related to copyright are intellectual property rights, other than copyrights, which are enjoyed by the performers, for their own performances, the producers of audio recordings and the producers of audiovisual recordings, for their own recordings, and the broadcasting and television organizations, for their own shows and program services.

The collective management of copyright and related rights emerged when the first laws on copyright and related rights began for the first time to be adopted, a practice that has developed over the centuries with the evolution of scientific progress. Thus, we may say that copyright has been collectively managed since the late 18th Century.

The first Performers' Associations were established in France. At first, the roles of professional associations – that of fighting, inter alia, for the full recognition and consideration of copyrights – were combined with the elements of the collective management of rights.

Establishment of the first organization of this kind is strongly related to the name of Beaumarchais. He was the one who led the legal „battles" against the theatres which had certain legal reservations in respect of the recognition and consideration for moral and economic rights of authors.

In Romania, the collective management of related rights was regulated for the first time by Law no. 8/1996 which, by the amendments brought to it by Law no. 285/2004 in June 2004, by Government's Emergency Ordinance no.123/2005 in September 2005, and by Law no. 329/2006 in 2006, has undergone significant amendments and supplements.

Following the adoption of this Regulation, many organizations were created in Romania for the management of copyright and related rights, currently operating a number of 17 Collective Management Organizations.

2. Content

A) On the Romanian territory, CREDIDAM is the most representative Collective Management Association for Performers' Rights.

CREDIDAM represents both performers from Romania and from abroad, the latter having the possibility to receive their due remuneration either by direct CREDIDAM membership, or by means of a foreign collective management association that has a Management Bilateral Agreement signed with CREDIDAM for mutual representation. Thus, CREDIDAM has both the right and obligation to collect the related rights due to performers from a series of legal entities, which are bound to pay such remunerations, for a number of over 12000 performers – members - and of nearly 1000000 foreign performers represented under the 33 international bilateral agreements. Such activity involves, on the one hand, maintaining a permanent communication with performers and with representatives of the Authorities regulating the activity of Collective Management Associations and, on the other hand, the

[2] Romania joined the Rome Convention on the Protection of Performers, Phonogram Producers and Broadcasting Organizations by Law no. 76 of April 8th, 1998 as published in the „Official Gazette of Romania", Part I, no. 148 of April 14th, 1998.

[3] Romania joined the Geneva Convention on the Protection of Phonogram Producers against Unauthorized Copying of Phonograms by Law no. 78 of April 8th, 1998, as published in the „Official Gazette of Romania", Part I, no. 156 of April 17th, 1998.

development and organization of collecting and distribution capacity of the amounts owed by various debtors.

In accordance with the legal provisions, CREDIDAM undertakes the obligation of collecting and distributing the remunerations under the management mandate as granted by the right holders. The distribution of collected amounts is performed subject to the law, to the Articles of Association and to the Distribution Rules, as approved by the General Assembly. Amounts from the remunerations collected by CREDIDAM are directly distributed to the holders of rights, the performers, depending on the actual use of their own performances, after deducting a management quota (fee) in order to cover the operating expenses.

The management quota (fee) for the members of this Collective Management Association - CREDIDAM – complies with the maximum percentage as provided by Law no. 8/1996, with subsequent amendments and supplements. For the non-members, the management quota (fee) is given by the actual expenses borne for the management of rights (both collection and distribution), but it does not exceed 25%.

The remaining amounts are taxed according to the provisions of the law on taxation. Distribution of remunerations to the beneficiaries of rights is carried out every six months.

If bilateral agreements concluded with the partner Management Associations from abroad provide otherwise, the distribution to foreign beneficiaries shall be made according to the agreement.

Because of the great number of debtors from which CREDIDAM is required to collect the amounts due to performers, the association is often in a position to initiate Court actions in order to recover due amounts. Consequently to such actions, the amounts to be recovered arrive at a distance of three or four years from the date that they should have been paid by the debtors. The large number of such actions (there are over 568 active cases on trial before the Courts of Justice) leads to a time-lag between the moment the amounts would be due and the one when the amounts can be effectively recovered from the debtors and distributed to the performers. The number of legal actions also involves an additional effort in coordinating the work of attorneys representing CREDIDAM's interests in disputes with users. The communication of legal solutions as well as the supervision for developing a unitary jurisprudence is essential for CREDIDAM activity.

As artistic performances of some performers, members of CREDIDAM, are also broadcasted abroad, CREDIDAM proceeded to signing the 33 bilateral agreements as well as to "uploading" the repertoire in international joined databases. (IPDA[4] and VRDB[5])

Upon his/her enrollment as a member in the Association, each performer pays a fee of RON 10. Subsequently, the actual collection activity of the amounts owed by the debtors that use the repertoire managed by CREDIDAM is conducted by withholding a management quota/fee of the money due to artists, governed by a special Law No. 8/1996 on Copyright and Related Rights and which may not exceed the maximum of 15%.

According to the Law on Copyright and Related Rights, the management quota/fee which CREDIDAM enjoyed was up to 15% of the collected and distributed amounts, amount which has to be used for both the collection activity and the distribution one of the collected remunerations. By way of example, within

[4] International Performers Database Association
[5] Virtual (Musical and Audiovisual) Recordings Database

the collection activity CREDIDAM uses the management fee for the issuance of the approximately 10500 invoices/year, for notifying the users, paying utilities (rent, phone bills, internet connection subscription, subscription for „internet boxes" allocated for use to each member by the organization, based on USERNAME and PASSWORD, salaries, postage, stamp duties, expert fees, attorney fees, arbitration fees – a single arbitration carried out in order to develop certain methodologies means costs of approximately RON 50000, and in 2012 we had four arbitrations which were subsequently cancelled by the Courts or their solutions were modified), as well as for expenses caused by the distribution of collected remunerations.

The authorization granted by artists is a special delegation both from the point of view of its granting method (under Law no. 8/1996 on Copyright and Related Rights) and from the point of view of costs, because the Principal does not transfer money into the account of the organization. In order to receive the management fee, CREDIDAM is the one that has to endeavor to collect and distribute the amounts of money in order to withhold the management fee in order to be able to run its activity. Any economic blockage affects the activity of this collective management organization. A major issue is the one regarding VAT. Although the collective management associations are non-profit organizations without carrying out economic activities, they are subject to VAT payment. If the organization has issued an invoice in order to collect remuneration, and the user refuses to pay it until the due date, CREDIDAM is bound to pay the relating VAT to the State Budget by the 25th day of the following month, which, because of the fact that the amount was not collected, will be paid only from the management fee. The CREDIDAM Articles of Association does not allow this money to be covered from the amounts payable/due to artists.

From this brief description of the complex activity carried out by the Collective Management Association CREDIDAM, we have to ensure ourselves that the provisions of the Fiscal Code are legally applied to the actual facts:

- The activity carried out by CREDIDAM, a Collective Management Association, is governed by Law 8/1996 on Copyright and Related Rights,
- The revenues gained by CREDIDAM are revenues from the intellectual property due by the users to the holders of rights related to copyright, more precisely to the performers,
- Community Principles on the generating event and on the chargeability of VAT establish that revenues due for the period before becoming a VAT payer, are not subject to VAT.

To the extent that such an association deems that one of its rights is affected by the tax authorities as far as the interpretation and application of legal provisions in tax matters are concerned, then it may address to the Court of Justice.

According to art. 8 paragraph 1 of Law no. 554/2004, „A person who/ which incurred damages regarding one of his/her/its legal rights or regarding a legitimate interest because of an unilateral administrative act, and received an unsatisfactory response to his/her/its prior complaint or has received no response within the period of time as provided by art. 2, paragraph 1, letter h, may notify the competent Administrative Court in order to request for the cancellation of all or part of the act, the repair of caused damage and, possibly, the repairs for moral prejudice. The person who/which considers that he/she/it incurred damages regarding one of his/her/its legitimate rights or interests because of failure to settle it within due time

or by an unjustified refusal to settle an application/request, as well as by a refusal to perform a certain administrative operation required for the exercise or protection of such legitimate right or interest, may also notify the Administrative Court."

Likewise, according to art. 11, paragraph 1, letter c of Law 554/2004,

„The requests for cancellation of an individual administrative act, of an administrative contract, for the recognition of a claimed right and for the repair of the caused prejudice, may be submitted within 6 months since: (...) c) the expiry of the deadline for solving the prior complaint (...)"

According to art. 2, paragraph 2 of Law no. 554/2004, „the unjustified refusal to solve the request regarding a legitimate right or interest or not responding the applicant within a due legal term, are assimilated to the unilateral administrative acts".

Accordingly, under art. 8, paragraph 1, in conjunction with art. 11, paragraph 1, letter c and with art.2, paragraph 2 of Law 554/2004, the entity is entitled to submit a file to the Administrative Court by which, as a result of failing to settle the Tax Complaint within the legal term, requests for the cancellation of the assimilated harmful tax administrative acts.

The practices of the Supreme Court also comes to support the above, the High Court of Cassation and Justice ruling as a principle, by the Decision 1224/2009 on the plea of inadmissibility of the action raised by the Tax Authorities for not solving the appealed Tax Complaint, that the latter is culpable for not solving such Tax Complaint within due legal term, for which reason the Supreme Court held as admissible the direct intimation of the Court, learning that „the refusal of the Defendant obviously constitutes the grounds for not solving the administrative complaint, which resulted in prejudicing the Plaintiff and to the right of the latter to notify the Court of this case of unsolved prior complaint within the legal term".

The Supreme Court considered the Constitutional Court's Decision no. 409/2004, which established that the procedure of appealing against the tax administrative acts before the Tax Authorities, which is currently regulated by the provisions of art. 205 and seq. of the Fiscal Code, does not grant jurisdiction, having the nature of a prior complaint, as the one provided by art. 7 of the general Law no. 554/2004. In this case, by silencing the special law, the general rules in art. 11, paragraph 1, letter c) of law 554/2004, which completely value the right to notify the Court supposing that the prior complaint was not solved within the legal term, become incidental if the Tax Authority failed to solve the complaint within the legal term.

Basically, after the expiry of the legal term for solving the preliminary procedure (the tax complaint), within which the competent authorities, culpably, has not issued any solution, by granting the Administrative Courts the proper jurisdiction to settle the case for the cancellation of the tax administrative act and of the assimilated act, represented by the lack of response to the complaint, the bodies which had to solve the complaint are automatically discharged from solving the administrative procedure, they no longer having the right to issue any solution.

The 45 day term provided by art. 70, paragraph 2 of the Fiscal Code for solving a complaint, is an imperative deadline provided by law, not a simple recommendation, similar to the 30 day term required for the taxpayers, within which they can submit the tax complaint (as provided by art. 207 of the Fiscal Code) and which is an imperative deadline, provided under the penalty of forfeiture. Therefore, in case of exceeding the 45 day term for solving the administrative procedure, the competent

bodies are deprived of the right to issue a solution.

To construe otherwise the regulations of the fiscal procedural law would mean a serious violation of taxpayers' right of access to justice, by being forced to wait indefinitely (sine die) for the issuance of a solution by the tax authorities in the prior administrative procedure and could lead to serious abuses by tax authorities, which could deliver anytime a solution in the preliminary procedure, even after solving the dispute before the Litigation Courts, the issuing moment being practically at their discretion.

B) The Tax Administrative Act as negotium, subject of the cancellation action.

The presence of elements that lead to the cancellation of the tax administrative acts issued during tax inspections also bring the cancellation of the assimilated administrative act represented by the lack of an answer to the administrative complaint.

The legal report of taxation right emerges after the issuance by the competent Tax Authorities of the tax administrative act, a document by which taxpayer's duties are regulated. On this report, the creditor is the State, which is the rightful collector and it has the obligation to pursue for the accurate collection of the amount which is to be paid by the taxpayer – i.e. the debtor. The Tax Negotium includes several rights and obligations of the subjects in the Tax Report, which emerge in certain tax administrative acts, of instrumentum[6]. Such tax administrative operation, generically called negotium, is so contained in a number of interdependent acts, that give substance to the tax decision and which lead together to its effectiveness.

Unilateral acts may be seen as producing final legal effects only when they become irrevocable. Only from this point the rightful subject is aware of the entire content of the legal report generated by the Tax Administrative Authority, the right and obligations established by the latter and especially their grounds.

The opposite of this principle could lead to legal uncertainty which is impermissible particularly in the field of taxation law, where the consistency and predictability of the acts are core principles. As Professor Antonie IORGOVAN claims, related to prior complaints in the administrative law, this preliminary stage of the administrative complaint (appeal), where the will of the two fiscal subjects of the taxation report meet, „values exactly the principle of revocability of administrative acts"[7].

In this respect it is also the art. 216 paragraph 3 of the Fiscal Code, which provides that, if the tax administrative act is cancelled, a new one shall be concluded „which will take in consideration the only the reasons of the decision". Thus, the decision for solving the complaint appears as the last form of consent of the Administrative Authority, a binding and final form both for the taxpayers and for the Tax Administrative Authority.

[6] The taxation law doctrine lists, among the rights and obligations of the taxation law subjects, the following: achievement of prior procedure acts; finding taxable earnings and assets or issuance of tax debt securities, amendment of the obligations included in the tax debt securities and payment of financial debts – budgetary. In this respect: R. BUFAN, B. CASTAGNEDE, A. SAFTA and M. MUTAȘCU: *Treaty of Taxation Law. General Part*, Volume I, Ed. Lumina Lex, 2005, pag. 302 – 303.

[7] This principle also emerges from the jurisprudence of the European Community Court of Justice which held that the principle of revoking the administrative acts that create subjective rights involve, in particular: a person's right to be heard before the individual measure is taken, the person's right of access to their own file and the obligation of the Administration to motivate its decision. A. IORGOVAN, L. VISAN, A-S. CIOBANU, D-I. PASARE: *The Law of Administrative Offenses. Comments and Jurisprudence*. Universul Juridic 2008, pag. 169 – 173.

The role of complaint's settlement decision is to show the reasons, to confirm or to deny the acts previously issued by the tax authorities, together forming a whole, a single tax administrative negotium, which creates rights and obligations for taxpayers. In this respect it is also art. 213, paragraph 1 of the Fiscal Code which provides that: „In solving the complaint, the competent body shall check the grounds de facto and de jure which gave rise to the issuance of the tax administrative act."

The decision for the settlement of the complaint completes the decision of the administrative authority by adding the instrumentum to the tax control instruments, by which the Tax Authority finally decides upon its obligations, the decision for solving the complaint no longer being administratively revocable. The finality is provided right in the end of the Decision for the Settlement of the Complaint, which generally provides that „this decision is final in the administrative complaint system".

By developing the preliminary procedure of the administrative complaint, in general, and the tax complaint, in particular, procedure which is performed before the issuer of the act, a new phase in issuing the tax administrative act has been established. This phase, which gives the possibility to the issuing authority to revoke the administrative operation or to strengthen the tax negotium, leads to the emergence of a new instrumentum. All these instrumentums compose the challenged tax administrative act and the illegality grounds for any of the former entail the cancellation of the whole.

C) The collective management associations do not owe any income tax.

The collective management associations which rights emerge only from the intellectual property rights do not pay income tax. From checking the records of the Ministry of Finance, we see clearly the factual basis of these claims for the collective management associations, of which the most important are: UPFR, UCMR-ADA, ADPFR, ARDAA, UNART, COPYRO, DACIN-SARA, PERGAM.

Both ORDA[8] and the European Association of Performers (AEPO - ARTIS[9]) sent detailed information about the lack of any incidences of economic activities for the purposes of tax on revenues (corporation tax) over the field of collective management associations.

However, the tax inspection bodies argue that for the management fees which are imperative in order to support the operational expenses, the collective management associations should pay an income tax. In my opinion, the reasoning of tax inspection bodies is based on misunderstanding the manner in which the copyright and related rights collective management system is organized both in Romania and in the EU Member States. Although the collective management associations are non-profit organizations that participate in the fulfillment of legal obligations of debtors and, although the operation and organization method of this activity is established by normative acts, the control bodies have thought that this is an economic activity.

Directives and treaties to which Romania is part of, define:

- „revenues/ incomes from intellectual property rights" mean revenues collected by a collective management association on behalf of right holders, whether they come from an exclusive right, from a remuneration right or from a right to compensation. By way of example here we have the compensatory remuneration for private copying;

[8] Romanian Office for Copyright, public control body/authority, which oversees and controls the collective management organizations.

[9] International Structure of Performers' Collective Management Organizations.

- „management fee" means the amount charged by a collecting society (in Romania by a collective management association) in order to entirely cover the costs relating to the management services for copyright and related rights;

The Tax Inspection bodies think that the activity of collection of rights related to copyrights is an economic activity carried out by CREDIDAM with the purpose of gaining profits, subject to the laws governing the economic activity specific to NGOs as provided by art. 15, paragraph 3 of the Fiscal Code.

This point of view is inconsistent with Law no.8/1996 on copyright and with CREDIDAM Articles of Association, both leading to one conclusion only, that such management quota (fee) obtained as a result of the collecting activity should be included as in-cash or in-kind contributions of members or sympathizers as provided by art. 15, paragraph 2, letter b of the Fiscal Code.

C.1) Operation of CREDIDAM activity as a collective management organization

In accordance with art. 124 of the Law, „the copyright and related rights collective management organizations, as referred to as collective management bodies/organizations within the law text, are, for the purposes of this Law, legal entities established by freedom of association which main object of activity is to collect and distribute those rights which management is entrusted to them by the right-holders." In order to exercise this rights' collecting and distribution activity, the organizations should be based on Articles of Association providing for, according to art. 127 of the Law, inter alia:

(1) the Articles of Association of the collective management organization has to include provisions regarding:...

i) the methods for establishing the commission fee due by the right-holders to the collective management organization in order to cover the operative required expenses;...

From these legal provisions it results that, precisely according to the law, CREDIDAM has the right to receive a commission fee in order to cover only its operating expenses.

Such commission fee is apart from the membership fee which is a small one, and it is paid upon registration of a new member.

The reason for the existence of such commission fee is the one of a contribution fee received from the members, through which they participate to the common expenses of the organization. Besides that, the Explanatory Dictionary of the Romanian Language defines the contribution fee as follows: "money/cash contribution to a common expense paid by the members of an organization". This commission fee is determined by art. 18, paragraph 2 of the Articles of Association:

The amounts resulting from the remunerations collected by CREDIDAM are directly distributed to the right-holders in proportion to the real use of their own performances, deducting a management quota (the commission fee) for covering the operation expenses.

The management quota (the commission fee) for the members of the CREDIDAM collective management association is the maximum percentage provided by the Law no. 8/1996...

These provisions of the Articles of Association are therefore supplemented even by the legal provisions:

Art. 134 (2) The collective management shall be exercised according to the following rules: ...

b) the commission fee due by the right-holders who are members of a collective management organization for covering the operation expenses of the same, as provided by art. 127 paragraph (1) letter i), combined with the commission fee due to the collective

management organization which is a sole collector in accordance with the provisions of art. 133 paragraph (2) letter c) and paragraph (4), cannot exceed 15% of the annually collected amounts;

All these provisions should have leaded the Tax Inspection Bodies to the obvious conclusion that it is not a economic activity, but to the conclusion that it is only a contribution of the members to the CREDIDAM operation expenses.

C.2) CREDIDAM does not carry out an economic activity classified by gaining a profit

The Fiscal Code defines the activity as any activity performed by a person with the purpose to gain profit. The revenues are accounting elements defined by Order 3055/2009 as being an increment of the economic benefits registered during the accounting period, as inflows or increases in assets or reduction of debts, which are reflected in increases in equity, other than those resulting from contributions of the shareholders.

Consequently, the taxable activity, in terms of tax on returns, is the one pursuing for economic benefits that would result in an increase in equity.

The same concept also emerges from the economic activity in terms of VAT, which is characterized by the purpose of continuously gaining income (art. 127 paragraph 2 of Fiscal Code) Even if this definition is mainly used in relation to VAT, the thing which characterizes an economic activity in all fiscal areas contrary to any other simple activity is the continuity purpose of gaining income, i.e. the continuity in increasing the equity of the taxpayers.

These considerations are not applicable in respect of an amount that a collective management organization shall retain in order to cover its expenses. There can be no economic activity, for the continuity in obtaining benefits in order to increase equity in relation to an amount for which retention is required by a legal provision, and the management quota (fee) which any collective management organization may withhold is covered by a special law which governs the operation of such legal entities.

CREDIDAM does not play the role of a company collecting debts/receivables, a company having as object of activity the purchase of receivables due and unpaid at a lower price in order to generate a profit by their recovering at the original price. The undersigned is an organization which, for the purposes of the law, performs a service to a certain category of taxpayers, thus approaching more to an organization performing a public service based on a special authorization granted by the artist.

The CJUE (Court of Justice of the European Union) stresses in the Case C-467/08, *Padawan*, that CJUE has established that, regarding the remuneration for private copying, this payment system: complies with the requirements of this "proper balance" to be provided that persons who have the equipments, devices, and digital reproduction supports and, on that basis, make this equipment, de jure or de facto, available to private users or provide the latter with a reproduction service, are debtors of the obligation to finance an equitable compensation, to the extent that they are able to pass on the real task of such funding on the private users (paragraph 50).

The Law 8/1996 requires a certain mechanism for collecting copyrights, which has a dual role:

- To facilitate the communication between lenders, performing artists and debtors, the persons who use their works, and
- To facilitate the collection of fees and taxes due by performing artists for these amounts – instead of checking over 12000 performing artists, the inspection bodies analyze a single entity.

Such an explanation was also retained by the Courts which concluded:

„Copyrights and related rights are not part of the category of trade deeds covered by art. 3 letter 'c' of the Commercial Code, which is limited to publishing companies, bookstores and art objects, when they are sold be persons other than the authors.

Criticism regarding the civil nature of this dispute as established by the Court is not well grounded. The Commercial Law provides that, even if carried out by a trader, deeds concluded with the author or the artist himself/herself by which the latter capitalizes his/her property rights derived from the artistic creation, are not classified as commercial deeds.

This is our case here, the Plaintiff is the agent of the holders of the related rights, and the activity carried out by the Defendant for the purpose of cable retransmission of phonograms does not entail the commercial nature of a legal report existing with the Plaintiff and which only limits to the collection of remunerations due to artists" Civil Judgment nr.809/R/2008 of Cluj Court of Appeal.[10]

Withholding a commission fee in order to cover CREDIDAM operation expenses does not represent an economic activity. It represents the contribution of the members required for the proper operation of the collecting and distribution of the collected amounts mechanism as established by law. Within this mechanism CREDIDAM acts as agent which existence is required by law.

This contribution is not an income generated by an economic activity but a method enforced by law to the members, in order to support the activity for which the association was established. Even if covered expenses would be less than the amounts resulting from the application of the commission fee (which, in reality, it is hard to imagine), the remaining amounts were not subject to tax on profits, but represented amounts for future expenses.

In conclusion, the Tax Inspection Bodies misinterpreted the commission fee withheld by the collective management organization under the provisions of its own Articles of Association, as approved by ORDA, and of the Law no. 8/1996, as being the result of an economic activity, the same representing in fact a form of in-cash contribution of the members which is enforced by the Law no. 8/1996, and CREDIDAM cannot exclude it from its Articles of Association and on which it depends the carrying out of CREDIDAM activity as being the only source of income from which it covers all the expenses related to the operation of the association (see art. 134, paragraph 2, letter 'b') of the special law).

D) Tax on nonresidents' revenues

The Tax Inspection Bodies appreciate that the tax rate on nonresidents' revenues is of 16% instead of 10%, taking into consideration that such revenues also gained from intellectual property rights would benefit from a different rate in relation to the nationality of the recipient.

Both from the provisions of art. 118, paragraph 1 of the Fiscal Code and from the Double Taxation Conventions concluded with the States toward which the distributed amounts were sent by CREDIDAM, it results that tax cannot exceed 10% of the paid amounts. Because we have here amounts payable to beneficiaries of the European Union Member States, we will apply the most favorable taxation rate, i.e. the 10% one.

Moreover, the percentage of tax treatment differences between Romanian citizens and the European Union ones would

[10]Available at: http://jurisprudentacedo.com/Casarea-acesteia-si-trimiterea-cauzei-spre-solutionare-Judecatoriei-Cluj-N-iar-in-subsidiar-modificarea-sentintei-in-sensul-respingerii-actiunii-ca-neintemeiata.html

be a violation of the principle of freedom to provide services and of freedom of people migration. Knowing that revenues from Romania are subject to 16% taxation rate and not to 10% taxation rate, for the simple fact that they are not residents in Romania, performers from Europe would cease to transfer broadcasting rights toward the Romanian area.

In case C-290/04, FKP Scorpio Konzertproduktionen GmbH, the European Union Court of Justice has determined that, in the matter of income tax due for artistic performances, the mere existence of withholding procedures to the source for nonresidents' revenues which is not applicable to residents, is a violation of the freedom to provide services under European Union treaties (paragraph 28-39).

If the mere existence of different procedural provisions implies the violation of Community principles, the existence of different tax percentages even more represents a breach of Community regulations.

In accordance with the provisions contained under the Title Withholding tax on taxable revenues obtained by nonresidents from Romania, art.116, paragraph (4) of Law 571/2003 on Fiscal Code, "Tax is calculated, respectively withheld at the moment when the revenue is paid and should be paid to the State Budget until the 25th day, inclusively, of the month following the month in which the revenue was paid.[…]"

E) Correct calculation and payment of due VAT.

In my opinion, as far as the collected VAT is concerned, it is important to correctly understand the timing of the chargeable event and chargeability of VAT. The Tax Inspection Bodies think that they depend on the issuance of an invoice and not from the actual performance of the service. As a starting point for understanding the method by which VAT is construed, one should take into account that collection and distribution operations are carried out by the collective management organizations under a legal mandate grated by its members.

Any expenses related to the initiation and completion of a taxable operation is susceptible of being subject to VAT deduction. Thus, in case C-32/03, Skatteministeriet, CJUE (the European Union Court of Justice) has determined that even the services required in order to close a company which no longer carries out any business, are subject to VAT deduction (paragraph 23).

Based on the provisions of the Fiscal Code and on the VAT principles, the reasoning for VAT calculation and payment was the following:

- VAT is due at the moment of taxable debt chargeability.
- According to art. 134^2 of the Fiscal Code, chargeability of the tax is liable when its generating event occurs. Only by way of exception, the tax chargeability becomes liable upon the date of issue of the invoice, only if the invoice was issued before the date when its generating event occurs;
- According to article 134^1 of the Fiscal Code the generating event occurs either on the date of goods' delivery or on the date of services' performance.

The generating event is represented by the services enjoyed by debtors through using the rights related to copyright of CREDIDAM members. Such related rights are born, according to Law 8/1996, on the date of fulfilling the legal conditions depending on the method of use. They are due for each year, as the licenses for use are granted on annual basis.

Therefore, if the VAT generating event is reflected over a period of time during which CREDIDAM was not a VAT payer because its revenues did not exceed the limit as provided by law, such operations are not subject to VAT, regardless of the date on which the invoice is issued.

Such reasoning results:

- Either from the provisions of point 45 paragraph 2 of the final thesis of Methodological Norms according to which:

By exception to the provision of art. 155 paragraph (19) of the Fiscal Code, the invoice does not have to include a specification regarding the VAT registration code for the operations carried out before the taxable person, according to article 153 of the Fiscal Code, becomes subject to VAT liability.

- Or from the Letter no. 270105/15.02.2006 of the Ministry of Public Finance – General Department for Indirect Taxes' Legislation[11], which retains the same solution regarding the invoicing of amounts due by users before the date when the Undersigned became a VAT payer.

In conclusion, there is no reason to justify VAT collection for the operations carried out before the date of registration of the collective management organization as a VAT payer.

F) The social security contributions withheld at the source for revenues from intellectual property rights.

The withholdings at source for the remunerations distributed to the holders of related rights, i.e. the performers, are:

a. The Unemployment Fund individual contribution due by the persons who gain professional income (with the remark that starting with 01.07.2012 CREDIDAM has no longer the obligation to withheld this contribution);

b. The Unemployment Fund contribution for professional income;

c. Social Security individual contribution due by the persons who gain income from intellectual property rights;

d. Health Insurance individual contribution due by the persons who gain income from intellectual property rights.

The remunerations collected by CREDIDAM are not directly transferred into the property of right-holders. Distribution of such amounts is carried out, at 6 months legally predetermined periods of time depending on the criteria as set by the Distribution Rules and Law 8/1996. Since the time of collection and up to distribution, amounts collected by CREDIDAM are kept in special bank accounts and produce interests. These interests, which are entirely distributed to the artists together with the main amount of their due rights, were taxed by CREDIDAM as revenues from intellectual property rights or as revenues from interests.

This was also the opinion of the Ministry of Public Finance, National Agency of Tax Administration, General Department for Complaints Settlement, asserted in a Point of View dated October 31st, 2013, we quote: „in our opinion, the interests distributed to the members of the association neither can be classified as revenues from interests, as long as the holders of bank deposits are not the CREDIDAM members, but the association itself, nor as revenues from other sources, as long as they represent a civil fruit of the remunerations received on the basis of an invoice from all the categories of users provided by law.

We estimate that revenues from such interests are classified as revenues from intellectual property rights, because they are covered by the legal nature of the main amount which generated them."

Tax Authorities' classification of interests as revenues from other sources instead of revenues from intellectual property rights, is not in compliance with the legal provisions.

Tax Authorities' reasoning is erroneous considering the following provisions:

- The Art. 52, paragraph 1 of the Fiscal

[11] Unpublished.

Code classifies the revenues from intellectual property rights as revenues from independent activities, i.e. the relationship of a part from the whole[12].

- The Art. 48, paragraph 2, letter b of the Fiscal Code provides the rules for determining the annual gross revenues from independent activities (self-employment). It is expressly emphasized that interests are part of the gross revenues gained from independent activities[13]. If they are incorporated into the category of revenues from independent activities, as a whole, and being their civil fruit; likewise they are part of the category of revenues from intellectual property rights, as their civil fruits.
- The Art. 52, paragraph 2 of the Fiscal Code sets that for such revenues from intellectual property rights, the percentage withheld at source shall be of 10%.

For reasons related to the proper management of revenues due to holders of related rights, the collective management organization CREDIDAM was prudent enough to also collect the interests related to the period of time prior to the distribution.

The Law no. 8/1996 does not allow to the collective management organizations to apply to the remuneration due to right-holders any accounting treatment specific to credit institutions to distinguish between actual remuneration and interests. Consequently, according to this accounting treatment, the revenues distributed and paid to the right-holders was treated in terms of taxation according to the income tax rules, thus we withheld at source the corresponding 10% taxation rate by way of advance tax, in accordance with the legal rules regarding NGOs, as nonprofit organizations. Consequently, there is no additional payment liability to be borne by the collective management organizations as difference relating to the tax on interests, because in reality, the Law makes the revenues' beneficiary (i.e. the performer) responsible for such a liability, i.e. the 6% difference which is regulated by the Annual Statement no. 200.

It is obvious that the amounts owed by the debtors of copyright related rights are receivables of the CREDIDAM members, and the interests relating to them are also part of the amount of gross revenues relating to such rights. The interest represents, under these circumstances, a civil fruit of the revenues which are deposited in the bank account up to the moment of the effective distribution. The only role played by these interests is to maintain the value of the amounts by reporting them to the period of time during which they stay under the property of the collective management organization, i.e. for maximum 6 months.

Furthermore, according to articles 117 and 124 of the Fiscal Code, the taxpayers have the right to gain interests for the amounts which were paid to the State Budget but which were not due. The principles of legal certainty as well as the avoidance of enrichment based on unjust cause, lead to the conclusion that such interests should be calculated starting with the date on which the undue amounts have been paid.

[12] ART. 52 Withholding at source the tax representing prepayments for certain revenues from independent activities (1) For the following revenues, the taxpayers that are legal entities or other entities which have to manage accounting, are required to calculate, withhold and transfer the tax by withholding at source, representing prepayments from the paid revenues: a) revenues from intellectual property rights.

[13] (2) Gross revenues include: a) collected amounts and the equivalent in RON of the in-kind revenues resulted from activity performance; b) **interest** revenues from trade receivables (claims) or from other receivables (claims) used in relation to an independent activity.

3. Conclusions

De lege ferenda

According to the Fiscal Code, non-profit organizations are exempt from the income tax (corporation tax) for certain types of income listed exhaustively, including fees and registration fees of members and contributions in-cash or in-kind from members and sympathizers. Compared to these legal provisions, it is necessary to clarify the tax treatment of the fee payable by the holders of copyrights and related rights to the collective management association for covering the expenses necessary for its operation, by changing the relevant provisions of the Tax Code.

Clarification regarding the exemption subjects. The fiscal code defines the non-profit organizations as any association, foundation or federation established in Romania, in accordance with the law in force, but only if the revenues and assets of the association, foundation or federation are used for an activity of general, community or non-patrimonial interest.

According to Government's Ordinance no. 26/2000 on associations and foundations, the common law regarding the non-profit organizations, associations and foundations are defined as non-profit legal entities, of which associates pursue to perform certain activities of general interest or in the interest of communities or, as appropriate, in their non-profit personal interest.

On the other hand, the collective management organizations are defined by Law no. 8/1996, on copyright and related rights, as legal entities established by freedom of association, which main object of activity is to collect and distribute those rights which management is entrusted to them by the right holders. According to art. 125, paragraph 1 of Law no. 8/1996, the collective management organizations operate as non-profit associations.

Therefore, although the legislator uses non-unitary vocabulary, susceptible of creating confusion, the collective management organizations are undoubtedly non-profit organizations, as their operation as associations, their object of activity and their non-profit purpose are all expressly regulated by the Law no. 8/1996.

Consequently, the collective management organizations are susceptible to benefit from the exemption from the revenues tax regulated by the Fiscal Code.

1. Clarification regarding the categories of exempt revenues

The Fiscal Code exempts the non-profit organizations from the payment of revenues tax for the contributions and registration fees of the members and for the in-cash or in-kind contributions of members and sympathizers. To a certain extent, also the revenues from economic activities carried out by non-profit organizations are exempt.

In terms of the revenues of non-profit organizations, the Government's Ordinance no. 26/2000 also expressly distinguishes in art. 46, between the contributions of members and the revenues from direct economic activities.

Therefore, it is a clear distinction between the revenues of non-profit organizations from economic activities and other categories of revenues. As far as the collective management organizations are concerned, the art. 127 of Law no. 8/1996 regulates the charging of a commission fee for covering the expenses required for the operation, which fee shall be withheld from the holder of copyrights or related rights from the amounts due to each of them, after calculating the individual distribution. Therefore, the commission fee, as a category of revenues, is distinctly and expressly regulated by the legislator, apart from the revenues from economic activities and having a precise destination, to cover the operation required expenses.

From this point of view, the management fee paid by the holders of copyrights is a real contribution required for the effective operation of the specific activity of collection and distribution of copyrights or related rights by the collective management organizations.

Since the reasoning of this fee is the same as the one underlying the regulation of contributions or donation as revenues of non-profit organizations and since this fee does not correspond to an economic activity, but for financing the specific activity to the interest of the performers, the tax treatment of such fee should be the same.

Since the vocabulary used by the legislator for defining the non-profit organizations and their specific categories of revenues is non-unitary, as mentioned above, the express listing of management contributions within the category of incomes for which the non-profit organizations are exempt from the payment of revenues tax is compulsory.

2. Proposal for the amendment of the Fiscal Code

Therefore, the art. 15, paragraph 2, letter f of the Fiscal Code shall appear as follows:

„b) in-cash or in-kind contributions of the members and sympathizers, as well as the commission fees owed by the right-holders to the collective management organizations, according to the special law".

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