

## Tax & Legal Weekly Alert

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#### Amendments to the Fiscal Code

On 14 April 2015, Emergency Ordinance no. 6/2015 amending the Fiscal Code (“the Ordinance”) was published in Official Gazette no. 250. The amendments refer to withholding tax and VAT.

#### New decision of the European Court of Justice

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## Amendments to the Fiscal Code

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Please find below the key amendments:

### Value Added Tax

VAT rate for foodstuffs, restaurant and catering services down to 9% from 1 June 2015

The reduced VAT rate of 9% will be applied to the following:

- Foodstuffs, including beverages, except alcoholic beverages, meant for human and animal consumption;
- Alive animals and birds of domestic species;
- Seeds, plants and ingredients usually used to prepare foodstuffs;
- Products usually used to supplement or substitute foodstuffs;
- Restaurant and catering services, except alcoholic beverages.

Currently, the reduced VAT rate of 9% in the food sector applies only to breadstuff, bakery and various types of flour and ingredients.

### Withholding Tax

Two new articles (116<sup>1</sup> and 116<sup>2</sup>) were introduced on the taxation of:

- interest derived from Romania by non-resident legal entities and
- income from self-employment obtained in Romania by non-resident individuals,

resident in a Member State of the European Union or the European Economic Area.

The new amendments were introduced in order to solve the infringement of European Union law, i.e. freedom to provide services and freedom of capital movement for non-resident legal entities and individuals.

### Tax treatment applicable to non-resident legal entities

Non-residents entities can opt for the regularization of the tax withheld in relation to interest revenues by declaring and paying corporate income tax. The corporate income tax will be computed for the taxable profits related to such interest income, in accordance with Title II “Profits Tax” of the Fiscal Code.

The tax initially withheld will represent a prepayment performed on the account of the corporate income tax and it will be deducted from the corporate income tax due by the non-resident (computed as noted above).

### Tax treatment applicable to non-resident individuals

Non-residents individuals can also opt for the regularization of the tax withheld for revenues from self-employment by declaring and paying individual income tax. The tax will be computed for the taxable income from self-employment obtained by non-residents on the Romanian territory, the computation being performed in accordance with Title III “Income Tax” of the Fiscal Code.

The tax initially withheld will represent a prepayment performed on the account of the individual income tax and it will be deducted from the individual income tax due by the non-resident in accordance with the computation previously mentioned.



# New decision of the European Court of Justice

## Do utilities costs follow the VAT treatment of rent when recharged to the tenant?

On 16 April 2015, the European Court of Justice ("ECJ") decided in case C-42/14 Wojskowa on the VAT treatment of utilities costs recharged by landlord to tenants in the frame of rental arrangements.

### Background

Wojskowa is a public body which lets state immovable property. The costs related to certain utilities, including electricity, heating, water and refuse disposal were passed on to the tenants at the VAT rates applicable to each utility.

The Poland Finance Ministry was of the view that the utilities and refuse collection were part of a whole, constituting a single supply for VAT purposes, and should be thus invoiced at the VAT rate applicable to the main service, rental.

The ECJ was asked to rule on whether utilities should be included in the taxable base of the rental service or they constitute supplies separate from the rental service.

### Considerations of the ECJ

Starting from the previous case-law on the matter (i.e. *Tellmer Property, Field Fisher Waterhouse and BGZ Leasing*), the ECJ made a more detailed analysis of the criteria to determine if a single supply or several independent transactions exist from a VAT perspective, as follows:

Several independent supplies exist if:

- The tenant has the right to choose his suppliers and/or the terms of use of the goods or services.
- The tenant can determine his own consumption of utilities (e.g. existence of individual meters).
- Services are itemized separately from the rent on the invoices addressed to the tenant.

A single supply exists:

- If the rent and the related utilities are a whole from an economic point of view, e.g. letting of turnkey offices ready for use, immovable property let for short periods (for holidays or business reasons), when they are offered with the utilities included.
- When the landlord who owns part of a multi-dwelling building is required to use suppliers designated by the co-proprietors collectively and to pay his share of the utilities costs, which he then passes on to the tenant.

We consider that this ECJ decision brings clarity on the criteria for determining the VAT treatment of recharges of utility costs related to rental.

The impact should be significant when the rental is VAT exempt. In that case, it may turn out that the utilities costs related to that rent should be passed on by the landlord to the tenant with VAT.

For further questions regarding the aspects mentioned in this alert, please contact us.

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