

Chapter 20

Leasing Operations

1. General

Leasing as a method of financing has been comprehensively regulated in Romania since 1997. Since then, the Romanian leasing market developed strongly. As a result of the fiscal advantages offered by this financing system, the number of leasing companies has grown, along with the level of leasing operations. Consequently, the Romanian leasing regulations were supplemented by relevant enactments concerned with 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. 227/2015 regarding the Fiscal Code, amended to date (“**Fiscal Code**”);
- Methodological norms for application of Law No. 227/2015 regarding the Fiscal Code approved by GD No. 1/2016, amended to date (“**Norms of Fiscal Code**”);
- Law No. 93/2009 regarding non-banking financial institutions, amended to date (“**Law No. 93/2009**”).

3. Definition

According to GO No. 51/1997, leasing operations are operations whereby one party, called the 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 the lessee, against a periodic payment, called a leasing installment. At the end of the leasing period, the lessor/financing party undertakes to comply with the lessee’s optional right of purchase of the asset, to extend the leasing contract without changing the leasing operation’s nature, or to cease contractual relations based on a request from the lessee. The lessee has the option to buy the asset before the end of the leasing period, but no sooner than 12 months, if the parties so agree and if the lessee pays/settles all its obligations existing 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

- (i) A financial leasing agreement is any leasing agreement which meets at least one of the following conditions:
- (iii) the risks and benefits of the rights of ownership over the asset under lease are transferred to the lessee, as of the date of entry into the leasing agreement;
- (iv) the leasing agreement expressly provides that the ownership rights over the asset under lease will be transferred to the lessee upon the cessation of the leasing agreement;
- (v) the lessee has the option to purchase the asset upon the expiry of the agreement and, moreover, the asset's residual value, expressed as a percentage, is less than or equal to the difference between the maximum standard life of the leased asset, and the duration of the lease agreement, reported to the maximum standard life of the leased asset, expressed as a percentage;
- (vi) the lease period exceeds 80% of the maximum standard life of the leased asset; the lease period includes any period in which the lease agreement may be extended;
- (vii) the total amount of the lease installments, less ancillary expenses, is equal to or exceeds the entry value of the asset.

4.2. Operational leasing

An operational leasing agreement is any leasing agreement concluded between a lessor and a lessee which transfers to the lessee the risks and benefits of the rights of ownership over the leased asset, except for the risk of marketing the leased asset at its residual value, and which does not meet the conditions provided for in the financial leasing agreement, as described at item 4.1 let. (ii)–(v) 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 for 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) a provision defining the contract as financial or operational leasing;
- (iii) designation of the asset under lease and identifying features thereof;
- (iv) value of the leasing installments and their maturity;
- (v) leasing period;
- (vi) asset insurance clause;
- (vii) the initial asset value (in the case of financial leasing agreements);

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

Leasing agreements, as well as all personal and real collateral created to secure the obligations undertaken under a 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 entities with as scope of activity the performance of credit activities, as detailed in Law No. 93/2009, including financial leasing operations. Non-banking financial institutions may be established and operate only as joint stock companies, except for non-banking financial institutions subject to registration in the Evidence Registry. Non-banking financial institutions are organized and operate under Law No. 31/1990, Law No. 93/2009 and other relevant enactments. According to Law No. 93/2009, the minimum registered share capital is established by the National Bank of Romania and is no less than the equivalent in RON of EUR 200,000 (or EUR 3,000,000 in the case of non-banking financial institutions granting mortgage loans), fully paid upon subscription.

The National Bank of Romania is the only authority competent to decide if the activity performed by an entity is a credit activity under Law No. 93/2009. Therefore, non-banking financial institutions may perform their specific activities after the National Bank of Romania registers the company in the latter's General Register.

The provisions of Law No. 93/2009 supplement specific enactments concerned with leasing operations.

6. Customs procedures

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

The customs duties owed with respect to leased assets imported and/or exported from countries outside the European Union are computed on the asset residual value, which must 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

Incomes obtained in Romania by non-residents as interest related to leasing installments are subject to withholding tax.

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

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

In the case of operational leasing, for fiscal purposes, the lessor/financing party is treated as the owner. The lessor incurs the cost of asset depreciation. In this case, the lessee deducts the leasing installment, with certain limitations.

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

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

Any expenses on the insurance of a leased asset are tax deductible by the party bound by the contract to pay the insurance premiums.

According to the Law No. 93/2009, non-banking financial institutions constitute, regularize and use the credit risk specific provisions, which are deductible for profit tax purposes according to the provisions of the Fiscal Code.

8. Currency system

Beginning in 2002, leasing operations concluded between residents and non-residents were 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 the NBR for statistical purposes.