

## **Regional legal consequences of the separation of the notion of registered office**

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### ***Abstract***

*Starting from the importance of defining the registered office with the commercial law, this study aims at analyzing the legal connotations of the business office in the fiscal law. The separations of the notions originate in the European regulations included in Law no 31/1990 regarding the commercial companies, Law no 105/1992 regarding the international private law, the Fiscal Code, and the International Conventions regarding the avoidance of double taxation. Depending on the fiscal legal status of the subject as either resident or non-resident, this study aims at finding what are the differences and the relations between the institutions called: registered office – business office.*

**Keywords:** *law, registered office, business office, resident, non-resident*

### **Introduction**

The legal institution of the *registered office* has various connotations in the Romanian legislation. Although we can find it in the Civil Code and in specific normative acts, we can also find it in the private law in the Law no 31/90 regarding the commercial companies, republished, with further modifications, and Law no 105/1992 for the regulation of the private international law relations.

On the other hand, given the importance of collecting fiscal debts, the *registered office* of the tax-payer shall be reflected, from the fiscal point of view, in the institution of the fiscal residence, but not in the *business office*, when we take into account the activity of a non-resident.

Last but not least, issues regarding the location of the registered office, both from the commercial point of view and fiscal point of view, can be found in the CE Directives, either partially (Directive I no 68/151/CE dated 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community<sup>3</sup>), or entirely covered

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<sup>3</sup> Published in OJ L 65, 14.3.1968.

(Directive 2005/56/CE dated 26 October 2005 regarding trans-national mergers of partnerships<sup>4</sup>.

### 1. From the registered office to the fiscal residence

The issue of the registered office originates in its definition. Since the art. 96 in the Civil Code (previous to the abrogation of art. 49 in the Decree no 32/1954 for the enforcement of the Family Code and of the Decree regarding physical persons and legal persons) „the residence of a legal person is where that person has *the office of its activity*”. A similar regulation existed in the Law no 21/1924 regarding the legal persons (abrogated as well by the Governmental Ordinance no 26/2000 regarding the associations and foundations<sup>5</sup> and in art. 13, respectively, stipulating that „the residence of a legal person is the *main office of its activity*”.

Currently, we have art. 40 paragraph 2 in Law no 105/1992 in force, stipulating that the real office is „the place where *the main office of the management of the statutory activity is*”.

The doctrine<sup>6</sup> includes the opinion stipulating that the notion of main office should be seen from the perspective of its three functions, namely: element to identify the commercial company; place to receive the mail; and place where the Executive Management runs the activity for which the legal person has been set up.

Consequently, various attributes of the notion of main office appear: *actual* (regulated by art. 40 in Law 105/1992), *main* (regulated by art. 43 paragraph 1 and art.63 in Law 31/90), *secondary* (regulated by art. 7 letter g, art. 8 letter l, art. 44 and 56 in Law 31/90).

The definition of the fiscal residence of the legal person as an alternative form shifts towards a new denomination, namely an *actual office*, as it has been formulated in the EU regulations<sup>7</sup> according to art. 31 paragraph 1 in the Fiscal Procedures Code as „the registered office or the place where the *administrative management and the actual management of the business, in cases where these two types of management do not take place at the location of the registered office*”<sup>8</sup>.

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<sup>4</sup> Published in the J.O.C.E.L, 301 dated 25.11.2005.

<sup>5</sup> Published in the Official Gazette, Part I, no. 39 of 31 January 2000, approved with amendments by Law no. 246/2005 (published in the Official Gazette, Part I, no. 656 of 25 July 2005), as amended.

<sup>6</sup> Cristian Haraga, Liviu-Narcis Pîrvu, *Unele aspecte teoretice și practice privind stabilirea sediului social al societății comerciale* in „Revista de drept comercial” no. 2/2007, Lumina Lex Publishing House, Bucharest, p. 91-104.

<sup>7</sup> Dan Velicu, *Câteva considerații asupra migrației transfrontaliere a societăților comerciale* in „Revista de drept comercial” no. 5/2007, Lumina Lex Publishing House, Bucharest, p. 19-23.

<sup>8</sup> Silvia Cristea, *Comentarii la Codul de procedură fiscală*, Dareco Publishing House, Bucharest, 2007, p. 124.

## 2. Why it is useful to identify the registered office: commercial purpose and fiscal purpose

a) In its capacity of *identification attribute* of the legal person (although, according to Law 26/90, republished, regarding the Commercial Register, the registered office shall be also the place where the physical person and the partnership without legal personality carry out their activities) the registered office shall be established before the registration of the commercial company with the Commercial Register, as a pre-requisite to set up the new legal subject, registered later on with the Commercial Register and written on all the documents issued by the commercial company. The identification function and the mail function are, therefore, combined<sup>9</sup>.

b) As a starting point when we want to *define the applicable law*, the registered office is relevant both to establish the nationality of the commercial company („*lex societatis*”), that is to which country it belongs, and to establish the applicable law, according to the conflictual provision „*lex loci actus*”, when the party that has undertaken the contractual obligation is the commercial company or, unless otherwise stipulated, the registered office is the place where a contract is executed, in cases where the party supposed to execute the contract is the commercial company itself („*lex loci executions*”)<sup>10</sup>.

c) *As a party in a court trial*, the registered office helps establish the competent court to judge litigations in which the commercial company may be a party, the location where the judicial documents shall be sent to (subpoena, notifications etc), the location where certain advertising measures shall be enforced (e.g. insolvency procedure for the commercial company), and the location where an enforcement procedure upon the assets is performed. These three aspects are solved similarly in the commercial and fiscal legislation.

In the EU, the doctrine regarding the recognition of the legal personality of commercial companies has two theories regarding the registered office: the registration theory (the registered office of a foreign commercial company shall be the place where the company has been registered; it is the case of countries like Denmark, Great Britain, Ireland, the Netherlands) and the theory of the actual office (originating in the protection of local interests; which considers that the registered office shall be given by the location of the main interests of the commercial company; this theory is admitted in France, Germany, Luxemburg, Portugal, Belgium, Spain, Greece)<sup>11</sup>.

In the Romanian law, the theory of the actual office has been reflected by the definition (art. 40 paragraph 2 in sect.1 of this paper) of the registered office

<sup>9</sup> Cristian Haraga, Liviu-Narcis Pîrvu, *work cited*, p. 91-104.

<sup>10</sup> Octavian Căpățână, Brândușa Ștefănescu, *Tratat de drept al comerțului internațional*, Academy Publishing House, tome II, special Part, 1987, p. 135.

<sup>11</sup> Daniel Șandru, *Societățile comerciale în U.E.*, University Publishing House, Bucharest, 2006, p. 123.

expressed in Law 105/1992, and recently, by the definitions regarding the fiscal residence in the Fiscal Procedures Code.

d) Since it corresponds to the location function as it is the location from where the management ensures the coordination of the activities, the registered office is important because it establishes the *location of the managers of the commercial company*, of the „brain” of the commercial company. We can understand therefore, from this perspective, the reluctance existing in the doctrine<sup>12</sup> regarding the latest modifications to the Law 31/90 through the Law 441/2006 regarding the possibility to have the registered office of several commercial companies at the same location, if certain specific requirements are met.

Regarding the actual nature of the office, seen as the actual location where the activity takes place, we can notice a modification of the regulation covering the fiscal residence in the Fiscal Procedure Code.

On the one hand, where there are no other possibilities to identify the fiscal residence of a legal person, there shall be taken into account the criterion: „location where most assets are” (art. 31 paragraph 3 in the Governmental Ordinance no. 92/2003 regarding the Fiscal Procedure Code<sup>13</sup>); on the other hand, in the case of associations and other entities with no legal personality, the fiscal residence shall be „their office or the location where the actual main activity takes place” (art. 31 paragraph 1 letter d). In the case of physical persons, the fiscal residence shall be „the address where they actually live” (art. 31 paragraph 1 letter a), where “actually” means „the address of the dwelling that a person uses continuously for more than 183 days during a calendar year”, with a few exceptions (art. 31 paragraph 2)<sup>14</sup>.

The purpose of these clarifications is, from the fiscal point of view and in the legal field, to enable the control activities performed at tax-payers, and the enforcement procedures for the assets when tax-payers fail to pay their fiscal obligations. In these cases, the registered office is less important (the office registered with the Commercial Register), than the actual office where the financial documents, the bookkeeping documents and the assets that may be executed are.

The provisions of the Order no 419/2007 for the approval of the procedure to change the registered office and for the approval of the form „Decision to register the registered office and the fiscal residence”<sup>15</sup> must be interpreted in the same sense; according to this Order, following the request submitted by the taxpayer – commercial entity that changes its office, the fiscal administration competence shall pass from one fiscal body to another, depending on the new registered office and on the fiscal residence. There is a cause-effect relation between the two legal institutions (registered office/fiscal residence) but the fiscal residence shall not be identified as registered office.

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<sup>12</sup> Cristian Haraga, Liviu-Narcis Pirvu, *work cited*, p. 91-104.

<sup>13</sup> republished in the Official Gazette of Romania, Part I, no. 513 of July 31, 2007, as amended.

<sup>14</sup> Silvia Cristea, *work cited*, p. 127.

<sup>15</sup> Published in the Official Gazette, Part I, no. 473 of 13 July 2007, as amended.

### 3. Business office: location where the activity of a non-resident entity takes place

The Romanian fiscal regulations stipulate that all incomes shall be taxed, irrespective whether the subject of the taxation is Romanian or foreign, by applying the non-discrimination principle which is a basic feature of the Romanian legislation<sup>16</sup>. This may be the explanation of the fact that the Romanian Fiscal Code<sup>17</sup> defines the non-resident as „any foreign legal person and any physical non-resident person (according to art. 7 paragraph 1 point 17), expressing, therefore, the foreign legal person, on the one hand, and the non-resident physical person, on the other hand; both imply understanding of the Romanian legal person, firstly, and of the resident physical person.

#### 3.1 Fiscal residence in Romania

According to art. 7 in the Fiscal Code:

- a Romanian legal person is any person that has been set up in compliance with the Romanian legislation or has the actual management location in Romania (pct. 24);
- a foreign legal person is any legal person that is not a Romanian legal person (point 25);
- the non-resident physical person is any physical person that is not a resident physical person (point 21);
- a resident physical person is any physical person that meets at least one of the following requirements:
  - a) has its residence in Romania;
  - b) the location of its vital interests is in Romania;
  - c) spends time in Romania, during one period or several periods, that altogether sum up more than 183 days, during 12 consecutive months, and that ends during the respective calendar year;
  - d) is a Romanian citizen that works abroad as an employee or as a Romania employee in a foreign country (except foreign citizens with diplomatic or consular status in Romania, or citizens that are employees of international bodies or their families).

#### 3.2 Business office in Romania

According to art. 8 paragraph 1 in the Fiscal Code, the business office shall be a *location where the activity of a non-resident entity takes place, either entirely or partially, either directly or through a dependent agent* (there shall be considered that a non-resident shall not have a business office if the requirements stipulated under art. 8 paragraphs 6 and 7 in the Romanian Fiscal Code are met).

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<sup>16</sup> Ioan Condor, Silvia Cristea, *Drept vamal și fiscal*, Lumina Lex Publishing House, Bucharest, 2002.

<sup>17</sup> Law no 571/2003 regarding the Fiscal Code, published in the Official Gazette, Part I, no. 927 dated 23 December 2003, with further modifications and completions.

Although the criteria establishing if an activity carried out is dependent or independent are stipulated in the Norms for the application of the Fiscal Code (approved by the Governmental Decision no 44/2004)<sup>18</sup>, we consider that a dependent agent shall be interpreted as an employee of the non-resident entity (art. 8 paragraph 5 of the Romanian Fiscal Code lists the requirements imposed for a location where the activity of a person acting on behalf of the resident entity takes place so that the location could be considered the business office).

A business office implies the place of the management, a branch, the premises, factory, shop, workshop, as well as a mine, an oil and gas rig, a place where extraction of natural resources takes place (as an exception, a business office does not imply the activities listed in art. 8 paragraph 4). A business office implies a construction site, a construction project, the installing activities, other related activities or the supervisions activities, if the construction site exists, or the project or the activities last for more than 6 months.

### Conclusions

We can notice that the institution of the business office corresponds to the non-resident physical or legal person; while the fiscal residence corresponds to the resident tax-payer, either physical or legal person, and we consider that there is a unified standpoint in this respect in the fiscal field.

In terms of terminology, we can notice that we can link commercial law to the fiscal law: starting from the residence/office of the commercial entities, we can find in the fiscal legislation that the residents have the fiscal residence institution while the non-residents have the business office institution.

The transformational processes undergone by the „registered office” to become „business office” have led to modifications in the definitions and in the practical consequences of the use of this institution.

Thus, if under the Romanian Fiscal Code, the business office of a physical person shall be considered a *fix base* (art. 8 paragraph 8), we can see that, in practice, there will be difficulties in interpreting certain terms:

- For instance, the mere presence of a non-resident in a building can lead to the conclusion that the building is available to the non-resident as a fix location<sup>19</sup>?
- What means an activity fix location if there are several activity locations? How can we interpret the „fix” nature of the activity in the case of e-commerce<sup>20</sup>?
- Who assesses the permanent nature of the activity to set up the business office, starting from the fact that temporary interruptions in

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<sup>18</sup> Published in the Official Gazette, Part I, no 112 dated 6 February 2004, with further modifications and completions.

<sup>19</sup> Adriana Ene, *Sediul Permanent* in „Ghid juridic pentru societățile comerciale” no. 9/2007, Tribuna Economică Publishing House, Bucharest, p. 39-44.

<sup>20</sup> *idem*, p. 39-44.

the activity do not put an end to the existence of the business office in cases where an activity location is frequently used? What about shorter periods of time? Is the 6-month period stipulated in the law enough?

- What meaning has the institution of the business office under the circumstances of a cross-border migration of commercial companies towards countries that provide more favourable fiscal facilities, if we already have the Regulation of the Council no 2157/dated 8 October 2001 in the EU legislation, regarding the status of the shareholders European companies, and this Regulation is the legal tool that suggest the criterion of the actual office as the justification for migration<sup>21</sup>?
- What are the terms to interpret the provisions of Regulation no 1435/2003 of the Council dated 22 July 2003 regarding the status of the European co-operative companies stipulating that „a EU member state can request the companies registered in its territory to have the central management and the registered office at the same location”<sup>22</sup>?
- What are the implications, upon the institution of business office, of the adoption of the Regulation of the Council no 2137/85 dated 25 July 1985 regarding the European Group of Economic Interest (G.E.I.E.) that allows the setting-up of joint EU branches and trans-national mergers<sup>23</sup>, if the European Group of Economic Interest – G.E.I.E. – has been regulated in the Law no 161/2003 (Title V in the Law no 161/2003 regarding some measures to ensure transparency in exercising positions like: parliamentarians, public servants, and businessmen, and to prevent and sanction corruption<sup>24</sup>, by correlating this information with the Directive 2005/56/CE of the Parliament and of the Council dated 26 October 2005 regarding the trans-national mergers of the partnerships?

We believe that an effort to re-define the institutions registered office-business office, taking into account all the practical effects of what we mentioned above, is needed.

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<sup>21</sup> Dan Velicu, *work cited*, p. 19-23.

<sup>22</sup> Daniel Şandru, *work cited*, p. 125.

<sup>23</sup> Jack Bussy, *Droit des affaires*, Ed. Presses de Sciences Po et Dalloz, Paris, 1998, p. 142.

<sup>24</sup> Published in the Official Gazette no 279, Part I, dated 21 April 2003, with further modifications and completions.

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