



OVERRIDING OF A COMMERCIAL AND A FISCAL DEBT : COMMENTING A JUDICIAL DECISION

A recent judgement of an Algerian first instance court confirmed the principle of the binding force of agreements, in connection with the tax debt of the administration.

A wholesale trading company provided drinks to an individual retail entrepreneur.

One of the usual business practices in Algeria is that the customer sends a purchase order to his supplier of goods or service provider, and then, settles, in principle upon delivery, the agreed price.

An arising dispute between the two parties comes, they end up to conclude a transactional agreement, containing mutual commitments, and, in particular an engagement of the supplier towards his client to handle half of the taxes due by this latter for the related financial year.

The agreement provided symmetrically for the customer to acquire a (supposed) new utility vehicle leased by the supplier.

Believing that the transaction was not respected, notably because of a challenge by the customer on the conformity of the sold vehicle, who pretended that it was in fact second-handed and not brand new, the supplier launched a trial against him.

The respondent, the client, invoked before the judge, among other arguments, a tax adjustment that he would have suffered from, because of, according to him, invoices that were not applicable, that were not corresponding to operations that he would have effectively asked for. Invoices he gave the qualification of "imaginary".

In Algeria, a small trader often keeps a cash accounting system, which is the simplest method, consisting of recording the receipts and disbursements. Money inflows on the one hand, and outflows on the other hand, at their date, mathematically.

The Ministerial Ruling dated 26.07.2008 calls it a « simplified financial accountability » and sets up the criteria that enables holding such method (turnover, number of employees, type of activity). If the limits are exceeded, the merchant should hold an « accruals accounting system », which is the principle according to the IAS – IFRS accounting standards incidentally.

The accrual accounting uses legal and economic concepts, and takes into account the date of acquisition of a debt (positive) (i) and the date of birth of a debt (negative) (ii), which is rather the privilege of businesses of a certain size in practice.

The client was subject to the tax regime of the real income, consisting in taxing the tax benefit, i.e the realized revenue, after deducing the expenses incurred for the realization of such profit, according to the progressive scale of the Tax on the Global Income (IRG).

We open a small bracket to say that, fiscally speaking, it should be noted that the expenses that are not directly related to the interest of the business* are rejected by the tax administration and should be reintegrated in the taxable profit.

It is obvious for a lawyer and a fiscal advisor that a simple invoice is not sufficient in itself to establish the reality of a concrete commercial transaction. The invoice should at least be approved by the customer or be preceded by a purchase order from the customer, schematically an "offer" and "acceptance" in terms of contract law.

Thus, Article 30 of the Algerian commercial code, dealing with the commercial means of proof, mentions among those : « an approved invoice », meaning clearly by the contracting partner.

The stake is of course the proof of these accounting movements, and the role of the writing is essential.

So, in order to relate these principles with the dispute case, what are the chances of success of the counter-claim of the customer to ask for the performance of the commitment of his opponent (the provider) to pay a part of his taxes ?

A contractual engagement is, in principle, valid if it has been done in writing (in the broadest sense of the word), even if the writing is required only as a proof of the obligation, and not for its validity (*ad probationem*).

Such an obligation, although it seems rather unusual, should be recognized and enforced by a court, if the debtor cannot prove that he has been released from* (Article 323 of the Algerian civil code, about the proof of the civil obligation).

It was indeed what the tribunal has sentenced, admitting the respondent's adverse claim, by deducing the amount of the engagement to pay half of those taxes from the sum it has awarded to the supplier, considering finally that the wrongs were shared.

So, finally and in short, two debts have the same party, the "taxpayer-client"; the tax debt (positive) of the administration towards the taxpayer (i), and the commitment of the supplier to refund half of that taxes due by his client (ii).

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