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BRIEF CONSIDERATIONS ON THE PENALTIES FOR THE DELAYED PAYMENT OF FISCAL OBLIGATIONS

Rada POSTOLACHE[1]

Abstract

Delayed payment penalties have been reintroduced in our fiscal system recently, by Government Ordinance No 39/2010 modifying the Fiscal Procedure Code. This regulation is meant to discourage inconsistent fiscal behavior of taxpayers, and to stimulate the complete collection of tax incomes for the public budget. Delayed payment penalties are integrated in the fiscal obligation accessory, together with the fiscal interest and delayed payment additions, having a particular legal regime unlike the latter mentioned. We shall analyze the delayed payment penalties, under the aspect of their legal nature, by using the law as instrument, especially the latest modifications brought to it.

Keywords: *accessory fiscal obligation, interest, delayed payment penalties, delayed payment addition, legal regime.*

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1. The notion of accessory fiscal obligation

The fiscal obligation is correlated to the fiscal rights of claim, both resulting from the fiscal law relation. The fiscal obligation includes, beside the main obligation to pay, the accessory fiscal obligation.

The accessories of the fiscal obligation are stated by the Fiscal Procedure Code[3], in its Title 8 "Collection of tax receivables", Chapter 3 "Interests, delayed payment penalties or delayed payment additions", Art 119-124[1].

Regarding the accessories, the Fiscal Procedure Code states the generic name of:

a) accessory fiscal debt title – signifies the "right to levy interests, delayed payment penalties or delayed payment additions, according to the case and legal conditions [Art 21 Para (2) letter b) of the Fiscal Procedure Code] – from the perspective of the fiscal creditor;

b) accessory payment obligation – signifies the "obligation to pay interests, delayed payment penalties or delayed payment additions, as the case may be, corresponding to taxes, contributions and other amounts of money due to the general consolidated budget [Art 22 letter d) of the Fiscal Procedure Code] – from the perspective of fiscal debtor.

Thus named (the correlative notions of *accessory fiscal debt title/accessory payment obligation*), the Fiscal Procedure Code states as their forms: the interest, delayed payment penalties, delayed payment additions. They accompany the main obligations imposed with the specificity of the tax, fee, contribution, in case of delaying their payment.

Interests and delayed payment penalties shall be added to the budget to which the main claim belongs to; but, in the case of local taxes, can only be imposed delayed payment additions.

We shall focus here only on the delayed payment penalties, based on the elements that offer them legal substance, considering their modification made by Government Emergency Ordinance No 50/2013 on certain fiscal measures[4], in force since 1 July 2013.

2. The legal nature of delayed payment penalties

The penalties for the delayed payment of the fiscal obligation have been reintroduced in the Fiscal Procedure Code by Government

[3] Government Emergency Ordinance No 92/2003 republished in the Official Gazette No 513/31 July 2007, further called *Fiscal Procedure Code* or *the special law*.
[4] Official Gazette No 320/3 June 2013.

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Emergency Ordinance No 39/2010[5], being stated together with the fiscal interest (Aniței, N.-C., (2011) : 98-101). Why have these been reinserted, since the fiscal interest was already stated? What is their legal nature? Can they be cumulated with interests (Cristea, S.L., (2004) : 87-95) without debating the *non bis in idem* principle? For an appropriate answer we must legally clarify their nature.

Government Emergency Injunction No 50/2013 on certain fiscal measures brought modifications regarding the delayed payment penalties, which appear to be helpful in clarifying their legal nature. Their legal regime is synthetically expressed by Art 120[1] ("Delayed payment penalties") of the modified Fiscal Procedure Code: "(1) Delayed payment penalties are the sanction for non-complying with payment obligations on due date and shall be calculated for each day of delay, starting with the following day of the deadline and until the day when the payment is done. Art 120 Para (2)-(6) are properly applied. (2) The level of the delayed payment penalties is 0.02% for each day of delay. (3) The delayed payment penalties shall not remove the obligation to pay the interests."

On one hand, by this modification, the law expressly qualifies them as a "sanction" for non-complying with the due date of the obligations. Indubitable, as a sanction, are part of the legal liability, as well as the interest. In this context, given the fact that these two are not mutually excluded, which must be the qualification of the interest, for their appliance to be in accordance with the *non bis in idem* principle? Unfortunately, the special law does not qualify the fiscal interest. We thus integrate it in the area of legal liability but, it cannot be qualified as sanction because it would breach the mentioned principle (cannot be applied two sanctions for the same illicit action). It remains valid the solution of qualifying the interest as recovery interest, with a special legal regime, governed by the Fiscal Procedure Code. Besides, this is the idea spread among law-makers, and previously supported by us (Postolache, R., (2012) : 963).

On the other hand, though are qualified as "sanctions", by modifying their settlement, the Government Emergency Ordinance No 50/2013 offered for the delayed payment penalties a legal regime similar to that applicable for the interest. It has established the same procedure of settlement, differentiating only by share[6]: 0.04% for the interest; 0.02%

[5] Official Gazette No 278/28 April 2010.

[6] Until the entrance into force of the Government Emergency Ordinance No 50/2013 (1

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for the delayed payment penalties, applicable for each day of delay, after the due date and until the payment of the main obligation. In this context, we consider that their "uniformity" only overlaps them as notions, to the detriment of qualifying the penalties as sanctions.

As they were adopted, the modifications lead to the conclusion that both the interests, as well as the delayed payment penalties have the purpose, as well as in the previous period, to insure the integral repair of the prejudice caused for the state because of the failure to pay the fiscal obligations, similar to the common law, but without overlapping with it: *damnum emergens* (in this case, covered by the fiscal interest) and *lucrum cessans* (in this case, covered by the delayed payment penalties).

Also, the delayed payment penalties stated by the Fiscal Procedure Code are a legal institution different from the common law penalties, stated by Art 1535 and following of the Civil Code, legal or conventional, any analogy being absurd.

Conclusion

The "cohabitation" of the two institutions – interest and delayed payment penalties – is possible without breaching the *non bis in idem* principle, if they shall be understood as reparatory, namely sanctioning measures; in other words, the fiscal interest is meant to insure the repair of the prejudice caused for the public budget because of the failure to pay the taxes, and the delayed payment penalties sanction the improper conduct of the taxpayer. Both can coexist if we offer them a "recovery" feature, this time the penalty insuring the integral repair of the prejudice caused for the public budget (*lucrum cessans*).

Government Emergency Ordinance No 50/2013, far from clarifying the legal nature of the two accessories, merely standardized the fiscal interest and delayed payment penalties, transposing in the law a certain fiscal policy: maintaining the measures of constraint of the

July 2013), the delayed payment penalties are owned "for each month and/or fraction of month, thus: *a)* if extinguishment is performed within the first 30 days from the maturity date, there are not due and calculated any delayed payment penalties for the main fiscal obligations extinguished; practically, law institutes here a grace term, with the view to motivate debtor to pay his fiscal duty; *b)* if extinguishment is performed in the following 60 days, the value of delayed payment penalty is of 5% from the main fiscal obligations extinguished; *c)* after the term provided for by letter b) above is reached, the level of delayed payment penalty is of 15% from the main fiscal obligations which were not extinguished [Art 120^1 Para (2)]".

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improper fiscal conduct, but reducing the fiscal obligation by reducing the share of the delayed payment penalties (0.02% per day of delay, namely 7.3% per year, half of the interest's share), finally to encourage fiscal compliance.

The frequent modification of the accessories of the fiscal obligation only confirms the difficulty of transposing a private law institution in the public law. In this context, as *lege ferenda*, we consider that for one form of the accessories – regardless of its name and formulation, having only the role to repair, by applying an adequate percent that will ensure the repair of the caused prejudice; even more, in this case the fiscal non-compliance consists only of the delayed payment of the fiscal obligation.

As *lege lata*, interests and delayed payment penalties have a *repair-sanctioning* feature, accompanying the failure to pay on time the main fiscal obligation by the fiscal debtor, being integrated in the fiscal liability institution.

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