CONCEPTUAL ASPECTS REGARDING JOINT AND SEVERAL LIABILITY OF COMPANY ADMINISTRATORS IN TAX MATTERS

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Abstract
The activity of companies under Law no. 31/1990 is facing a series of challenges, often independent of the will of the shareholders, associates or management and control bodies, challenges generated by external factors, at macroeconomic level, such as economic instability or existing political conflicts at international level, but also by microeconomic factors, such as the problem of maintaining a positive cash flow, due to delays regarding collections from clients. In addition to the influence of these extrinsic factors, there are situations in which the illegal, culpable actions or inactions of the company administrators, exercised in bad faith, determine the non-payment of the outstanding payment obligations of the debtor and thus attract the state of insolvency of the company. The fiscal procedural legislation establishes a distinct procedure for the joint and several liability of the governing bodies of a taxpayer, a procedure that contains specific eligibility criteria, as well as different conditions for contesting the joint and several liability decisions. Not infrequently, the courts are charged with ruling on the legality and validity of the decisions to engage the joint and several liability of the administrators, in assessing the existence of the condition of bad faith, a necessary and mandatory condition for incurring joint and several liability in fiscal matters.
Keywords*: insolvency, joint liability, bad faith, corporate administrators.*

Legal nature of administrator's joint and several liability

In this study, we propose an analysis of the conditions under which the joint and several liability of the administrator can be drawn for the outstanding payment obligations of the debtor declared insolvent, under the conditions of the procedural-fiscal norm, related to the interpretations of the courts and the doctrinal arguments.

The administrators' liability is joint and several with the company, according to the provisions of art. 73 of Law no. 31/1990, which provides that administrators are responsible for: the reality of payments made by associates; the real existence of dividends paid; the existence of the registers required by law and their correct keeping; the exact fulfilment of the decisions of the general meetings and the strict fulfilment of the duties that the law and the constitutive act impose. From the perspective of this regulation, the liability of the administrator is civil, contractual and/or tortious and concerns the relations between the company and the administrator.

The legal framework for incurring the administrator's joint and several liability in fiscal matters is established by the provisions of art. 25 para. 2 of the Fiscal Procedure Code, which provides for a distinct, special procedure to attract the joint and several liability of the corporate administrator, establishing a passive solidarity between the company/principal debtor and the administrator, co-debtors of the fiscal body regarding the outstanding tax payment obligations of the company, respectively regarding the payment of fiscal claims. The liability of the administrator in fiscal matters has a subjective nature [1].

The choice of the joint and several liability procedure based on the provisions of the Fiscal Procedure Code does not exclude the right of the fiscal authorities to promote the action in the liability for the insolvency of the debtor company under the terms of Law no. 85/2014, which is a tortious commercial liability, for which the cumulative meeting of the conditions of tortious liability is necessary: the illegal act, the damage caused to the company, the causal relationship between the illegal act, damage and guilt [2].

One of the subjects of many controversies in judicial practice, has been the possibility of starting the procedure of individual liability of the administrator for the outstanding fiscal debts of the company, based on the provisions of art. 25-28 of Law no. 207/2015, simultaneously with the insolvency procedure of the main debtor according to Law no. 85/2014. This dispute was settled during the meeting of the presidents of the administrative and fiscal litigation sections of the High Court of Cassation and Justice and the appeal courts, that took place at the Craiova Court of Appeal, between October 17-18, 2019. On this occasion, unanimously the opinion expressed by the the National Institute of the Judiciary trainer was approved, according to which "The procedure for incurring joint and several liability regulated by the provisions of art. 25 and 26 of the new Fiscal Procedure Code can also be applied if the debtor is in the insolvency procedure regulated by Law no. 85/2006 on insolvency prevention and insolvency procedures"[3].

The joint liability established by fiscal provisions is a legal solidarity, the law being it`s source. Solidarity is established by fiscal administrative act issued by the competent fiscal body when the conditions provided by the law are met. At the same time, this form of liability is a passive solidarity, being an obligation with several debtors, with all the consequences arising from it and a conditional solidarity, it can only be established if

certain conditions provided by law for attracting responsibilities, subjective or objective, as the case may be [4].

Joint and several liability represents a guarantee of the tax debt collection, being both passive and conditional solidarity. Thus, in fiscal matters, the fiscal bodies can hold the administrators/associates liable only for the outstanding fiscal obligations (main and ancillary) of the company, with reference only to those related to the period for which the persons in question had the capacity that was the basis of the joint and several liability [5].

The liability of administrators for the insolvency of the company carrying out commercial activity is a tortious civil liability. For this liability to be drawn, it is necessary to fulfill the general conditions of the liability according to the provisions of art. 1357 Civil Code (illegal act, damage, causality and guilt), conditions that have some particularities in this situation. On the other hand, the liability established by the provisions of art. 25 para. 2 of the Fiscal Procedure Code is a tortious civil liability for one's own deed, a liability that has a subjective nature, the administrator being responsible only for his own actions or inactions, respectively for the way in which he exercised his duties as an administrator of the company[6] and only for his eventual share of the damage [7].

From the perspective of the causal relationship between the illegal act and the creation of the state of insolvency, from the analysis of of the Fiscal Procedure Code provisions, it appears that in order to attract the joint and several liability of the administrator, the causal link between the illegal acts and the state of insolvency of the company must be properly proven.

By the provisions of art. 25 para. 2 of the Fiscal Procedure Code, a legal presumption of liability is not established, but only the possibility of liability was provided, based on the evidence leading to the conclusion that, through the facts listed by law, the state of insolvency of the company was caused. In the case of the liability regulated by the fiscal rule, the administrator's guilt must exist and must be proven, together with the fulfillment of the other conditions required for incurring tortious civil liability, the administrator's fault not being presumed under art. 1082 Civil Code, applicable only to contractual liability [8].

The conditions of the administrator's joint liability for the cases provided for by art. 25 para. 2 of the Fiscal Procedure Code

Among the five cases provided by law no. 207/2015 of joint and several liability for the outstanding payment obligations of the debtor declared insolvent, four have as the subject of the obligation report the person of the corporate administrator. The liability of administrators/associates does not automatically become operative in all cases when the social liability or part of it cannot be covered, but only when it is proven that the administrators/associates caused the state of insolvency of the company by culpably committing any of the express acts and limitatively listed in art 25 paragraph (2) letter a)-e), and the damage resulted directly from the culpable act/s committed, respectively the commission of these acts caused the legal person to become insolvent[9] . The simple existence of managerial deficiencies in the administration of the company, without the fiscal administration body having proven a behavior likely to frustrate the legal measures to recover accumulated debts, cannot justify the joint liability of the administrator [10].

Thus, a first case of joint and several liability of the corporate administrators for the outstanding payment obligations of the debtor declared insolvent, according to art. 25 paragraph 2 (b) of Law no. 207/2015, is the one in which *they caused the insolvency of the debtor legal entity by alienating or hiding, in bad faith, in any form, the assets of the debtor*.

Therefore, for the incidence of this case of attracting the liability of the administrator, it is necessary the proven existence of acts or facts of alienation or concealment of the debtor's assets, carried out in bad faith by the administrator.

Order no. 431/2022 of the Ministry of Development, Public Works and Administration for the approval of the Joint Liability Hiring Procedure regulated by the provisions of art. 25 and 26 of Law no. 207/2015 regarding the Fiscal Procedure Code, published in the Official Gazette no. 342 of April 7, 2022, gives only by way of example, cases of bad faith concealment of the debtor's assets: changing the location of the movable asset so that it can no longer be found both in fact and in law; hiding movable and/or immovable property in any form, both in fact and in law, in order to no longer be the subject of enforcement proceedings, or not declaring movable and/or immovable property, especially the debtor's movable property, at the request of the body local fiscal.

The acts of alienation or concealment of the debtor's assets must lead directly to the provocation of the state of insolvency, which, according to art. 265 paragraph 1 of the Fiscal Procedure Code, is that situation of the debtor *whose income and/or traceable assets have a lower value than the fiscal payment obligations or who has no traceable income or assets. In this sense, the fiscal body communicates the insolvency report to the debtor.*

The provisions of the law require that the state of insolvency of the debtor company be ascertained under the conditions and in compliance with the Fiscal Procedure Code, prior to establishing the liability of the corporate administrator[11]. The decision declaring the state of insolvency, uncontested under the law, are consolidated under all the factual and legal aspects retained in its content.

In court`s practice[12] it was held that the simple alienation of some assets from the debtor's property cannot lead directly to the presumption that these acts caused the state of insolvency of the company, it being necessary to prove the administrator's bad faith and the connection of causality between the acts of alienation and the state of insolvency of the company.

Another case of attracting the joint liability of administrators regulated by art. 25 para. 2 (c) of the procedural-fiscal law is the one in which, *during the exercise of the mandate, in bad faith, they did not fulfill their legal obligation to ask the competent court to open the insolvency procedure, for the fiscal obligations related to the respective period and remained unpaid on the date of the declaration state of insolvency*.

In the practice of the courts[13], it was held that the simple failure to formulate the request to open the insolvency procedure cannot lead to the conclusion of bad faith on the part of the administrator, in order to have caused the insolvency of the company and the evasion of the payment of tax obligations, the commission of these facts not presuming bad faith. In addition, a possible request for the staggering of tax receivables by the company cannot be requested in the event of the opening of the insolvency procedure contrary to the debtor company.

The most common basis in practice for the liability of the administrator is the one indicated in art. 25 para. 2 (d) of the Fiscal Procedure Code according to which, for the outstanding payment obligations of the debtor declared insolvent, *the administrators who,*

in bad faith, determined the non-declaration and/or non-payment of the tax obligations when due are jointly and severally liable with him.

The legal text requires bad faith as a form of guilt, regarding the statutory administrators who determined the non-declaration and/or non-payment of tax obligations when due, in their activity of administration of the legal entity.

The proof of bad faith requires the presentation of the reasons and the evidence on which the fiscal body bases its opinion regarding the fulfillment of the conditions for incurring liability, considering that this cannot imply a simple lack of diligence, respectively a volitional attitude of the guilty person consisting in the representation of the negative result and the pursuit of this finality through his actions and inactions.

The administrator's bad faith cannot be presumed in relation to the fact that the company has debts due to the state budget, since, on the one hand, bad faith is not presumed, but must be proven, and on the other hand, the provisions of art. 25 para. 2 (d) of the Fiscal Procedure Code cumulatively establish two conditions for the engagement of the administrator's joint and several liability, respectively the material act described by the law and, distinctly, the condition of the administrator's bad faith. The persistence of fiscal payment obligations is not sufficient for the engagement of liability, the fiscal body having the task of precisely identifying the non-compliant works attributable to the administrator and proving the concrete way, the fraudulent act through which he caused the state of insolvency of the company [14].

Therefore, only in the situation in which the bad faith of the administrator is legally, argued and substantiated, it is up to him to prove his good faith, respectively to justify the reason why he did not pay the company's obligations when due. The passivity, disinterest or non-manifestation of a pro-active attitude of the corporate administrator does not equate to bad faith, in the sense of the procedural-fiscal norm[15], even if, in relation to the provisions of art. 73 of Law no. 31/1990, the company administrator is obliged to strictly fulfill the duties that the law and the constitutive act impose on him, and according to art. 20 para. (1) from Law no. 207/ 2015, he also has the obligation to pay taxes, local taxes and contributions, non-payment of the company's fiscal obligations[16]. Bad faith is a *sine qua non* condition for incurring joint and several liability [17].

A last case of joint and several liability of corporate administrators regulated by the provisions of art. 25 para. 2 of the Fiscal procedure code is the one from letter e, according to which, *the administrators are jointly and severally liable with the debtor declared insolvent who, in bad faith, determined the restitution or reimbursement of sums of money from the general consolidated budget without them being due to the debtor.*

In the practice of the courts[18] it was held that, *if the tax authorities establish the fictitiousness of some commercial relations - allegedly existing between the debtor company and a third company - following the finding of improper VAT reimbursement for economic operations carried out by the debtor company, against the unreal nature of them, the direct intention in the declaration of these reports and subsequently in the coordination of the illegal value added tax deduction operations is obvious. In these situations, the condition of bad faith of the administrator results from the very materiality of the fact of carrying out fictitious commercial operations.*

Conclusions

The provisions of art. 25 para.2 of the Fiscal procedure code does not establish a legal presumption of liability, but only provides for the possibility of holding the corporate administrator liable, regulating a procedure suitable to guarantee the realization of the tax claim. However, the tax authorities have the obligation to overturn the principle of good faith and to demonstrate, with sustainable arguments, the incidence of one or more of the reasons provided by the text of art. 25 para.2 of the Fiscal procedure code for the joint liability of company administrators. The simple affirmation of causing the insolvency of the debtor, through the alienation of some of its assets, cannot constitute grounds for the joint and several liability of the administrators. It is necessary to establish the destination or the way in which the sums of money obtained from the sale of the company's assets were spent. Also, the simple statement of the non-fulfilment of the administrator's legal obligation to ask the competent court to open the insolvency procedure cannot justify incurring joint and several liability, given that even the tax authorities have the possibility to request the opening of the insolvency procedure contrary to the debtor, according to the provisions of art. 3 point 20 of Law no. 85/2014, as a creditor entitled to request the opening of insolvency proceedings, holder of a certain, liquid and enforceable claim older than 60 days on the debtor's patrimony. Although indicated as a *sine qua non* condition

in the regulation of situations in which the joint and several liability of administrators can be drawn, the notion of "bad faith" is not rigorously defined by the legislator within the procedural-fiscal law, being interpreted *per a contrario* with that of good faith. This is where the fundamental role of judicial doctrine and practice comes in, to "fill" this legislative gap.

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