

Some considerations on excise duties and the maximum sale price of tobacco products¹

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Lately, several controls performed throughout the country by the local Excise and Customs Operations Divisions of the Ministry of Finance (“Divisions”) have resulted in fines not at all negligible for tobacco products producers, importers and distributors, whether we are talking about wholesalers (which were often the very producers or importers of tobacco products, owners of cigarette brands) or retailers.

One of the main reasons for applying these sanctions (fines) by the Divisions was the so-called violation of the maximum sale price declared for cigarette trade by the producers/ importers or by their distributors.

Even if, in most of the cases, the judicial courts censored these not-at-all-modest pecuniary sanctions, by annulling them for being applied in breach of (or in abusive exercise of) excise duty regulations, this legal issue raises a series of discussions and we believe that understanding it is very important for all players in this field.

The main reason for applying some wrong sanctions by the control bodies, and for censoring these sanctions by the courts also, was the wrong understanding and application of the legal provisions governing the excise duty for tobacco products (more specifically, for cigarettes) as well as of the notion “maximum sale price” related to cigarettes, by reference to the activity of cigarettes producers/importers/distributors.

Preliminary notes. Retail trade (en-detail) and wholesale trade (wholesale).

The retail trade and the wholesale trade are defined by the updated Law no. 296/2004 on the Consumption Code, which clearly establishes the difference between retail and wholesale trade.

According to the Annex to this Law:

- *“Wholesale/en-gross trade – activity performed by the economic operators which buy products in large quantities for resale in smaller quantities to other retailers or professional and collective users. (item 10);*
- *“Retail/en detail trade – activity performed by economic operators which usually sell products directly to consumers, for their personal use”.*

¹ This article does not represent, and cannot be considered as, a legal opinion rendered within a client-attorney relationship. As well, this article took into consideration the contents of the legislation dealt with, as it was in force at the date the article was prepared and published within *Consulting Review Magazine* (September 2009 issue) and therefore some of the information contained herein might not be up to date. For updated, more detailed information and/or attorney-client assistance, please contact us.

The distinction between the wholesale trade and the retail trade is important for understanding the relevance and applicability of legal provisions in the matter of excise and maximum sale for tobacco products. In this regard, we stress that, unlike distributors, which mainly make retail trade with tobacco products (cigarettes) – even if not exclusively, the producers/ importers are exclusively dealing with wholesale trade and never sell directly to consumers.

In the following paragraphs our analysis will exclusively focus on the legal applicable regime for producers/importers of tobacco products.

Presentation of the legal regime of excise duties applicable to tobacco products.

Tobacco products are subject to payment of excise taxes under the Fiscal Code (art.162, letter f), and art. 174, par. 1) which define the “manufactured tobacco” as: cigarettes, cigars, cigarillos and tobacco for smoking.

Further on, according to art. 164 of the Fiscal Code, tobacco products (cigarettes) are subject to excise duty at the moment of their manufacturing on the community territory, or at the moment of their importation in this territory (in case they are purchased from a factory located in a non EU state).

As a very important aspect, it should be noted that according to art.165 of the Fiscal Code the excise duty is due upon *release for consumption of the excisable tobacco products*, and the release for consumption of tobacco products (cigarettes) is represented, for cigarettes distributed by the producers/importers, either by:

- The date of their production in a factory in Romania (according to art.166 par. 1, letter b) of the Fiscal Code), or by
- The take-over of these products from a factory (seen as a fiscal warehouse) located in another member state of the EU (according to art. 166 par. 1 letter f) from the Fiscal Code).

Therefore, the due date of the excise is represented by the moment in time when this special tax becomes due to the state budget; in other words, the excise is due when it is established, based on the above criteria, the existence and amount of this tax in the patrimony of the entity which by law must pay it.

The due date of the excise must not be confused with the payment date of same as, according to art. 195 of the Fiscal Code, the deadline for paying the excise duty is until the 25th o the month following the month in which the excise becomes due.

The calculation of excise duties owed for tobacco products.

Regarding the calculation of specific excise duties on tobacco products, the Fiscal Code provides in art. 177, par. 7 that it is forbidden to sell cigarettes to any person, to a price that exceeds the *maximum declared retail price*.

What does this mean and why the ban on selling cigarettes at a price that exceeds the maximum declared retail price is contained in a legal provision referring to "excise calculation", located under Title VII – Excises, of the Fiscal Code? In other words, what is the connection between the amount of excise owed to the Romanian state by producers/importers or distributors and this legal provision?

Some brief observations are required in order to elucidate the correct answer to this question. Article 177 par. 1 of the Fiscal Code establishes a way of calculating the excise based on the summing up of the “specific” excise and the “*ad valorem* excise” but not less than 91% of the excise related to cigarettes of the best selling price category, which represents the minimum excise. This minimum excise is established quarterly by Order of the Minister of Finance, according to art.177 par. 1 of the Fiscal Code.

Therefore, the minimum excise rate established by the Government applies to the maximum retail price of cigarettes (value criterion), a circumstance which determines the importance of understanding this notion outright – thus wrongly interpreted and applied by the controlling bodies.

The concept of maximum retail price

In understanding and making a correct interpretation of the notion "maximum retail price" we are going to make reference to the legal texts that directly relate to this issue, and mainly to Article 177 of the Fiscal Code.

According to paragraph 4 of Article 177, the maximum retail price is the price at which the product is sold to persons *other than traders* and includes all taxes and fees. Further on, paragraph 5 of the same Article 177 provides that the maximum retail price for any brand of cigarettes is set by the one who manufactures cigarettes in Romania or imports cigarettes, and is made public in accordance with the requirements of the implementation rules of this Article.

The following *important* issues result from the literal, grammatical and logical-legal analysis of these two paragraphs:

- The maximum retail price is never practiced by manufacturers / importers, which are exclusively wholesale distributors of tobacco products, on the economic chain from producer to final consumer.
- Producers / consumers never sell "*to other than traders*", in other words they never sell *en-detail*, to the end users, making a wholesale only.
- Only buyers who take cigarettes from manufacturers / importers, and who are always legal (traders) can sell (or practice) to the maximum price of sale to consumers – this price is the price above which no trader who has previously purchased products from the producer can't pass when it sells cigarettes to the consumers (be it supermarkets, hypermarkets, kiosks or any other specialized stores that sell cigarettes to end users).
- The producers of cigarettes and the importers of such (for the case the cigarettes are purchased from factories outside the country) are those who determine the maximum retail sale price, after a predetermined procedure prescribed by law and not arbitrarily decided on it.
- In the event of purchasing wholesale cigarettes from abroad, the importer is the only one that establishes and declares the maximum retail price, but never uses it towards its clients.

That is, from the corroboration of paragraph 7 with paragraph 5 of Article 177, it results that it is forbidden to sell cigarettes to any person, at a price exceeding the maximum declared retail price, and the word "declared" shall be interpreted as referring to the maximum retail price "made public in accordance with the requirements of implementing rules" - in conformity with Article 177 par. 5 of the Fiscal Code.

In conclusion, the notion of "declared" price should be understood as the price "made public" - by strictly regulated procedure and detailed rules for the application of the Fiscal Code , respectively by the Government Decision no. 44/2004 on the Methodological Norms of the Fiscal Code.

The obligation to declare the maximum retail price

This obligation of public declaration of maximum retail price was set by the Fiscal Code and detailed through the Methodological Norms taking into account very specific purposes, namely:

- On one hand, to ensure, for the consumers of tobacco products, that all retailers who buy from producers/importers will not be ever able to sell those cigarettes at prices higher than the maximum allowed by the manufacturer/importer, declared to this end at the Ministry of Finance and made public by publication in 2 newspapers of wide circulation.
- On another hand, with the direct fiscal purpose of ensuring a maximum value subject to excise, whereas the excise is applied to the maximum declared retail price and not to those lower prices with which the importers buy from producers, neither to those prices relatively low both producers and importers sell to wholesale distributors.

It is therefore evident that the purpose of regulation in this regard is to maximize the value of the excise tax base, in order to bring more large sums to the state budget.

However, it should be noted the very important aspect that the producer/importer is sovereign in determining the maximum retail prices, with the sole obligation to make them public by registering a specific declaration with the Ministry of Finance and to publish this price list in two newspapers of wide circulation.

Finally, once this obligation is fulfilled, the maximum retail price declared by the producer/importer is the only price to which it will be reported the legality and accuracy of the prices charged by *distributors (retailers)* in the reference period for which the maximum price was set.