

# THE PRINCIPLE OF NON-RETROACTIVITY OF CIVIL LAW - DEVIATIONS IDENTIFIED IN THE MATTER OF TAX LEGISLATION

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## **Abstract**

*This article aims to examine the effects of the principle of non-retroactivity of law. While the first section deals with the principle of non-retroactivity of the law in terms of Romanian civil law, the next section presents cases of compliance, but also several cases of violation/breach of the principle enunciated, identified in the tax matter. By researching the date when legal acts or deeds are concluded or, as the case may be, committed or produced, in relation to the effects of the new law over them, we are submitting to a non-retroactivity test some texts from tax laws governing the obligation of the taxpayers to pay tax on profit when no longer meet the conditions to be micro-enterprises, obligation of the individuals without revenue to pay social health insurance contributions, the obligations of the persons carrying out transactions with related parties to draw up transfer pricing file. The effect of the *facta pendentia* situation is presented and analyzed on a specific case of transfer pricing, which may be misinterpreted as a breach of the principle of non-retroactivity of the law. Precisely for this reason the conclusions present utility both for law theorists and practitioners.*

**Keywords:** *principle of non-retroactivity of law, facta pendentia, fiscal legislation, transfer pricing, tax law.*

**JEL Classification:** K34

## **1. Introduction**

In order to get into the tax matter, whose regulations we wish to analyze, we will make an overview of the non-retroactivity principle in the civil law (section 1), to the end that we will analyze texts from normative taxation acts where we believe the principle of non-retroactivity of the law is breached (section 2), following to exclusively address in section 2.3 an issue resulting from the practice of a legal entity who conducts transactions with affiliated persons, then show how we propose to resolve the matter. In the final section we shall simplify the remarks in the form of conclusions.

## **2. The principle of non-retroactivity of civil law**

The civil law operates concurrently in three sides: a certain period, a particular territory, it applies to certain people. Therefore, civil laws succeed, coexist and have determined categories of persons to whom they apply to. Consequently, we are talking about the enforcement of civil law over time, space and people.<sup>2</sup>

Laws have their own life span throughout time that is determined between the entry into force and the exit.<sup>3</sup>

The entry into force of a law adopted by the Romanian Parliament takes place upon its publication date in the Official Gazette or in three days from the publication or the date stated within the content of the law (if the law expressly establishes a certain date). By entering into force the law becomes mandatory, it applies to all persons, regardless of citizenship - *nemo censetur legem ignorare* - no one may evade the law enforcement on the grounds of lack of knowledge.

The exit from force of the law occurs by repealing it, repeal that may be explicit or implied. The explicit repeal requires the existence of a specific wording with respect to the old law that exits from force. As an alternative, the implied repeal is covered when the new civil law is incompatible with the dispositions of the old law.

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<sup>2</sup> Carla Alexandra Anghelescu, Gabriel Boroi, *Curs de drept civil – Partea Generală*, 2<sup>nd</sup> edition revised and enlarged, Bucharest, Hamangiu, 2012, p. 14.

<sup>3</sup> Laura Poțincu, *Drept în afaceri*, 2<sup>nd</sup> edition revised, Bucharest, C.H. BECK, 2015, p. 52.

In the case of civil laws succession, there may be a number of issues arising on the application throughout time and these must be resolved by considering two principles:

- the principle of non-retroactivity of the new civil law;
- the principle of immediate enforcement of the new civil law, the latter being subject to the exception of the clause remains in force of the (survival) old law.

In Romania, the principle of non-retroactivity of the civil law was provided in the Civil Code of 1864, art. 1 of the preliminary title: "General effects and enforcement of the law" stating the following: "The law orders only for the future; it has no retroactive power", modeled after the French Civil Code of 1804<sup>4</sup>. Given that the principle was regulated only in the Civil Code, the obligation to ensure non-retroactivity of the law went exclusively to the judge on the case, the legislator being this way able to dispense its powers for this within the lawmaking process.<sup>5</sup>

This principle was constitutionalized in art. 15 para. (2) of the 1991 Constitution, according to which "The law orders only for the future, except for the more favorable penal or contravention law".

As a result this constitutional principle also applies in the field of taxation.

At infra-constitutional level<sup>6</sup>, the principle of non-retroactivity of the civil law is provided *de lege lata*, art. 6 from Chapter II - Enforcement of the civil law from the Civil Code, as follows:

*"(1) The civil law is applicable while it is in force. This has no retroactive force.*

*(2) The documents and legal deeds entered into or, as applicable, committed or produced before the entry into force of the new law cannot generate legal effects other than those provided by the law in force at the time of their conclusion or, where appropriate, their committing or their production.*

[...]

*(5) The dispositions of the new law apply to all acts and deeds concluded or, where applicable, produced or committed after the entry into force, as well as to legal circumstances arising after its entry into force.*

*(6) The dispositions of the new law are also applicable to the future effects of legal circumstances arising before its entry into force, derived from the status and capacity of persons, from marriage, parentage, adoption and legal dependents, from property relations, including the general assets regime, and from vicinity relations if these legal circumstances remain after the entry into force of the new law."*

At first glance, tackling the matter of the law applicable to a specific legal circumstance appears to be very simple, in the sense that any new law only regulates legal circumstances arising after its entry into force, and the old law applies to legal circumstances that took place before its repeal. This rule is expressed by the adage *tempus regit actum*. Simplicity exists only in those legal circumstances which arise, change, disappear and produce all their effects under the influence of that law. In practice, however, there are numerous legal circumstances that produce successive and remote effects, being therefore possible for a legal circumstance to produce certain effects or to run out subject to a new law that repealed the law that was in force at the time the legal circumstance arose, bringing out in this manner the issue of determining which law shall apply to the respective legal circumstance.<sup>7</sup>

Therefore, taking into account the principle of non-retroactivity and the possibility had by the legislator to choose between the immediate enforcement of the new law and the survival of the old law, we can distinguish between three categories of legal circumstances:

- **facta praeterita**, meaning that the constitutive, modifying or extinctive facts that give birth to legal circumstances, made entirely prior to the entry into force of the new law and the

<sup>4</sup> Art. 2 of the French Civil Code: „La loi ne dispose que pour l’avenir; elle n’a point d’effet rétroactif.”

<sup>5</sup> Ioana Marilena Chiorean, Valenn-Zoltán Puskás, *Principiul neretroactivității legii civile – doctrina reflectată în jurisprudența Curții Constituționale*, p.1, available online at [https://www.ccr.ro/uploads/Publicatii%20si%20statistici/Buletin%202013/puskas\\_ro.pdf](https://www.ccr.ro/uploads/Publicatii%20si%20statistici/Buletin%202013/puskas_ro.pdf), last access 15.11.2016

<sup>6</sup> *Idem*, p. 1.

<sup>7</sup> Carla Alexandra Anghelescu, Gabriel Boroi, *op.cit.*, p. 16 ff.

effects caused by that legal circumstance before that moment. Only the old law applies with respect to these, meaning that the law in force at the time such act was committed or its effects, because if a subsequent law would apply, then a retroactive effect would be assigned. Consequently: a subsequent law may not affect the constitution, change or extinction of the prior legal circumstances, whether a new law would suppress formation, change or extinction, or would change the terms required;

- **facta pendentia**, meaning the legal circumstances undergoing formation, change or extinction after its entry into force. With respect to these, the legislator may choose between the enforcement of the new law or the clause remains in force of the (survival) old law. But if the elements that make up the formation or, where appropriate, modification or termination have individuality, then for each element applies the law in force when it occurred;
- **facta futura**, meaning the legal circumstances to arise, change or cease after the entry into force of the new law and the future effects of the past legal circumstances. The new law shall apply with respect to these, unless the legislator chooses for the survival of the old law.<sup>8</sup>

### 3. Normative acts with tax implications – testing the principle of non-retroactivity of civil law

In the present study, we chose to submit to the non-retroactivity test the provisions of the Fiscal Code referring to the taxpayers obligations of paying profit tax upon the exit from the microenterprises system, the obligation of individuals without income of paying social health insurance contributions and the obligation of individuals who carry out transactions with related parties to prepare and submit to tax inspection authorities the transfer pricing documentation.

#### 3.1. Law 571/2003 published in the Official Gazette Part I number 927 from 23.12.2003 corroborated with the GD 44/2004 on the Fiscal Code with enforcement methodological norms published in the Official Gazette Part I number 112 din 06.02.2004

*ART. 112 ^ 6 Tax enforcement of the microenterprises attaining revenues exceeding € 65,000 „[...]if during a fiscal year o micro-enterprise obtains incomes more than 65,000 euros, such micro-enterprise shall pay profit tax taking into account the incomes and the expenses made from the beginning of the fiscal year. The computation and the payment of the profit tax is made starting with the quarter during which any of the limits provided in this article was exceeded. In determining the payable profit tax, the payments representing the tax on the incomes of the micro-enterprises made during the fiscal year are to be deducted.”<sup>9</sup>*

This provision was introduced with the entry into force, on the date of 1<sup>st</sup> of February 2013, of the Ordinance no. 8/2013 for the modification and completion of Law no. 571/2003 regarding the Fiscal Code and the regulation of financial and fiscal measures.

According to this, if the tax payer subject to the micro-enterprise system (with a taxation rate of 3% applied on the revenue) obtained, in the course of the year, incomes above the value of 65,000 euros (compared to the 100,000 euro threshold applied until the entry into force of this ordinance), he would have been engaged, with retroactive effect, in the corporate tax regime (with a taxation rate of 16 % applied on the profit). This way, the taxable base subject to the 16 % rate was alleged also for the incomes registered before the threshold of 65.000 euro was exceeded, so for the revenue obtained prior to the entry into force of the OUG 8/2013, i.e. the date of 01.02.2013. In other words, the new normative act (OUG no 8/2013) also applied to the tax period prior to its entry into force.<sup>10</sup>

<sup>8</sup> Gabriel Boroi, *Aplicarea în timp a Noului Cod civil*, p.1, available online at [http://www.inm-lex.ro/fisiere/d\\_175/Noul%20Cod%20civil.%20Aplicarea%20in%20timp%20-%20prof.univ.dr.%20Gabriel%20Boroi.pdf](http://www.inm-lex.ro/fisiere/d_175/Noul%20Cod%20civil.%20Aplicarea%20in%20timp%20-%20prof.univ.dr.%20Gabriel%20Boroi.pdf), last access 15.11.2016.

<sup>9</sup> According to Ordinance no. 8/2013 amending and supplementing Law no. 571/2003 regarding the Fiscal Code and regulation of certain financial-fiscal measures, published in the Official Gazette, Part I no. 54 of 23.01.2013.

<sup>10</sup> Daniel Udrescu, *O constantă juridică: practica fiscală neconstituțională*, available online at <http://www.juridice.ro/288084/o-constantajuridica-practica-fiscalaneconstititionala.html>, last access 15.11.2016.

This situation of retroactive taxation, when exceeding the micro-enterprises threshold, continued until the 1<sup>st</sup> of January 2016 when Law no. 227/2015 on the Fiscal Code<sup>11</sup> entered into force. With this law, the appearance of the retroactivity of the calculation of the tax has been solved by the introduction of article 52 - Rules of exit from the system of taxation on the income of micro-enterprises during the course of the year, which has the following content:

*„(1) If in the course of a fiscal year a micro-enterprise receives incomes higher than 100,000 euro or the share of income made from consultancy and management in total revenue is above 20% inclusive, this dues tax on profit, starting with the quarter in which it has exceeded any of these limits.[...]*

*(4) The calculation and payment of the tax on profit by the micro-enterprises which falls within the provisions of paragraphs 1 and 3 shall be carried out taking into account the revenue and expenditure obtained starting from the quarter concerned."*

We consider this a beneficial return to the principle of non-retroactivity of the tax law, this time causing her effects only for the future. We note that the effects of the survival of the old law are not applicable to the provisions analyzed.

### **3.2 The obligation of individuals without income to pay social health insurance contributions under article 180 paragraphs (1) of law No. 227/2015 regarding the Fiscal code, regulated by order No. 3743/2015 from 23<sup>rd</sup> of December 2015<sup>12</sup>**

*„9. (1) for natural persons who do not have earned income for a period of more than 6 months and which have not paid the monthly contribution for this period, the specialty lays down the contribution due for the month in which they require registration by the application of the quota for the individual health contribution on the basis of calculation representing the value of 7 times the minimum gross salary [...]*

*(2) If the period in which there has not been earned income is less than 6 months and it has not been made the payment of monthly contribution for this period, the contribution due for the month in which they require registration shall be determined in proportion to the period concerned."*

We believe that these provisions are nothing else but a breach of the principle of non-retroactivity of law. The nature of the infringement is all the more obvious as it discriminates against a category of taxpayers: the individuals who have not earned income for a period longer than six months have to pay, for the first month, a contribution of health insurance in the dimension of 5.5% applied to the value of 7 times the minimum wage in the country.

The retroactivity of the fiscal law is betrayed also by the fact that in the case of individuals who have not earned income for a period of less than 6 months, the contribution of health insurance for the first month shall be calculated in proportion to the period in question. We consider the situation thus created unfair for a person who does not carry on income, even for a period of less than 6 months.

### **3.3 The obligation to document the transactions between affiliated persons on the principle of the market value - the dossier of the transfer pricing**

Transfer pricing documentation has been and continues to be a touchstone for the taxpayers who must prove that the prices charged in transactions with affiliated persons respect the principle of the market value<sup>13</sup>. Chances for tax authorities to adjust the amount of income or of the expenditure,

<sup>11</sup> Law no. 227/2015 regarding the Fiscal Code, published in the Official Gazette, Part I no. 688 of 10.09.2015.

<sup>12</sup> Order no. 3743/2015 of 23 December 2015 published in the Official Gazette, Part I no. 975 of 12/29/2015, approving the procedure for the management of the health insurance contribution payable by individuals who do not have income under Art. 180 par. (1) of Law no. 227/2015 regarding the Fiscal Code, published in the Official Gazette, Part I no. 688 of 09.10.2015 and the approval of certain forms.

<sup>13</sup> The principle of the market value = when the conditions laid down or imposed in commercial or financial relations between two people affiliated are different from those which would have been existed between independent persons, any profits which in the absence of these requirements would have been carried out by one person, but do not have been carried out by this because of the conditions in question may be included in the profits of that person and taxed accordingly.

relating to the fiscal result of any of the parties affiliated, on the basis of the trend of the market, depend on this documentation.

Until the entry into force of the Order No. 442/2016 of 22 January 2016<sup>14</sup>, more precisely the 2<sup>nd</sup> of February 2016, the fiscal inspection authorities had the possibility to request to all the taxpayers who conducted transactions with related parties to submit the transfer pricing file, irrespective of the value of the transactions conducted.

This requirement could be translated in the fact that small companies, who conducted transactions with modest values with the parent company, were put in the situation to have significant costs (amounts in the thousands of euros) with the drawing up of a transfer pricing file. We must mention the fact that tax authorities offered the possibility of supporting these companies, in the sense that they could draw up such a dossier, generically called „advance pricing agreement”, through authorized institutions.

The problem was that this support would have cost such firms 10,000 euros, with the advantage of being opposable and mandatory to the fiscal authorities (subject to compliance with the terms and conditions thereof)<sup>15</sup>.

Since such a situation could not continue, by Order No 442/2016 of 22<sup>nd</sup> of January 2016, the obligation to draw up the transfer pricing file has been limited, as it was natural, depending on the value of the transactions carried out with the affiliated parties.

The great tax payers have now the obligation to draw up the transfer pricing file and to submit it even outside of a tax inspection, but only if the value of the transactions carried out were/are equal to or greater than:

- 200,000 euro, in the case of interest received/paid for financial services;
- 250,000 euros, in the case of the transactions relating to the provision of services received/ rendered;
- 350,000 euros, in the case of the transactions on procurements/sales of tangible or intangible assets.

The great tax payers which do not exceed these thresholds of significance, small taxpayers and medium-sized enterprises have, under Order No 442/2016, the obligation to draw up and submit the transfer pricing file only at the request of the tax authorities, within the framework of a fiscal inspection, and only if the value of the transactions carried out are equal to or greater than:

- 50,000 euro, in the case of interest received/paid for financial services;
- 50,000 euros, in the case of the transactions relating to the provision of services received/ rendered;
- 100,000 euros, in the case of the transactions on procurements/sales of tangible and intangible assets.

Taxpayers who carry out transactions with affiliates with a total annual value below any of the thresholds mentioned are no longer required to prepare transfer pricing documentation, but only to document, during a fiscal inspection, that the prices used comply with the principle of market value according to general rules laid down by the accounting and tax regulations in force.

By introducing these materiality thresholds, the small companies we were talking about above are able to make significant cost savings (cost of drawing up the transfer pricing file), more so if they pay attention to the following provisions which may be misinterpreted as a breach of the principle of non-retroactivity of the law.

We refer to art. 13 of Order no. 442/2016 of 22 January 2016, which provides:  
*"(1) The provisions of Article 2(1) will be applied to transactions with affiliated persons carried out starting with 2016.*

*(2) The provisions of this order shall apply to administrative procedures initiated after the date of 1<sup>st</sup> of January 2016.*

<sup>14</sup> Order no. 442/2016 of 22 January 2016 on the amount of transactions, time for preparation, contents and conditions of application and file transfer pricing adjustment procedure/ transfer pricing estimate, published in the Official Gazette, Part I no. 74 of 02/02/2016.

<sup>15</sup> Silvia Cristea, *Acordul de preț în avans*, „Revista română de fiscalitate” no. 16/2008, pp.21-25.

(3) For the administrative procedures initiated prior to the date of 1 January 2016 are applicable the legal provisions in force at the time of the initiation of the thereof."

Let's suppose that a taxpayer is subject to a fiscal inspection initiated on **19<sup>th</sup> of January 2016**, for the period between **2010-2015**. It is known that, in compliance with the principle of non-retroactivity of law, the correctness of the fiscal treatment of the transactions carried out in the period under consideration will be regarded under the legislation in force in each of the years analyzed, according to *tempus regit actum adagium*, invoked in section 1 of this article. In this respect, the inspectors will check whether the billing was done using the rate of value added tax in force at the time of the invoice, whether any daily allowance expenditure have been deducted limited or in full - reported to the laws in force in each year of the period analyzed, if tax on the income of non-residents has been retained and paid or not – according to the laws applicable to each period and so on.

Since between 2010 and 2015, according to the relevant legislation, taxpayers who conducted transactions with related parties were obliged to present, upon the control bodies request, the transfer pricing file regardless of the value of these transactions, it can be interpreted that this taxpayer, subject to the fiscal inspection initiated on 19<sup>th</sup> of January 2016, has the same obligation - to submit the transfer pricing file for the period inspected, regardless of the amount of those transaction.

However, the legislator noticed the injustice of the situation and decided differentially:

- for the transactions carried out before the entry into force of the new normative act - applicable from 2<sup>nd</sup> of February 2016, subject to fiscal inspection initiated before 1<sup>st</sup> of January 2016, to comply with the principle of non-retroactivity of law;
- for the transactions carried out before the entry into force of the new normative act - applicable from 2<sup>nd</sup> of February 2016, subject to fiscal inspection initiated after 1<sup>st</sup> of January 2016, to apply the effects of the *facta pendentia* situation, analyzed in section 1 of this article, and to require the immediate implementation of the new law;

This can be explained by the fact that, according to the old law, drawing up, respectively, submitting the transfer pricing file would have been mandatory **only upon the request of the tax authorities, during a fiscal inspection**. Consequently, so far the inspection was not initiated, there was not a legal situation which should be subject to the legislation concerned.

We can also see a different application of the effects of the *facta pendentia* situation. For example, we can ask ourselves one question: why the fiscal inspections initiated before 1<sup>st</sup> of January 2016, let's say December 2015, which have not been ended before the entry into force of the new law, are not judge under the provisions of the new law? The answer is: because the legislator has chosen, in this case, the survival of the old law to a situation born, but unfinished under the effect of it.

Analyzing more carefully the mark of time - the time of the opening of the inspection – used in the determination of the applicable legislation, we see that in the case of procedures initiated in the period between **1<sup>st</sup> of January 2016 and 1<sup>st</sup> of February 2016**, the period during which the new normative act was not entered into force, the situation being still under the old law effects, the legislator chose to apply the new law this being another example for the application of the *facta pendentia* situation. This law interpretation is in favor of the tax payers and we understand the reason why the legislator has chosen to apply this rule.

Returning to the case exposed, the person subject to tax inspection initiated on 19<sup>th</sup> of January 2016 will have the obligation to present the transfer pricing file only for that period in which the value of the transactions carried out with affiliates have exceeded the thresholds of significance laid down by Order No 442/2016 of 22<sup>nd</sup> of January 2016.

In the context of the provisions examined, if the legal person would have been unlucky to be subject to a tax inspection initiated in December 2015, it would have had the obligation to submit the transfer pricing file, regardless of the value of the transactions conducted.

#### 4. Conclusions

We observe that the rules and exceptions of the non-retroactivity of the law apply also to the taxation domain.

If for some provisions the tax legislator tried to correct the deviations from this principle over time, such as the case of the retroactive charge of 16% of the earnings attained before the appearance of the legal circumstance (exceeding the threshold of € 65,000), other provisions, such as the obligation of individuals with no income who were required to pay the health insurance contribution or even the Law no. 186/2016 on certain measures in the field of social security insurance for certain categories of individuals part of the public pension system, recently published in the Official Gazette, Part I, no. 842 of October 24<sup>th</sup> 2016 that will allow the retroactive payment of social security insurance contributions by those individuals who have not yet retired lead us to believe that the need/desire to attract Budget revenues (in the examples given, the social security budget) is beyond the Constitution.

Even if sometimes the exceptions from this principle are in the advantage of the tax subjects, we believe that we must not forget: the Constitution is the fundamental law of Romania and there is a danger for the exception to become the “rule itself”.

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