Employers' Association of the Software and Services Industry

To,

THE MINISTRY OF PUBLIC FINANCE

Department for Legislation on Direct Taxes

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NATIONAL AGENCY FOR FISCAL ADMINISTRATION

Legal Department

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Considering the **outstanding implications of the fiscal regulations on the development of the business environment within the Romanian IT industry,** we submit to your attention a situation clarified for us through the legal norms in force (Law 571/2003 - Fiscal Code and the Methodological Application Norms), that could however raise some issues for the IT companies wishing to bring further value to the national management, in relation to the authorities.

The purpose of pointing out this issue is the need to provide ANAF's administrative divisions with a new assessment and thorough explanation, respecting the spirit and letter of the law, of the notion '**royalty**' **payable for a software program,** as well as of the legal and material exceptions to this notion, as it was envisaged to be regulated by Law 571/2003 - Fiscal Code and the Methodological Application Norms.

Thus, according to **article 7, point 28 of the Fiscal Code**, 'royalty' is any sum which must be paid in money or in kind for the use of, or the right to use.... [a] software".

Exceptions to this notion are:

- the ones mentioned in the same article i.e.: a) "remuneration in money or in kind paid for the acquisition of software that is intended exclusively to its operation, without modifications other than those necessary to install, implement, store or use such software" and b) "remuneration in money or in kind paid for the acquisition of the copyright of a computer program in its entirety"

- the ones resulted from the application of the principle of the interpretation *per a contrario* of the Methodological Norms quoted as follows: '*In the case of transfer of a partial right of a copyright for software, the sum which must be paid is a royalty if the receiver obtains the right to use that software, so that the lack of this right represents a copyright violation. Examples of such transactions are the transfers of the rights to reproduce and distribute to the public any software, as well as transfers of rights to modify any software and make it public. '* This interpretation determines the conclusion that **the payment of a right which does not require copyright is not a royalty (the essence of copyright is the right to multiply and modify the respective software;**

reselling exactly what you have bought, in the same number of units and without modifications does not require copyright).

Thus, the mere transfer of a 'license' from an importer to a final client, the 'importer' being basically just an intermediary, does not give rise to the obligation to pay a 'royalty', but simply to payment of a price to which no 'royalty tax' can be applied.

For a better analysis of the previously theorised situation, we present you the following case: A company (generically named "**company A**") with the profile specific to IT consultancy, buys a software product (a unique 'licence') from a partner who is not a resident in Romania, which is to be transferred directly to an end user, this destination being deliberately stipulated in contractual acquisition documents (the invoice issued by the non-resident and the drawn up contract thereof).

The company **A** has no other right except the one of further transmission of the license to the end user indicated directly by the producer, in whose name it bought it.

Company A does not use that software license for itself in any way, since it carries out no soft development operation which might determine the modification of the said software (not having access to the source code), and the acquisition of a new product.

Company A does not multiply (and consequently nor does it distribute copies of the aforementioned software).

The only operation which it performs is transferring the license further (license = right to use for a pre-established number of users, for example the license of use for one user, or the license of use for 300 users), whilst its contractual relationship with the end user lies in ensuring **consultancy** specifically employed for this, consultancy necessary to operate the program.

Therefore "company A" does not buy software license for its own use and neither with the intention or the right to create a new product, or to multiply and distribute it.

In this situation, the payment made by 'company A' to the non-resident producer is not a taxable 'royalty', according to article 7, point 28, letter b of the Fiscal Code.

In relation to the description above, kindly pronounce yourself once again for a **very clear delimitation on the commercial operations regarding the software licenses transmission according to their final destination, considering that the simple purchase and resale of a new license, of a new computer program without modifying, multiplying or distributing it cannot be defined as carrying obligations for the payment of a royalty and implicitly for the payment of the income taxes deriving from royalty**, the way it is stipulated in the Romanian fiscal legislation, as well as the similar European one.

Yours faithfully,

Valerica DRAGOMIR

EXECUTIVE DIRECTOR