

LOCUS STANDI OF THE CIVIL CORPORATION TO APPEAL AN  
ORDER FOR ATTACHMENT OF BANK ACCOUNTS OR DISTRAINT  
OVER A RECEIVABLE FROM A THIRD PARTY FOR PUBLIC  
LIABILITIES OF ANY OF ITS PARTICIPANTS? LEGALITY OF THE  
SECURITY MEASURES.

**1. Application of Decision No. 788 of the Council of Ministers of the Republic of Bulgaria (Council of Ministers) dated 28.11.2014 on the payments by budget spending authorities under contracts /promulgated in State Gazette of the Republic of Bulgaria (SG), issue 100 of 05.12.2014, effective from 01.12.2014/**

The above decision of the Council of Ministers stipulates that payments by budget spending authorities under contracts with counterparties shall be executed only after:

1. The National Revenue Agency of the Republic of Bulgaria (NRA) has confirmed that:

1.1.) The person receiving the payment has no delayed tax liabilities, mandatory social security contributions and other public liabilities, collected by the National Revenue Agency;

1.2.) The person receiving the payment has overdue public liabilities and interim security measures under the Tax - Insurance Procedure Code of the Republic of Bulgaria (TIPC) are imposed; where the National Revenue Agency has imposed a distraint on the upcoming payment in order to secure the overdue public liabilities, upon receipt of an order for payment, the payment due by the

budget spending authority shall be made to the National Revenue Agency to the amount of the overdue public liabilities;

2. the Customs Agency of the Republic of Bulgaria (the Customs Agency) confirms that the person receiving the payment has no public duties collected by the customs, and in cases where the person has such obligations, interim security measures under the Tax Insurance Procedure Code of the Republic of Bulgaria were imposed for the public liabilities.

Decision No. 788 of the Council of Ministers dated 28.11.2014 shall apply only where:

-the amount due under the contract is equal to or exceeds 100 000 BGN, VAT included

or

- The amount due, subject to the payment, is less than 100,000 BGN, VAT included and represents monetary consideration under a contract the value of which is equal to or exceeds 100 000 BGN<sup>1</sup>.

Payments to contractors of the budget spending authorities shall be made only after confirmation by the NRA and the Customs Agency. Such confirmation is provided to the payer electronically by email within 7 days of the notification of the NRA and the Customs Agency. If there is no confirmation, the payer /budget spending authority/ shall notify the executive director of the NRA and/ or the director of the Customs Agency by requiring confirmation. If after such re-notification no confirmation is received from the National Revenue Agency and/ or the Customs Agency, the budget spending authority shall make the payment under the contract and shall notify the Minister of Finance of the Republic of Bulgaria.

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<sup>1</sup> The decision of the Council of Ministers does not apply to payments made by the National Assembly and the judicial authorities

In the practice there is an increasing number of cases of imposition of an interim security measure - attachment of a bank account or a receivable of a civil corporation from a third party for obligations of a participant /partner/ in the corporation, for taxes, mandatory social security contributions and other public liabilities collected by the National Revenue Agency.

## **2. Locus standi of the civil corporation to appeal the ruling for attachment of bank accounts or a receivable from a third party for the public liabilities of a participant in it. Legality of the interim measures.**

The NRA practice includes cases where appeals against orders for interim measures are left without consideration if the security is imposed on a bank account of a civil corporation or a receivable of a civil corporation from third parties in connection with public liabilities of its partners. With their decisions under Art. 197, para. 2 of the TIPC the territorial directors of the NRA consider that the civil corporation does not have active locus standi to challenge the decree imposing interim security measures- attachment of bank accounts or distraint of a receivable from a third party. The territorial Directors of the NRA assume that the appeal of the civil corporation against such decrees for interim security measures where these provide attachment of bank accounts or distraint of a receivable from a third party, are ineligible for consideration on the merits. According to the territorial directors of the NRA the civil corporation is not a debtor in the enforcement case, which is why **it is a third party. Only third parties under Art. 197, para. 5 of the TIPC falling within the exhaustively listed cases, have the right to attack the order for interim measures. These assumptions relate to the injunction by a bailiff only if it was imposed on property which on the day of the distraint or injunction was in possession of such persons.**

By its decree No. 733 of 24.03.2015, delivered on pr. adm. case 653 of 2015 the Administrative Court – Plovdiv, Bulgaria fully agrees with the

territorial director that third parties may appeal the rulings for interim security measures only in the cases under art. 197, para. 5 of the TIPC. In another decree dated 16.06.2015 on administrative case 652 of 2015 the Administrative Court - Plovdiv assumes that the civil corporation does not have any legal interest to appeal the order for interim measures imposing an attachment on its receivable from a third party. The Court considers that: "it cannot be assumed that the enforcement actions in question affect the rights or threaten the interests of the civil corporation, or create a risk of such an impact, as the property is held by the individuals participating in it and not by the civil corporation under the OCA<sup>2</sup>".

I believe that the formal application of Art. 197, para. 5 of the TIPC is improper and unlawful due to the following reasons:

The Civil Corporation under the Obligations and Contracts Act of the Republic of Bulgaria (OCA) is a party in the proceedings for interim relief, since its property is affected by the interim measure in the absence of tax liabilities of the corporation. **The decree imposing interim security measures is an administrative act, which directly affects the property rights and legitimate interests of the civil corporation.** The logic of art. 197, para. 1 of the TIPC is that rulings for interim security measures may be appealed by persons who are directly and personally affected by them. Besides the tax debtor, person whose property rights are directly and individually affected shall also be a party to the appeal proceedings on interim security measures. Any persons whose legal interests are affected by the measure are also legitimised to appeal the order for

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<sup>2</sup> Upon determination of the participation in the property of the civil corporation, the contents of the contract establishing such civil corporation shall be taken into consideration. If the contract states that the profits and losses will not be distributed according to the shares but according to the actual work, the share participation in the civil corporation would be variable (argument of art. 361 of the OCA). The funds are not distributed between the participants in the civil corporation before recapitulation of the business activities (argument of art. 359, para. 3 of the OCA).

interim relief imposing distraint on bank accounts or attachment of a receivable from a third party<sup>3</sup>.

According to Art. 9, para. 2, sentence one of the TIPC unincorporated associations are treated as legal entities in proceedings under the Code. Therefore, unincorporated associations for tax purposes are parties in the tax proceedings and have their own tax legal capacity.

**Parties to the interlocutory proceedings are both the tax debtor and any person whose rights have personally and directly been affected by the implementation.** Outside the appeal proceedings for interim measures, the legislation provides for a right of appeal by third parties.

I believe that the civil corporation is not a third party within the meaning of Art. 197, para. 5 of the TIPC, but a main party whose property rights are affected. It is a truism that **citizens and legal persons may appeal any administrative act affecting them, unless otherwise provided by law<sup>4</sup>. To deprive persons whose personal property rights are directly affected by the administrative act, without having a provision excluding the administrative or judicial review, means that the administration would abuse their individual rights.**

Until the formation of the tax financial result under art. 22 of the Corporate Income Tax Act of the Republic of Bulgaria (CITA), the participants in the civil corporation have no claims against the latter. The reason for the above is that the

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<sup>3</sup> Point 6 of Interpretative decision 6/2013 of 14.03.2014 of the SCC. The interpretative decision in question is applicable in compliance with par. 3 of the supplementary regulations of the TIPC. Para. 2 of the TIPC provides that the provisions of the Administrative Procedure Code and the Civil Procedure Code shall apply to all matters which are not settled therein.

<sup>4</sup> Art. 120, para. 2 of the Constitution of the Republic of Bulgaria

participants in the civil corporation are entitled to a share of the profits and not a share of the income<sup>5</sup>.

According to Art. 9, para. 2, sentence one of the TIPC unincorporated associations are treated as legal entities. Evidenced by the second sentence of the same article, the enforcement is carried out against the persons participating in the unincorporated entity according to their share participation. The Code envisages the actual participation in the conduct of the activity and not the formally agreed one upon the establishment of the civil corporation. This is confirmed by the provision of Art. 361 of the OCA.

According to Art. 361 of the OCA, unless otherwise agreed upon the establishment of the association, the profits and losses are distributed among the partners in proportion to their share. This rule is discretionary. If the contract of the civil corporation provides that the profits, losses and sanctions of the association (civil corporation) will be distributed among the partners according to the specific contribution of each of them, the interim security measure may be imposed only to the actual share. The amount of the actual participation in the property of the civil corporation may differ from the initial participation rate.

Although the property of the civil corporation is jointly owned by the participants, prior to its termination or exit from the entity the partner may not claim his share. The property of the entity includes the rights, obligations and factual relations which have a monetary value. The share of the partner in the civil corporation represents the difference between the rights and liabilities. I.e. **the share of the partner in the property is formed after the recapitulation of the activity - formation of a positive financial result /profit/ or upon leaving the entity or termination thereof.**

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<sup>5</sup> Argument of art. 361 of the OCA. Therefore, decree on adm. Case 652 of 15 and adm.case 653 of 15 of the Administrative Court - Plovdiv are wrong, since the interim security measures are imposed on the income (receivable from a third party) and not on the property of the civil corporation.

**Cash in bank accounts and receivables of a civil corporation from third parties may not be distributed according to the shareholding, since these funds are used for business activities and the share participation may not be applied to them.**

Practically, when proceeding to attachment of cash in a bank account or receivables from a third party "lion taxation" would be achieved, leading to the imposition and execution only on the revenue, without taking into account the costs related to the common activities. Therefore it is unacceptable to impose attachments on bank accounts or receivables from third parties of the civil corporation, prior to the formation of the financial result /profit/, before the participant has left the entity or prior to its termination. Art. 359, para. 3 of the OCA explicitly provides for the initial moment of chargeability of the share in the common property.

**Therefore, the receivable /dividend/ of a participant in the civil corporation, according to his share, would arise if the following conditions are fulfilled:**

- 1. tax financial result - profit;**
- 2. annual tax return submitted for the civil corporation;**
- 3. decision of the General Assembly of the Civil Corporation for distribution of dividends in favour of the participants<sup>6</sup>**

The right to a share of the property of the partner arises if any of the prerequisites of art. 359, para. 3 of the OCA are fulfilled.

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<sup>6</sup> "The allocation of dividends falls within the competence of the General Meeting of the Partners and arises under certain conditions - adoption of the annual financial statements and balance sheet, financial resources for payment, as well as the intention of the partners. Hence, together with the annual financial statements prepared, Minutes of the General Meeting shall be submitted, certifying that the annual financial statements are adopted and there is a decision for allocation of the profit and its payment." **CLARIFICATION by the NRA No. 96-00-455 from 20.10.2011 on the tax treatment of certain transactions of a company established under the OCA./**

**The lack of fulfillment of any of the prerequisites for distribution of dividends and/ or share of the property leads to the lack of a receivable of the participant in the civil corporation due and payable by the latter. Without fulfilling the prerequisites mentioned above, securing of an alleged dividend of some of the participants, including a share in the common property, is unacceptable.**

Practically, the imposition of an attachment by the bailiff on a bank account or receivable of the civil corporation from a third party is unacceptable and unlawful, since there is no due and payable receivable of the participant in the civil corporation.

By Decision No. 5367 of 29.07.2015 on administrative case 2872 from 2015, the Sofia Administrative Court assumes that a civil corporation, subjected to decree for a security measures which imposes a distraint on bank accounts, is legitimized to challenge such measure. The court accepted that money is a specific kind of "chattels" and based on the possession we may not reach the conclusion that Article. 197, para. 5 of the TIPC excludes the imposition of security measures on monetary claims from the scope of appealing.

"The allocation of monies paid to perform the common activities or acquired as a result of their implementation may be carried out through settlement of the property relations between the partners after the termination of the civil corporation pursuant to Art. 359, para. 3 of the OCA and following a thorough recap of the profits and losses resulting from the joint venture /78 decision of 17.06.2009 on com.case 756 of 2008 of the SCC, decision 2906 of 20.12.2005 on civil case 2188/2004 of the Supreme Court of Cassation of the Republic of Bulgaria (SCC), decision of 34 of 06.03.2013 under com.case 94/2012 of the SCC<sup>7</sup>/ ". **Moreover, the court correctly ascertains that the participation of a partner may not be equated to a percent of the financial**

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<sup>7</sup> Court decision No. 5367 from 29.07.2015 on adm.case 2872 from 2015, Administrative Court - Sofia

**income of the civil corporation. Cash proceeds are common to all partners and not subject to percentage allocation according to shareholding, since they are designated for the business of the entity.** Therefore I believe that the attachment of bank accounts or distraint of a receivable from a third party due to public liabilities of a participant represent inadmissible security measures.

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