

Consequences of dependent or independent activities performed in Romania

The human factor plays a key role in the success of a business. In this respect, a company repeatedly enters into contractual relationships together with qualified individuals trained to provide the necessary services for the fulfillment of its day-to-day activity.

From the beginning, it is very important to determine, the exact nature of the contractual relationship between the company and the individuals who will provide services. According to this, the work performed by the contractor may be fiscally qualified as being a dependent or an independent activity, with different economic consequences.

Thus, if the activity qualifies as a dependent one, the company will incur additional costs to the situation in which the work performed was done as an independent activity.

Dependent activity, as defined by tax rules, requires an employment relationship by concluding an Individual Labor Agreement. In this case, the employing company must withhold income taxes. Besides income taxes, the company will also bear the costs of social security and healthcare taxes for their employees, professional insurance, annual leave allowance or for temporary work disability and other similar expenses. Broadly, if a contracted activity is qualified as a dependent one, the company may incur up to 25-30% higher costs than for an independent activity where the company basically does not bear such additional costs.

Therefore, it is obvious why companies may be inclined to conclude Services Agreements with third party individuals conducting independent activities.

The criteria that define the existence of an independent activity are basically the following:

- the free choice of the activity, working hours and place of business;
- the risk that the entrepreneur assumes;
- the possibility to provide services for more than one client and not only directly, but also through employees hired by the entrepreneur himself.

When entering into a contract, the will of the parties on qualifying the object of the agreement as an independent activity creates a presumption in this respect, but the tax rules provide legal mechanisms for tax authorities to reconsider the payments made to the contractor as salary incomes, with the consequences that the employer should bear the payment of all income taxes, wages and other costs according to the tax rules applicable to dependent activities and all related incomes.

In this respect, there are many factors that may cause a legal qualification of an activity as a dependent or independent one, but it is important to note that, taken individually, none of these factors can determine the classification in one of the two categories. These indicators should be interpreted interdependently by the overall analysis of the entire legal relationship between the parties.

One of the main factors that can lead to qualification of an activity as a dependent one is the subordination of the beneficiary of the income to the payer of the income and its leading body, respectively.

Subordination implies that the income beneficiary should strictly observe the working conditions imposed by the payer, such as his tasks and the way to fulfill them, the location where the activity takes place, his working hours.

Generally, an independent contractor will determine in which manner his own work shall be performed and will use its own methodology to fulfill the contract. If the way to fulfill the tasks is drawn by the company, it is likely that the work will be considered as a dependent activity.

Also, while an employer establishes to the employee a fixed number of working hours, from which he cannot deviate without the consent of the employer, an independent contractor is free to set his own working program in order to perform certain tasks incumbent under contract.

Moreover, in case of a dependent activity, the place of work is provided by the employer, while an independent contractor has the freedom of choice with regard to the place where to fulfill the obligations outlined in the contract.

Another important aspect is whether the means and tools the individual uses in order to perform the contracted activity are his own or provided by the company. Thus, if they are provided by the payer of the income/company, this may be an indication of a dependent activity. If, however, the income beneficiary uses his own working tools, special equipment or protective work, he can be classified as an independent contractor.

Moreover, if performing dependent activity, the employee does not bear any financial risk, this being the sole responsibility of the employer; in case of performing an independent activity, the contractor is an entrepreneur who always bears the financial risk of non-fulfillment or improper fulfillment of any obligation incurred by contract.

Furthermore, an employee's activity consists only in his physical performance or intellectual capacity, while an independent contractor usually brings equity contribution to the contracted activity.

To conclude, when a company enters into contractual relationships with individuals that will provide their services, it is essential to be observed the criteria outlined in tax regulations by drafting specific contractual clauses in order to offer transparency in regard to the nature of the legal relationship established between the parties.

At "Dragomir & Asociații", we have experience in drafting both Individual Labor Agreements, for dependent activity, as well as Services Agreements, in case of independent activity needed. Also, we can advise on current performing agreements of your company to make sure you are fully protected in all legal aspects.

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