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TAXATION OF NON – RESIDENT LEGAL ENTITIES IN ROMANIA. CASE: RMMs vs. ANAF BRĂILA

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Abstract: The taxation of non – resident economic entities supposes the establishment of an administrative framework as fair, efficient, effective and comprehensible as possible, fact due to the multifaceted nature of the concept of profits generated by an enterprise and which depend on some items as: the foundation of incomes sources, the methods of valuation and collecting taxes, as well as different rules of establishment of some tax thresholds in different situations. Taking into account the legal doctrine, as well as jurisprudence, respectively the national and international tax practices, we can notice the fact that the profits of enterprises are founded, *stricto sensu*, on tax declarations made by companies. Therefore, we consider very important, in this way, the technical capability of tax administrations regarding the establishment, implementation and coordination of some good practice procedures. In this article, we have tackled the treatment regarding the taxation of non – resident economic entities in Romania. The first part of the paper represents a truth *caveat* in which is presented and analysed the international and European theoretical framework of legal and tax treatment of non – resident economic entities. The second part of the paper represents a *quid pro quo* of taxing of non – resident economic entities in Romania, in which are analyzed the taxing stipulations established on national level. The final part of the article is enriched with the presentation and analysis of a particular case regarding the taxation of non – resident economic entities in Romania. The conclusion resulted from this article highlights the fact that Romania had made important steps regarding "the adjustment" of national tax legislation, as well as the permanent improving of tax administration framework in the field of non – resident economic entities taxation in Romania.

Keywords: double taxation, non – resident legal entities, business profits, residence, permanent establishment, fiscal space, fiscal cooperation.

1. Introduction

In international tax law, *lato sesnu*, and taxation, *stricto sensu*, if we made reference at non – resident economic entities taxation we have to take into account that double taxation could generate unwanted effects upon foreign direct

investments (also as stock, as well as flow), on cross – border trade, but also on the "flexibility" of companies under the auspices of the economic structure in cases in which it is decided to operate cross – border. From this point of view the problem is the legitimate right own by a state to tax its taxpayers. Considering these aspects, the international tax treaties does not establish limitations *vis – á – vis* these items. However, it is the problem of the authority which owns the tax rightful: the source state *versus* the residence state of the taxpayer. Most often, in order to avoid international double taxation, the source state and the residence state use specific methods, techniques and procedures, but also some distributive rules to eliminate or minimize the occurrence of double taxation.

An extreme important item towards the foundation of non – resident economic entities taxation is the existence of a permanent establishment, through which the non – resident taxpayer carries out his business abroad. This concept of permanent establishment represents the "Pepelea's nail" of enterprise's profits taxation because international economic entities and the groups of multinational economic entities operate abroad through branches or subsidiaries. The previous mentioned aspects are particularly "sensitive" since the companies are in position to pick up between two choices: permanent establishment *versus* subsidiary. This choice will depend on the company's taxation manner and the structure that could represent a permanent establishment. Analyzing the structure of an economic entity, the common law says that a subsidiary is an entity which has a distinct legal personality, taking into account the separation of assets, liabilities and risks, while a permanent establishment is just a simple work point through which are made the businesses of a company.

The affairs environment is "sensitive" at non – resident economic entities taxation, regarding certain aspects, *ceteris paribus*, as: the way of foundation, applying and collecting the taxes by tax administrations, but also the horizontal and vertical equity in relationships with non – resident economic entities from the tax administration of a state. As well, we consider being very important some complementary aspects as: the tax compliance of legal entities taxpayers, the certainty and righteousness of taxation, but also the predictability and stability of volume, structure and tax rates. The role of the tax administrations is, *mutadis mutandis*, not just "watching" to the well collection of taxes owed by taxpayers at terms and conditions provided by tax legislation, but also to establish a framework of confidence, stability and cooperation, to set out a competitive and health affairs environment which support the foreign direct investments.

In case of the situation in which the tax administrations fail to settle a good management of the process of establishing, applying, collecting and managing the taxes, caused by the lack of economic and legal expertise, lack of qualified, adequate trained and paid staff, lack of efficient administrative procedures and

specific computation techniques, all these will generate confusion, instability, uncertainty and irritation of taxpayers, fact that will lead to the failure of establishing a comprehensible tax policies and also to record a failure in attracting foreign companies to made serious investments into a source state.
In the last decades, the efforts oriented towards the changes evisaged in the legal framework established in order to eliminate double taxation in cross – border transactions have lead at the same time to double taxation. The efficient discharge of double taxation supposes, firstly the elimination of double non – taxation, the BEPS project presuming a coordinated action of states, this approach being considered more efficient then a unilateral action (Dumiter & Boiță; 2017a, pp. 15 – 16).
In this article we have proposed to analyze the non – resident economic entities taxation. This analysis is very important to be reviewed by the perspective of certain auspices as: concept, notion and signification of permanent establishment, including the article 5 of the Model Convention of OECD and UN; the significance of the enterprise's profits, including the perspective of article 7 of the Model Convention of OECD and UN; the legal and economic framework of non – resident economic entities taxation. Finally, we have proposed to present the legislation of Romania regarding the non – resident economic entities taxation and the analysis of the case RMM *versus* ANAF Brăila.

2. Judicial and economic framework regarding taxation of non – resident legal entities and its impact upon double taxation conventions

Regarding the tax policy established at international level, this has a unique economic, financial, legal and social dimension. If, considering the unitary monetary policy practiced in European Union, it is established a centripetal formula of it, but at tax policy level the problem is more complicated. Budgetary and tax federalism, problems like competition *versus* tax harmonization, especially in European Union, constitute "opened" problems to which the practice and the legal and economic theory did not find concrete solutions. Even more, the creation of *tax space*, *lato sensu*, worldwide, and *stricto sensu*, in European Union, constitutes the most stringent problems confronted at present by international tax policy (Dumiter et al. 2017, pp. 2).
On the background of international relationships enhancement, was stimulated the competitiveness regarding taxation, and also the national climate to be favorable to foreign direct investments which contribute to the development of internal markets. As a consequence, we have taken some measures to regulate the taxation system regarding the implementation of favorable taxation treatments to avoid capital migration to other states (Dumiter & Jimon, 2017c, pp. 242).

Arnold et al. (2003, pp. 187) outlined that taxation of the enterprise's profits is one of the mains characteristics of bilateral tax treaties. The dispositions of these tax treaties, and especially the concept of permanent establishment, became more and more common due to the importance of affairs services and e – commerce. Furthermore, the company's profits taxation under the auspices of the tax treaties rises several technical problems regarding the operation of existing provisions of tax treaties and on the fundamental problems as: debate between the market price principle and the way of operation regarding the mechanisms of allocation the enterprise's profits.

De Groot (2015, pp. 158) highlights the fact that combating tax evasion is a priority of the Organization for Economic Co – operation and Development (OECD) and also to the European Union (UE). Fighting against the aggressive tax planning, EU announced in December 6, 2012 the 6th Action of Parent – Subsidiary Directive which have to be improved regarding the double non – taxation which take place in hybrid loans. The proposal to bring new amendments to credit method from this directive was announced in November 2013. This proposal included also a general anti – abuse clause. Anyway, it was not possible to achieve an agreement regarding this clause previously. In June 3, 2014 it was announced the introduction of a new proposal which included only the new Article 4(1) of the credit method. New proposal assumes that profit should be taxed if and only if it is a distribution of subsidiary's profit deductible for those states that apply the credit method.

Using the financial freedom principle, each company is free to decide the type of capital which wants to make use to finance the company activities. Furthermore, the classic forms of financing, such as: own capitals and liabilities, have been enriched with a lower degree of importance, since in last decade the attention it was oriented towards the hybrid financial instruments. In the last years, the international embezzlement of profit through hybrid capital usage was looked as an efficient measure to reduce the tax burden which subject had been the corporations. The hybrid financial instruments were applied to achieve double non – taxation and were exploited as crucial instruments to international tax optimization. The attractiveness of these instruments consisted in attentive exploit of differences becoming in the tax treatment in two or more jurisdictions, were facts that leaded to international tax arbitrage (Kahlenberg & Kopec, 2016, pp. 38).

Reimer & Rust (2015a, pp. 72) advocate that not all forms of legislation established *ex post*, cancel the effects of a tax treaty. To be recognized in all states, and also in other states, the fact that a law enforced *ex post* will replace the special law applied *ex ante* should be clearly established, so the new legislation will not be superior against the old one in any case. In the international double taxation avoidance conventions, this fact was encountered through several court decisions which have been proved to be a special legislation against the general legislation.

This is the reason why, the courts want to avoid the violation of international legislation and sustain the alignment of national legislations within the international ones in the situations where it is possible.
Although some of the international double taxation avoidance conventions deflect from the Model Conventions of OECD and UN, these divergences are not significant and does not lead, implicitly to results that highlights meaningful deviations. So, it is unlikely that these final provisions to be regulated in the future, since that it cannot be remark a necessity of new amendments. The phrasing of these final provisions gives to contracted states a considerable margin of maneuver regarding the way of agreement on date of enforcement, applying and revocation of the respective tax convention, without these to deflect significant from the Model Convention of OECD and UN (Reimer & Rust 2015b, pp. 2024).
The unilateral measures and the solutions established at national level are not sufficient to resolve the different problems appeared regarding the free circulation of capitals in European Community, as well as to eliminate the international economic double taxation. Furthermore, due to the fact that multinational companies operate worldwide in a borderless market, an efficient solution regarding the international economic double taxation problem could be found into a multilateral context which may allow the enforcement of an international unified tax system, especially in European Union, fact that can be considered feasible (Rust 2011, pp. 42).
Resuming the previously mentioned, we consider very important to highlight the economic and legal framework of international double taxation avoidance conventions regarding the enterprise's profits. It is known that the non – resident taxpayers must conceive the tax declarations on the basis of which the taxation authorities will decide the taxation method and especially the way in which could benefit from the provisions of an international tax treaty. Also, it must be noted that the taxes paid at source are expressed in taxation of income of non – resident enterprises as: dividends, copyrights, interests and service charges.

3. Income taxation of non – resident companies in the "light" of Romania's fiscal code and fiscal procedure code

In Romania, the main tax regulations are provided by Law no. 227/2015 regarding the Fiscal Code and by Law no. 207/2015 regarding the Fiscal Procedure Code, and also the Community legislation and the international tax treaties signed.
Among international tax treaties signed by Romania, a large share is owned by the international double taxation and tax evasion avoidance conventions. The application of these provisions prevails over the national legislation and ensures the required framework for international transactions.

According to the Fiscal Code, in Romania are subject of taxation all taxable incomes obtained on the state's territory, and also the incomes obtained abroad by the residents of Romania. To protect the taxpayers against double taxation and a higher tax burden, the bilateral conventions establish the taxation limit for each state and the concrete way of double taxation avoidance.

The provisions of Fiscal Code stipulate the obligation of income payer to compute, withhold, declare and pay the taxes due by the non – resident persons to State Budget. The tax rate is settled as the most favorable rate for taxpayer related to national regulations, the provisions of international double taxation avoidance conventions and Community legislation.

An extreme importance item is to establish the tax residence. The Fiscal Code defines residence in the case of individuals related to the notion of home, the center of vital interests and the time passed on the state's territory, and in the case of legal entities depending on the location of headquarter and effective management, respectively the permanent establishment.

The non – resident legal entities has the obligation to pay taxes for the taxable profit gained through the permanent establishment from Romania. In the case of a foreign company which carries out business through several permanent establishments, the Fiscal Code stipulates the assignment of one permanent establishment which will accomplish all tax obligations for the foreign company activity in Romania.

To compute the tax on profit obtained in Romania by a non – resident company are considered, according to Fiscal Code, all incomes achieved and all expenses made in order to carry out the businesses through the permanent establishment. The permanent establishment assigned to accomplish the tax obligations will be the base for computation, declaration and payment of profit tax for the realized profit of all permanent establishments of foreign company on Romania's territory.

The existence of some transactions between foreign parent company and the permanent establishment from Romania enforce the need to figure out the market price of transactions made between these two entities. In this regard, the Fiscal Procedure Code implements the obligation to realize the transfer pricing file.

The payment of taxes for the obtained incomes, respectively the profits achieved by non – residents in Romania, is considered an anticipated payment, operation that will be adjusted in residence state based on the document certifying the payment.

The avoidance of international double taxation is made based on the tax residence certificate which proves the quality of resident of partner state in the imposed period.

As a consequence, the adjustment of payed taxes into the source state is accomplished by giving a tax credit or an exemption by the residence state of

taxpayer. The tax credit or the exemption offered by the resident state is limited at the value of taxes computed by tax legislation of residence state.
To adjust the tax payed into a partner state by Romanian legal entities, the methodological applying norms of Fiscal Code establish the submission of a rectification tax declaration, as well as the document provided by the partner state which confirm the tax payment by the permanent establishment in that partner state.
Through the Fiscal Procedure Code, the 86 international double taxation avoidance conventions and the 73 automatic information exchange agreements is supported the international cooperation and the information exchange between partner states regarding the incomes and capital taxation.
In applying the national tax regulations and the compliance with the provisions of international tax treaties could appear divergences due to the distinct interpretations and different conformity against the decisions of partner state. In these cases, the Fiscal Procedure Code and the double taxation avoidance conventions provide the mutual agreement procedure in order to solve the divergences.

4. Case: RMMs vs. ANAF Brăila

In this section we will present and analyze the Decision no. 2039 from June 22, 2016 pronounced by the High Court of Cassation and Justice of Romania – Administrative and Fiscal Contentious Section regarding the appeal made by the claimant Company RMM SRL against the Decision no. 19 from June 30, 2015 of Galați Court of Appeal – Administrative and Fiscal Contentious Section (High Court of Cassation and Justice of Romania – Administrative and Fiscal Contentious Section, Decision no. 2039, pronounced in public session from June 22, 2016, Folder no. 495/44/2013).
In this action, the claimant contests the tax obligations established by Directorate General of Public Finance Brăila consisting in profit tax, tax on income obtained by non – residents, VAT and related accessories. In this regard we will make reference especially at tax on incomes obtained from interests by non – residents on Romania's territory, considering the provisions of national tax legislation and the stipulations of the Convention between Romania and France regarding the avoidance of double taxation, ratified by the Decree no. 340/1974.

Circumstances of the case

Through the claim recorded in May 26, 2011 on the role of Galați Court of Appeal – Administrative and Fiscal Contentious Section, the claimant Company RMM SRL demanded the cancellation of following administrative – fiscal documents released by the defendant Directorate General of Public Finance Brăila: fiscal inspection report F BR – 37/24.01.2011, taxing decision no. F – B – 46/24.01.2011

and decision no. 155/4.04.2011 of solution of an administrative appeal, respectively the exemption of claimant to pay the amount of 781.629 lei additional imposed as a court cost.
The Galați Court of Appeal – Administrative and Fiscal Contentious Section, through the Civil Decision no. 431 from October 4, 2012 have accepted the claimant request, cancelled the administrative – fiscal documents released by the defendant authority and exempted the claimant from paying the amount of 781.629 lei, forcing the defendant authority to pay the claimant 54.600 lei as court costs.
Against this decision the defendant Directorate General of Public Finance Brăila appealed, accepted by the High Court of Cassation and Justice of Romania – Administrative and Fiscal Contentious Section, which had dismissed the attacked sentence and sent the case back to the same court.

The court's solution in re – judgment of the case
Through the Decision no. 192 from June 30, 2015, the Galați Court of Appeal – Administrative and Fiscal Contentious Section rejected as unfounded the request made by the claimant Company RMM SRL against the defendant Directorate General of Public Finance Brăila – County Administration of Public Finances Brăila for the annulment of administrative – fiscal documents represented by: the fiscal inspection report F BR – 37/24.01.2011, taxing decision no. F – BR – 46/24.01.2011 and decision no. 155/4.04.2011 of solution of an administrative appeal, respectively the exemption of claimant to pay the amount of 781.629 lei.
To give this decision, the court of first instance recorded that following the control made at the Company RMM SRL, the Directorate General of Public Finance Brăila release the taxing decision no. F – BR – 46/24.01.2011 through which established tax obligations consisting in profit tax, related accessories to profit tax, tax on income obtained by non – residents, related accessories to tax on income obtained by non – residents, VAT and related accessories to VAT.
The Directorate General of Public Finance Brăila, through the decision no. 155/4.04.2011 rejected as baseless the administrative appeal for the amount of 781.629 lei, and accepted partially the appeal, with the consequence of partially annulment of tax decision no. F – BR – 46/24.01.2011.
Against this decision, the claimant had actioned at Galați Court of Appeal.
Regarding the income tax, according to tax decision no. F – BR – 46/24.01.2011, the expenses made by recurrent claimant company with the consulting services provided by SEA France in the field of vegetable agriculture are fiscal non – deductible.
The court, based on art. 11 of Fiscal Code appreciated that, correctly the tax authorities did not take into account the invoices regarding the services provided by SEA in the lack of evidences that the respective transaction had an economic

purpose. It can be noted that the claimant due to the deficient way in which the work reports were recorded and by the unpresented collateral documents, does not succeeded to comply with the stipulations of art. 65 alin. 1 of Fiscal Procedure Code, according with the taxpayer has the obligation of evidence in proving the tax fact situation.

Regarding the value added tax additionally established, this is owed to the deliveries of goods consisting in the payment in kind of the lease of some contracts closed by the recurrent company with the owners of land to exploit the agricultural surfaces. The tax body appreciated that this deliveries were undervalued reported at the prices used by the recurrent to sell wheat and corn to other clients. The Galați Court of Appeal rejects as unfounded the demand of the claimant considering that the tax body respected the provisions of Fiscal Code.

Regarding the tax on income of non – resident legal entities, the court of first instance found that the defendant computed the tax for capitalized interests and paid to SEA France with a rate of 10%, both for the capitalized balance and also for the share of interests paid in between 01.01.2007 – 30.09.2010, in the conditions in which, according to the national legislation the interests are imposed in the source state of income.

In the motivation of the action, the claimant had invocated the provisions of the Convention between Romania and France regarding the avoidance of double taxation, enforced by the Decree no. 340/1974. Interpreting the provisions of this, the first instance noticed that par. 2 of the articles "Interest", "Commissions", "Royalties" from the Convention is not abolished by the par. 1 of the same articles, which foresees that the respective incomes paid to a resident are imposed in the residence state of the taxpayer.

The disposals of par. 2 establish the right of the source state, respectively Romania, to collect the tax for the mentioned incomes obtained in Romania by the residents of a partner state, but only to the level of 10%, which is less than the rate set by the legislation regulating the imposing of such incomes obtained by Romanian individuals or legal entities.

The application of par. 2 of the articles "Dividends", "Interest", "Commissions", "Royalties" from the double taxation avoidance convention, which stipulate the taxation in the source state does not lead to a double taxation for the same income, whereas the residence state gives a tax credit for the tax paid in Romania, according to the Convention's provisions.

For all these reasons, apart from the conclusions of the expertise made in the case, which confirmed the motives of nullity invocated by the claimant based on the wrong interpretation of the legal disposals and respectively, of justifying documents presented, the court rejected the request as unfounded.

The appeal

Against this decision, the claimant Company RMM SRL announced appeal, based on the provisions of art. 304 pct. 9 and art. 304 from the Civil Procedure Code, asking the modification of the appealed decision in the sense of admission of the request as it was formulated and forcing the intimate defendant to pay the court costs.

In the motivation of the appeal, the claimant shows that the High Court of Cassation and Justice abolished the first decision pronounced because it was not respected the procedurals forms to the administration of evidence with the accounting expertize, obligating the court judge to continue the procedure from the point of administration of this evidence. Therefore, it was imposed to solve the cause within the established ones by the annulation decision, whose effects could not be expanded to the aspects which the decision of the court did not indicate. Or, the first decision in the first instance regarding the tax on income obtained in Romania by non – resident persons was not the object of the annulment and consequently, has gain the authority of judged think.

Therefore, the amounts consisting into tax on incomes obtained in Romania by the non – residents, showed into the fiscal inspection report and into the taxing decision, are not owed because the annulment decision did not invalidate the decision of the first court on this issue.

The decision is also criticized for the wrong application of the law. The claimant sustains the wrong application of the legislation, respectively the Convention of avoidance the double taxation of income and capital closed between Romania and France whereas through the art. 11 from the convention results that, to be executed the exception of interests taxation into the contracting state from which its came from according with this state legislation, without exceeding 10% from the amount, is necessary, according with par. 2, that the parties of the convention to had established by mutual agreement the application of this paragraph. In the condition in which such an agreement does not exist, it is applied the rule established through the par. 1, according to which the interests obtained by French persons on Romania's territory are taxed in France, not in Romania. Maintaining the administrative – fiscal documents regarding the non – resident persons taxation has the consequence the double taxation of incomes from interests, both on the Romania's territory and also on France, which leads to a broken of the convention.

Concerning the expenses with consulting services, these were considered non – deductible by the first instance, which appreciated that the claimant did not prove with the adequate evidence that the services which made the object of the consulting contract, were effectively provided. In the case of the supposed unreal character of the operation, the claimant sustained that the evidence task was detained by the tax body. Also, even if were evoked the provisions of the point 48

from the Government Decision no. 44/2004, and the art. 21 alin. 1 and alin. 4 lit. m) from the Fiscal Code, the first instance made a wrong application of the law, without taking into account the folder evidences which confirm the reality of the services, and also the accomplishment of the legal conditions for the deductibility of the costs with these services.
Regarding the difference of VAT computed by the tax body, the claimant affirms to have been generated by the artificially setting the value of the lease, through using the mean price and ignoring the fact that the invoice of the products delivered to the owners of the land leased as a payment in kind, according to the contractual provisions, were made through the evaluation at theirs prices at free market value accepted by the land owners, which they considered just.

The High Court's judgments on the appeal in case
The High Court of Cassation and Justice partially admits the appeal made by the claimant Company RMM SRL, reported at the motives formed to appeal.
The High Court finds founded the appeal reason regarding the additional profit tax, establishing that, illegally, broking the art. 21 alin. 1 and alin. 4 lit. m) and the point 48 from the Methodological Norms for the Application of the Fiscal Code, was not give the deductibility benefit for the expenses with the consulting services.
The evidences administrated both in first instance and also in the appeal confirm the activity made based on the consulting contract. The High Court notices that the first instance removed unjustified the proofs which attest the delivery of the services, referring at miss of some collateral documents, respectively the work contracts of the service providers closed with SEA and the evidences regarding the transport and accommodation of the service providers, whose lack cannot be a decisive argument which lead at the conclusion of unreality of operations.
The High Court observes that are founded the claimant's objections regarding the value added tax. According to art. 137 lit. e) from the Fiscal Code, the tax base for VAT is formed, in case of exchange foresee at art. 130, when the payment is partial or integral in kind, from the normal value of that delivery. It is considered to be normal value all what a buyer can pay to the independent supplier, inside the country, in the competition conditions, to obtain the same goods. Both expertize reports concluded that the evaluation of lease in kind, made by the claimant and showed in the operative and accountant evidences, considered the normal value of the goods.
Regarding the taxation of incomes from interests obtained in Romania by non – resident individuals and legal entities, the recurrent make reference, firstly at the fact that first decision of the High Court of Cassation and Justice was one of partial annulment of the decision pronounced by the first instance, the decision referring at this tax not being denied in the appeal.

The claimant statements are unfounded whereas by the decision no. 3670/8.10.2014, the High Court of Cassation and Justice of Romania – Administrative and Fiscal Contentious Section had approved the appeal of the defendant authority, had abolished in the entire the appealed decision and send the cause to be re – judged by the first instance, retaining some procedural irregularities which had determined resuming the judgement at first instance. As the annulment of the first decision pronounced by first instance was total, according to the provisions of the art. 315 from the Civil Procedural Code, the trial has resumed on the whole of the appeal.

Considering the wrong application of the art. 11 from the Convention regarding the avoidance of double taxation of incomes and capital closed between Romania and France, according with the art. 11 par. 1 and par. 2 from the convention, the interests coming from a contracting state and paid to a resident of the other contracting state are taxable in the other contracting state, but they can be imposed in the source state, according to the legislation of this state in the limit of 10% from the amount of interest, the competent authorities establishing by mutual agreement the application mode of this provision.

The interpretation of the claimant according to which the interests could be taxed in Romania only if between the competent authorities would be established by mutual agreement the application method of this tax and in the lack of this agreement the interests obtained by French persons in Romania's territory are taxed in France, exceed the provisions of the convention. The lack of an agreement on "the application method" does not lead to the conclusion that the taxation with 10% of the incomes from interests is not applied. According with the convention, dividends, interests, commissions and royalties are categories of incomes and capital that can be subject of a limited taxation in the source state, situation in which the residence state should give a reduction of the income.

From the convention text points out that Romania, as a contracting state from which the incomes from interest come, has the right to impose these incomes without exceed 10% from their amount.

These provisions of the convention are connected with the provisions of art. 116 – 118 from Fiscal Code and the Methodological Norms of the Application of art. 118 from the Fiscal Code, according to which the provisions of the par. 2 of the articles "Dividends", "Interests", "Commissions", "Royalties" from the double taxation avoidance conventions deviate from the provisions of par. 1 of the same articles from the respective conventions, and the their application does not lead to a double taxation of the same income, whereas the residence state gives a tax credit for the tax paid in Romania, according to the provisions of the double taxation avoidance convention.

The solution of the court of appeal and its legal basis

The High Court of Cassation and Justice, based on art. 312 alin. 1 – 3, reported at art. 304 point 9 from the Civil Procedure Code, admits the appeal and change the appealed decision, in the sense that will accept partially the request expressed by the claimant Company RMM SRL, annulling partially: decision no. 155/04.04.2011 of solution of appeal, the tax decision no. F – BR – 46/24.01.2011 and the fiscal inspection report F BR – 37/24.01.2011, regarding the amount retained by the fiscal body as being owed as a profit tax and accessories, as well as VTA and accessories, maintaining the other contested tax documents.

Based on the art. 274 and art. 276 from the Civil Procedural Code, will admit partially the request of the recurrent claimer to afford the court costs and will force the intimate defendant Directorate General of Public Finance Brăila – County Administration of Public Finances Brăila to the payment towards the recurrent claimer the court cost, at first instance and at appeal, compound from a stamp duty, court stamp, expert fees, and lawyer's fees.

5. Conclusions

The taxation regarding the profits of non – resident legal entities must record a solid foundation for some fair measures expressed in national tax legislation and also in a more comprehensible framework of international tax treaties which count the "ampleness" of the capture basin of liability and responsibility of the non – residents regarding the payment of profit tax. Therein, an essential element, *ceteris paribus*, is the administrative capacity to manage the income and profit taxes comes from the tax authorities. As a result, if in the case of developed states can be observed that tax administrations had recorded a success in managing the tax on income and profit of the non – residents, it cannot be said the same thing about the developing states, which must significantly improve the capacity to manage the tax system, especially regarding the non – residents. The poor developed states own low levers and can adopt good practices and international tax norms which could constitute a true "catalyst" to improving the administrative capacity as a whole.

Another important aspect is constituted by the conformism and the tax culture of the taxpayers. As can be observed, the international tax policy owns common characteristics as: rates, structures, procedures, methods and technics of taxation. Instead, the national tax policy supposes a particularly of economics and of tax system of each state, according to the allocation, the stabilization and the distribution needs of those states. Moreover, the globalization had increased the intensity of capital flows, leaded to a high level of complexity from the financial market, states being permanently forced to re – evaluate the tax system and the public expenses. The conformity and the tax culture targets, besides the classic economic and legal aspects, other cultural, religious, psychological and

neurological characteristic which influence the behavior and the comportment of taxpayers and which, finally can explain the reason behind the unorthodox decisions took by the taxpayers in the rhetorical vision: a synergistic environment *versus* an antagonist one?!.

Romania case comes to support the "way" which should be followed by the states being in the process of "catching – up" *vis – á – vis* of the market economies from the developed states. Like the other economic and legal systems from Central and Eastern European states, Romania made important "steps" to improve the national tax legislation framework to confer a better comprehensibility of tax policy. Moreover, it was perceptive improved the capacity of tax administrations regarding the interaction with the taxpayers, and also the creation of a partnership state – taxpayer such that the taxation authorities have also the consultation, advice and catalyst role for the good course of the economy. However, we consider that Romania must continue this process, being enough *room to maneuver*, to improve the tax system, *lato sensu*, and the taxing legislation, *stricto sensu*, including the harmonization with the *communitaire aquis*, and with the provisions of the international tax law.

The case presented at the end of the article is selected in order to support the consolidation of the capacity of courts of administrative and fiscal contentious to considerably improve the approach of these complex tax aspects which contain extraneity elements, considerations from some decisions of legal practice of European Court of Justice, but also with the future hope that these instances could take decisions more "braves" to vertically and horizontally tax equity regarding one non – resident taxpayer, in order to obtain the most advantageous tax treatment into the source state.

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