

## cover article

### When insolvency law prevails over tax regulations

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#### The matter before the Court

The High Court of Cassation and Justice has received a referral for a preliminary ruling in order to resolve the following matter of law: "*The provisions of [art. 147](#)<sup>3</sup> of the Tax Code may be interpreted as meaning that, although it was established by a final decision that a tax receivable cannot be claimed in the insolvency procedure governed by Law [no. 85/2006](#) as a result of its late submission, the same receivable can be claimed by the fiscal body in the procedure for solving the VAT return application made by the debtor undergoing insolvency proceedings?*".

In essence, the matter of law is the priority of application between two special rules, on the one hand, the provisions of [art. 147](#) of the Law no. 571/2003<sup>1</sup> regarding the Tax Code, and, on the other hand, the provisions of art. 64 par. (1) and [art. 76](#) of Insolvency Law no. 85/2006<sup>2</sup>, in the recovery of a tax receivable against a debtor undergoing insolvency proceedings.

#### Tax regulations. Insolvency proceeding regulations. Interpretation

The Tax Code is the central act in the field of tax law. Given this status, the Tax Code contains a norm by which places it at the top of the tax regulation hierarchy.

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<sup>1</sup> Both acts are repealed at present. The provisions of Law no. 571/2003 on the Tax Code, published in the Official Gazette of Romania, Part I, no. 927 of 23 December 2003, as subsequently amended and supplemented, are repealed by the provisions of Law no. 227/2015 regarding the Tax Code, published in the Official Gazette of Romania, Part I, no. 688 of 10 September 2015, an act that entered into force on 1 January 2016. However, the provisions of [art. 147](#)<sup>3</sup> of the Law no. 571/2003 regarding the Tax Code are applicable to the case, since the contested fiscal administrative deed is issued under this act, all the administrative acts issued under this law being governed by it.

<sup>2</sup> The provisions of Law no. 85/2006 on insolvency, published in the Official Gazette of Romania, Part I, no. 359 of 21 April 2006, as subsequently amended and supplemented, were repealed by Law [nr. 85/2014](#) on Insolvency and Insolvency Prevention, published in the Official Gazette of Romania, Part I, no. 466 of June 25, 2015, but the repealed law remains active, being applicable in insolvency proceedings opened up to the date of entry into force of Law no. 85/2014, according to the provisions of [art. 343](#) of the latter act, the provisions of the Law no. 85/2006 governing the insolvency proceedings of the claimant in the case.

Specifically, Article 1 paragraph (3) stipulates that "in tax matters, the provisions of the tax code prevail over any provisions of other acts, and in case of conflict between them, the provisions of the tax code shall apply".

The provisions of art. 147<sup>3</sup> of the Law no. 571/2003 regarding the Tax Code correspond to the provisions of art. 303 of Law no. 227/2015 on the Fiscal Code, but they are not the same, to note that the new text contains regulations regarding the refunds of VAT for the situation where the VAT payer of is under insolvency.

As regard the Insolvency Law no. 85/2006, also currently repealed, the corresponding provisions of Art. 64 par. (1) and art. 76 are found in the provisions of art. 102 par. (1) and Art. 114 of Law no. 85/2014, being similar.

By interpreting the relevant legal provisions of the Tax Code, the H.C.C.J. notes that, from the point of view of the tax law relationship, these provisions take precedence over any other provision in other laws, so that the tax authority, on the basis of those provisions, would be entitled, in the analysis of VAT return mentioning a negative difference, to take into account its own receivable against the claimant, a receivable arising from administrative acts that have not been canceled but which has not been capitalized in the insolvency proceedings, and is not entered in the receivables table as a result of late submission of the statement of claim.

At the same time, the Court notes that the opening of insolvency proceedings marks the beginning of a special tax period, a company once insolvent having the right to pay its previous debts only under certain conditions, respecting the order and procedures provided by the insolvency law. Recovery of claims against a company in insolvency is governed by the provisions of the special law governing a collective and arbitration procedure which seeks to recover the claims of all creditors, including the recovery of tax receivables.

To this end, the law maker establishes for the holder of a claim prior to the commencement of the procedure the obligation to file the statement of claim within the legal term, failure of which influence the realization of this claim in the sense that the creditor will no longer have the right to claim against the debtor or members or shareholders of the debtor legal entity outside the insolvency proceedings.

### **Arguments considered**

Both the insolvency law and the fiscal code contain provisions of a special nature, each with its own regulatory area.

However, since all the creditors, including the public creditors, participate within the collective, egalitarian and competitive procedure of insolvency, they must comply with the provisions of the insolvency law in the process of claiming their receivable, since only in this way can one observe the stated principles governing insolvency proceedings.

Under these circumstances, the H.C.C.J. considers that during this special insolvency proceedings, the contrary provisions of another law can no longer be applied to the recovery of claims.

The Fiscal Code regulates the general procedure for determining tax receivables and recovering tax receivables against debtors who are not in special situations, such as insolvency proceedings, and Law no. 85/2006 regulates the special procedure for the recovery of all receivables, including the tax receivables against a debtor in insolvency.

Regarding the manner of recovery of the claims against a debtor under insolvency proceedings, it is clear that the provisions of the insolvency law apply as a matter of priority, as the fiscal authority can no longer recover its own claim not registered in the passive debtors table within the collective procedure.

Thus, the provisions of art. 147<sup>3</sup> of the Tax Code were interpreted by H.C.C.J. in the sense that if it was found that a tax claim can no longer be exercised in the insolvency procedure regulated by Law no. 85/2006 due to its late submission, the same claim cannot be capitalized by the fiscal authority within the administrative proceeding for VAT return filed by the debtor in the insolvency proceedings.

In the recovery of debts, the provisions of Law no. 85/2006 are a special rule in relation to the provisions of the Tax Code, the provisions of the insolvency law having priority. A tax claim born before the opening of the insolvency proceedings cannot be used only separately by the tax authority in an administrative proceeding initiated by a company undergoing insolvency proceedings.

Therefore, H.C.C.J. states that between the Insolvency Law – the special, and the Tax Code – the general, the special one prevails, according to the principle *specialia generalibus derogant*.

### H.C.C.J.'s decision and its practical impact

Responding to the issue of law, the High Court of Cassation and Justice decided that "*the provisions of art. 147<sup>3</sup> of the Law no. 571/2003 regarding the Tax Code are to be interpreted as meaning that if it has been established by a final judgment that a tax claim cannot be capitalized in the insolvency procedure regulated by Law no. 85/2006, as a result of its late submission, the same claim can no longer be recovered by the tax authority in the procedure for resolving the VAT return application made by the debtor in the insolvency proceedings.*" Thus, with regard to the essence of the issue of law, the object of the complaint, the H.C.C.J. found that, *between the two special laws in competition, Law no. 85/2006 regulating the insolvency procedure has priority.*

In practice, the debtor in insolvency proceedings is entitled to reimbursement of VAT, the tax authority losing the right to demand partial or total compensation if its own receivable was not registered in the debtor's list under insolvency law.

Decision no. 28/2018 issued by the H.C.C.J. is mandatory for all Courts starting with 20.06.2018, the date of its publication in the Official Gazette of Romania, according to the provisions of Art. 521 par. (3) of the Code of Civil Procedure.