

## GENERAL CONSIDERATIONS CONCERNING BUDGETARY DEBTS\*

**Lecturer Mihaela Cristina PAUL, PhD**

*”Titu Maiorescu” University of Bucharest, Romania*

*Postdoctoral Researcher*

*”Titu Maiorescu” University of Bucharest*

*av.mihaelapaul@yahoo.com*

### **Abstract**

*Theory and judicial practice represent unlimited source for the different situations that may arise in the course of the insolvency procedure.*

*Problems have occurred in court practice in connection with the competition between several guaranteed creditors, which have entered mortgage on the same immovable property, as a general rule one of whom shall be also the budgetary creditor.*

*It is clear that only if the budgetary creditor shall be entitled to one of the securities referred to in the Tax Procedures Code then we will be able to cover the existence of a budgetary receivable guaranteed in insolvency proceedings.*

**Keywords:** *insolvency, budgetary debts, fiscal debts, creditor, debtor*

As it is natural, we have to give first a definition of budgetary debts. Law 85/2014 defines budgetary claims as those claims that include taxes, fees, contributions, fines and other budgetary revenues, as well as their accessories. Retain this nature also budgetary claims that are not covered in full by the privileges value, mortgages or pledges held for the uncovered part of the debt (Article 5, Point 14).

Tax claims represent patrimonial rights arising from material fiscal law, consisting of: main fiscal debts - the right to levying taxes, fees, contributions and other amounts which constitute revenues of general consolidated budget, and fiscal debts accessories – the right in levying of interest and penalties on late payments.

The basis of a comparison of the two definitions can lead us to the conclusion, as regards budgetary claims, as those are supplied by tax and no tax revenues while in the case of fiscal claims, they shall be subject to judicial regulations covered by Tax and Tax Procedures Codes.

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Budgetary legal relationships are covered under the legal rules related to the establishment and implementation of the state budget revenues. Legal budgetary relationship by in their structure, cover three components, namely: subject, content and object.

Subject of budgetary legal relations are, on the one hand, the state through banking or financial bodies, invested with specific powers to achieve budget revenues, and on the other hand, legal entities or natural persons liable to pay taxes, fees and other revenue of the state budget.

The active subject must always be a person carrying a public authority - the state, a local community, a public institution in subordination, which gives it a higher position than that of the second subject, banking or financial bodies, in his capacity as it may require other subject compliance with the obligations laid down by law that they have to the state budget. In this category we can identify: the Ministry of Public Finance, local councils, various public institutions, the Court of Auditors, inspectorates, offices, etc.

Passive subject may be any natural or legal person, which judicial law regulates his liability towards obligations or rights regarding public finances.

In the framework of the insolvency procedure, the budgetary creditor as provided by Article 5, point 20 of the Law 85/2014 *may belong also to those creditors entitled to request the opening of proceedings, when his claim against debtor's assets is quarrel, liquid and chargeable for more than 60 days.*

Holder of budgetary claim can be also the creditor entitled to participate in the proceeding, as defined in Article 5, point 19 of the law, namely *the holder of a right of claim on debtor's fortune, which has registered an application for registration of the debt, after which it acquires admission rights and obligations covered by this law for each stage of the proceedings.*

If we are to relate to the amount of debt of the budget, the holder of the **budgetary claim** it may be either a creditor entitled to apply for initiation of the procedure, or a creditor entitled to participate in insolvency proceedings.

The content of budgetary legal relations constitutes the rights and obligations of participating subjects.

Subject to budgetary legal relations it constitutes the amounts of money which represents taxes, fees and other revenue of the state budget due by natural or legal persons who make incomes or have goods taxable or chargeable.

To achieve budgetary debts it is necessary that they meet the general conditions **of the common law**: *certainly, liquid, and chargeable* character.

Certified debt is that debt instruments whose existence is arguable, on which there is no dispute. By analysing the provisions laid down by law, it is observed that the legislator do not appealed to the character definition in the new code of civil procedure, but she had kept on the one of the code of civil procedure from 1875, Article 379, paragraph 3, which contains a better coverage of situations in which a claim can be labelled as quarrel [1].

Liquid debt is that debt the quantum of which is precisely determined. Are always liquid claims those having as its object a determined amount of money or a specified quantity of generic goods.

Debt is a debt due to fall due, which can be claimed, which may be required as soon as possible the execution, even forced.

Another essential condition to be satisfied by budgetary debt is that of the *financial nature of the claim*. This must bear on taxes, fees, contributions, or other income, even no taxable ones, taxes to the local or central budget, recorded by one of the forms of individualization of the tax claims as specified by Article 83 C. Tax procedure Code., but also throughout other legal provisions, i.e. the fiscal debt purposes, having always enforceable decision, by law effect [2].

An essential requirement to be satisfied by budgetary debt is that, the amount of the claim to reach the threshold of 40,000 lei or, when there are multiple claims, the amount thereof to reach same threshold value of 40,000 lei. What is significant is the fact that it has provided for this threshold value also for the debtor, including the proceedings initiated under law 31/ 1990 specifically for applications made by liquidators appointed to administer the winding-up proceedings governed by the law 31/1990 [3].

The quality of budgetary creditor, it has been established by court practice [4], that arises at the time in which the creditor complies with the conditions laid down in the law of insolvency, that he has requested the registration of the claim, that he had proved

it with any documentary evidence admitted by law and that this has a budgetary character.

The creditor is obliged to apply for registration within the table of creditors, to prove its existence and the amount of the claim, and thus after the registration at the Commission in relation to the share capital due to him under the law, retaining fees of the securities in exchange for service provided.

These charge having budget character must be paid annually, otherwise they will have to pay penalties for delay.

Even if the creditor's budgetary debt isn't due at the date of initiation of insolvency, it must lodge an application for admission to the statement of affairs of his undue application. (Article 102, paragraph 4 of the law)

In the event that budgetary debt is accompanied by guaranties, the creditor has the obligation to attach at the application for the acceptance of the debt, supporting documents.

Article 5 PCT 15 of the Law 85/2014 defines *claims which benefit from a question of preference* as those *claims which are accompanied by a privilege and/or a right of mortgages and/or similar mortgage rights, in accordance with Article 2347 Civil Code, and/or a right of pledge on the property of debtor's assets, regardless of whether it is main debtor or a third party guarantor of those receiving such causes of preference. In the case in which the debtor is third party guarantor, the creditor may take advantage of a question of preference will exercise the correlative rights only on the good or the right in question. These causes of preference shall have the same meanings given by the civil code, if by special law does not provide otherwise.*

Therefore, in the case in which the budgetary creditor benefits from a question of preference, we can speak of a budgetary debt guaranteed within insolvency proceedings.

Creditor's budgetary debt must have at the date of initiation of insolvency both the quality of budgetary debt instruments, as well as quality of guaranteed debt by a question of preference, so that it can be entered by the legal administrator/judiciary liquidator in the table of claims as having double qualification.

If, at the time of the opening of insolvency proceedings, budgetary debt did not have also the quality of a guaranteed debt, the creditor will participate at the insolvency procedure with only a budgetary debt, with rank of priority laid down in Article 161 (5) of the law. Participation in distributions of amounts shall be carried out in accordance with Article 161 (5) of the insolvency code.

If at the initiation of insolvency, the budgetary debt is guaranteed also by a clause of preferability this will participate at the distributions of amounts carried out in accordance with Article 159 of Law 85/2014. In the case in which there would be an uncovered part of a budgetary debt, the creditor will participate in the distribution of amounts carried out in accordance with Article 161, the priority ranking provided for that by same Article, at point 5.

With regard to the quality of **participating holders of budgetary debts in insolvency proceedings**, it can be noted that, in the case in which a budgetary creditor it has been decided to participate in insolvency proceedings, even if he does or not request the initiation of the proceeding, it will be a part of the creditors' assembly, if his claim was allowed to the statement of affairs.

Whereas it will be part of the creditors' assembly, the creditor will have all the rights provided in favour of any creditor and will be kept by carrying out of all obligations set out under load of any creditor, as provided by the Article 47-49 of the law.

Article 48 (3) of Law 85/2014, afford budgetary creditor to participate through representation at the creditors' meeting, their interests, in case in which participation by representation at meetings of creditors will be supported by an employee of the fiscal office with delegation signed by the chef in charge.

Article 50 (1) [5] lays down that both budgetary creditor with the highest debt in the category of creditors, can be part of the provisory designated committee of creditors by -syndic judge, after drawing up the preliminary table of claims, to the extent that it will be approved by the creditors' assembly, having regard to the provisions of Article 50 (4) of the law.

In accordance with Article 80 paragraph 1 and 2, exception to the rule, is that (1) *no interest, increase or penalty of any kind or expense, generically called*

*accessories, will not be able to be added to the claims born before the date of initiation of the procedure, except the circumstances provided for in Article 103.*

Claims that are beneficiaries of a preference clause, benefits in accordance with Article 103 of a special treatment, in the sense that they are *entered in the table permanently up to the market value of the collateral guarantee established by assessment, prepared by the legal administrator or judicial liquidator, carried out by an assessor appointed in accordance with Article 61. In the event that assets in question of preference will be sold at a price which is higher than the amount indicated in the table or in the table definitively consolidated, the favourable difference will return again to the guaranteed creditor, even if a part of his claim had been discussed as an unsecured debt, to cover main claim and the accessories that will be calculated in accordance with acts from which the debt is resulting in, up to the date of recovery. This provision shall also apply in the case of failure the reorganization plan and sale property in the bankruptcy procedure [6].*

As provided by Article 5 point 15 of the law, the budgetary creditor debt should be recipient of a cause of preferences. In the case in which there isn't the beneficiary of a cause of preference, at the date of initiation, the calculation of the delay increases must be stopped, even if we are talking about a budgetary creditor.

In practice [7] have been rejected appeals declared by budgetary who have requested, the entry in the additional table drawn up by the liquidator of certain debts consisting of the amount which represents penalties for delay and legal costs which could not have been foreseen at the time when the declaration was lodged, as is reported by court the date of initiation of the insolvency procedures when declaration is lodged, the consequence being that these amounts will not be included on the additional claims table.

In accordance with Article 122 C. Tax procedure code., in the case of taxpayers who have been opened proceedings, for fiscal debts born prior to, or after initiation date of insolvency is due interest and penalties for delay in accordance with Article 80 and Article 103 of the law 85/2014.

Articles 151 (8) and Article 154 (6) of the Tax procedure code provides for certain facilities for budgetary claims, in the sense that it assimilates to such claims, if they are

covered by a legally established movable or immovable property of the debtor's debts, secured by a pledge or mortgage legal grounds.

Claims by fiscal creditors will be subject to the same legal protection regime in respect of creditors with the causes of preference, including participation in distributions of amounts carried out in accordance with Article 159 of the Code of insolvency.

The Parties not covered from recouping assets guaranteed will have same juridical regime of a budgetary debt.

Whereas there were abuses in practice of fiscal authorities, who considered that by the mere inclusion of the debt in the Electronic Archive of Real Guaranties the budgetary debt became a guaranteed one by Article 5, point 22 of Law was expressly provide that the mere inclusion of a claim in the AEGRM, is not turning this one latter into debt instruments which benefit from a clause of preference.

## **Conclusions**

Any company has an activity which generates a complex system of relations both economic and legal with the beneficiaries of services provided, but also with the state budget regarding the payment of taxes and fees [8].

Raising effectiveness of the recovery of fiscal claims representing duties, taxes, fines and other contributions, will also be an important key in order to achieve budgetary projects, meant to ensure a balanced development in Romania. Development of the capacity for the collection of budget revenues and the fiscal discipline of the tax payers has a particular importance for the economical stimulation.

New insolvency Code is an important step in meeting debtor's desire, as a means of economic reinsertion, as well as a more efficient tool for ANAF, in order to recover budgetary debts.

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„The syndic judge can designate according to the number of creditors, the creation of a committee of 3 or 5 creditors from those with vote right, with preferability clause claims, budgetary claims and having the

biggest amount of debts as value. If the small number of creditors is considered an useful buy the judge the creditor committee attribution will be taken by the Creditors Assembly.”

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