

Chapter 20

Leasing Operations

1. General

Leasing is a financing means, which began enjoying a comprehensive regulation in Romania in 1997. Since then, Romanian leasing market was subject to a strong development. The number of leasing companies has grown, the level of leasing operations has also grown, as a result of the fiscal advantages provided by this financing system. Consequently, the Romanian leasing regulations have been completed by relevant enactments regarding cross border leasing and real estate leasing operations.

2. Main regulations

- Government Ordinance No. 51/1997 regarding leasing operations and leasing companies, republished and amended to date (“GO No. 51/1997”);
- Law No. 571/2003 regarding the Fiscal Code (“Fiscal Code”);
- Methodological norms for application of Law No. 571/2003 regarding Fiscal Code approved by GD No. 44/2004, amended to date (“Norms of Fiscal Code”);
- Law No. 93/2009 regarding non-banking financial institutions (Law No. 93/2009).

3. Definition

According to GO No. 51/1997, leasing operations are operations whereby one party, called lessor / financing party, in its capacity of owner, transfers, for a determined period of time, the right of use over an asset to another party, called lessee, against a periodic payment, called leasing installment. At the end of the leasing period, the lessor / financing party undertakes to comply with the lessee’s option right of purchasing the asset, to extend the leasing contract or to cease the contractual relations based on the lessee’s request. The lessee has the option of buying the asset before the end of the leasing period, if the parties so agree and if the lessee pays / settles all its obligations undertaken under the contract.

4. Types of leasing operations

GO No. 51/1997 divides leasing operations into two categories:

- (i) financial leasing;
- (ii) operational leasing.

4.1. Financial leasing

The financial leasing agreement is any leasing agreement meeting at least one of the following conditions:

- (i) the risks and benefits of the ownership right over the asset under lease are transferred to the lessee as of the date when the leasing agreement is entered into;
- (ii) the leasing agreement expressly provides that the ownership right over the asset under lease is transferred to the lessee upon the leasing agreement cessation;
- (iii) the lessee has the option to purchase the asset upon the expiry of the agreement, provided that the residual value reported to the leasing contract value is less or equal with the value computed as: (i) the difference between the maximum standard life of the leased asset and the duration of the lease agreement reported to (ii) the maximum standard life of the leased asset;
- (iv) the period of the lease exceeds 80% of the maximum standard life of the leased asset; the period of the lease includes any period in which the lease agreement may be extended;
- (v) the total amount of the lease installments, less the ancillary expenses, is equal or exceeds the entry value of the asset.

4.2. Operational leasing

The operational leasing agreement is any leasing agreement concluded between the lessor and the lessee which transfers to the lessee the risks and benefits of the ownership right over the leased asset, except for the risk of marketing the leased asset at its residual value and does not meet the conditions provided for the financial leasing agreement, as described at item 4.1 let. a)-e) above. Notwithstanding the above, the risk of marketing the leased asset at its residual value exists (i) in case the purchasing option is not exercised when the contract is entered into or (ii) in case the leasing contract expressly provides the restitution of the asset upon the expiry of the agreement.

4.3. Leasing agreement

The minimal elements that a leasing agreement must contain are the following:

- (i) the parties: lessor / financing party and lessee;
- (ii) the provision defining the contract as financial or operational leasing;
- (iii) designation of the asset under lease and identification features thereof;
- (iv) total value of the contract;
- (v) value of the leasing installments and their maturity;
- (vi) leasing period;

- (vii) asset insurance clause;
- (viii) the initial asset value (in case of financial leasing agreements);
- (ix) the residual asset value agreed by the parties, as the case may be (in case of financial leasing agreement);
- (x) the advance payment value (in case of financial leasing agreement);
- (xi) the leasing installment (in case of financial leasing agreement).

It is mandatory for all leasing agreements to be concluded for a minimum one-year period.

Leasing agreements, as well as all personal and real collaterals created to secure the obligations undertaken under leasing agreement, represent writs of enforcement.

In order to ensure priority of the owner-lessor over the financed movable assets, the leasing agreement must be registered with the Electronic Archives for Movable Security Interests. Leasing agreements over real estate must be registered with the Land Book having jurisdiction over the asset's location.

5. Non-banking financial institutions

Non-banking financial institutions are commercial entities having as activity object the performance of credit activities, as detailed in Law No. 93/2009, including financial leasing operations. Non-banking financial institutions may only perform operational leasing as ancillary activities provided by law, under certain conditions.

Non-banking financial institutions may be established and operate only as joint stock companies according to Law No. 31/1990, republished, Law No. 93/2009 and other relevant enactments. According to Law No. 93/2009 and also the updated GO No. 51/1997, the minimum registered share capital is established by Romanian National Bank rules and shall be no less than the equivalent in RON of EUR 200,000, subscribed and fully paid-in upon the company's establishment.

The Romanian National Bank is the only authority able to decide if the activity performed by a commercial entity is a credit activity under the Law No. 93/2009 provisions. Therefore, non-banking financial institutions may perform their specific activities, after the Romanian National Bank shall register the commercial company in the General Register.

The provisions of Law No. 93/2009 complete the relevant enactments regarding leasing operations.

6. Customs procedures

After Romania joined European Union, the favorable customs procedures provided by GO No. 51/1997 for the assets brought in Romania from countries outside the European Union or exported for the purpose of leasing operations, were repealed, either directly by the Romanian rules or indirectly by mandatory compliance of the Romanian legislation with the Community Customs Code.

The customs duties owed with respect to the leased assets imported and/or exported from countries outside the European Union are computed on the asset residual value, which may not be less than 20% of the asset entry value.

The sole purpose of the minimum residual value being legally regulated is to ensure customs duties payment to a reasonable extent. Yet, in practice, this provision was construed as meaning that a leasing contract may not provide for a residual value lower than 20% of the asset entry value. In our opinion, this approach lacks legal grounds and the parties are free to contractually establish a residual value of their choice, provided that custom duties are paid against the minimum 20% of the asset entry value.

7. Tax aspects

In Romania, incomes obtained by non-residents as interests related to leasing installments are subject to withholding tax.

According to the Fiscal Code provisions, both in relation to internal leasing operations and to leasing operations entered with foreign lessors, VAT becomes payable at each of the dates specified by the agreement for the installments payment. In case of advance payments, VAT becomes payable on the date the advance is received (for internal leasing operations) and on the payment date (for leasing operations entered with foreign lessors).

In case of financial leasing, according to the provisions of Fiscal Code, the lessee will be considered, for fiscal purposes, as the asset owner. Consequently, asset depreciation will be incumbent on the lessee, and all the expenses related to the depreciation and interest will be deductible with certain limitations.

The financial leasing installments are calculated as part of the asset entry value plus interest.

In case of operational leasing, for fiscal purposes, the lessor/financing party will be treated as owner. The lessor will incur the asset depreciation. In this case, the lessee will deduct the leasing installment with certain limitations.

The operational leasing installment is made-up of the depreciation value, calculated as per the regulations in force, plus a benefit established between the contracting parties. In the operational leasing contracts concluded with non-residents, the leasing installment is the benefit established by parties or the entire leasing installment, if the contract does not identify such benefit.

The identification of the benefit share in the leasing contract is recommendable from a taxation standpoint, so that withholding tax will not be levied on the entire installment.

Any expenses with the insurance of a leased asset will be tax deductible by the party bound by the contract to pay the insurance premiums.

According to the Fiscal Code provisions, non-banking financial institutions constitute, regularize and use the credit risk specific provisions, which are income tax deductible.

8. Currency system

Beginning with the year 2002, leasing operations concluded between residents and non-residents are no longer subject to the prior authorization of the National Bank of Romania. Nevertheless, medium and long term financial leasing operations must be reported to NBR for statistical purposes.