WORKING FROM HOME AND TELEWORKING FROM A FISCAL PERSPECTIVE*

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Abstract: *The pandemic triggered by the Sars-Cov-2 virus generated a reconsideration of labor relations. Before the pandemic, working from home and teleworking were the exception, the rule being the work organized at the employer's workstation or headquarters. The states of alert and emergency established on the Romanian territory forced the employers to look towards the organization of work from home and teleworking for their employees. While teleworking is regulated by a special law, working from home is regulated by several articles of the Labor Code. The Romanian tax legislation establishes some rules regarding the settlement and deduction by the employer of the expenses with the utilities of the teleworkers but does not contain provisions regarding the similar expenses made by the employee who are working from home.*

Keywords: *working from home; teleworking; tax legislation; workers' expenses.*

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The work from home contract is part of the of special employment contracts category, being regulated by art. 105-107 of the Romanian Labor Code, as a way of executing the individual employment contract concluded for an indefinite or determined duration, with full or partial daily working time¹. The telework contract is included into the same category of special employment contracts. The essential element, which derogates from the relevant customs in these contracts, is the fact that the place of work is no longer considered as in the classical interpretation of the concept of workplace, but is either the employee's domicile or is another place besides that of the headquarters or other space belonging to the employer.

According to the Law on safety and health at work no. 319/2006, workplace means the place intended to include workstations, located in the buildings of the enterprise and/or unit, including any other place in the area of the enterprise and/or unit to which the worker has access during his activity².

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¹ I.T. Ștefănescu, Ș. Beligrădeanu, *Codul muncii prezentare în ansamblu. Analiza textelor esențiale. Textul integral*, Lumina Lex Publishing House, București 2003, p. 81.

² Please see, art. 5 letter k) of Law no. 319/2006 on safety and health at work, published in the Monitorul Oficial al României no. 646 of July 26, 2006, as subsequently amended and supplemented.

Art. 16¹ para. (1) of the Labor Code defines the workplace as the place where the employee carries out his activity, located in the perimeter provided by the natural or legal person employer, at the main office or at branches, representative offices, agencies or work points belonging to him.

Employees working from home are considered those employees who perform, at their home, the duties specific to the position they hold, based on the agreement of the parties. Therefore, the place of work is not the headquarters or other space belonging to the employer, but the domicile of the employee. This aspect makes the work from home contract, a special contract where the employees establish their own work schedule, in order to fulfill their work tasks. Also, the employer of the home worker, is entitled to verify the activity of the employee, under the conditions established by the individual employment contract.

The individual work from home contract is concluded only in written form and contains the following elements: the express specification that the employee works from home; the program permitting the employer to verify the employee's activity and the way of performing the verification, but also the obligation of the employer to ensure the transport to and from the employee's home, as appropriate, of raw materials and materials used in the activity, as well as the finite products they make.

Although the Labor Code stipulates only the employer's obligation of ensuring the transport to and from the employee's home of raw materials and materials, as well as finite products, in the juridical doctrine it has been expressed the idea that the employer will also bear the costs involved in the work process, such as: electricity, water, heating, and so on³.

The regulations of the Romanian Labor Code gives the work from home a narrower scope than the relevant regulations of the Member States of the European Union. Thus, the definition of the employee that works from home given by article 105 of the Romanian Labor Code refers only to work performed from the employee's home, unlike the provisions of Convention No. 177/1996 of the International Labor Organization, which include in the definition the work performed at another location than the employer's space, determined by the employee. Also, unlike European regulations, the provisions of the Romanian Labor Code do not refer to the possibility for the employee to be assisted by family members in carrying out his work duties⁴.

At the level of the European Union, there has been a constant concern for legal regulation in the field of teleworking. Therefore, in the context of the European Employment Strategy, the Council of the European Union called on the social partners to negotiate contracts to help modernize the organization of the labor market, including flexible labor arrangements, in order to provide productivity and competitiveness to commitments and to achieve a balance between flexibility and

³ O. Ținca, Contractul individual de muncă la domiciliu, in *Dreptul* nr. 8/2003, p. 41.

⁴ A. Țiclea, A. Popescu, C. Tufan, M. Țichindelean, *Dreptul muncii*, Rosetti Publishing House, București 2004, pp. 544-545.

security. To this end, a European Framework Agreement on Teleworking was concluded between the social partners in Brussels in 2002⁵.

Romania has aligned itself with these trends and issued the Law no. 81/2018 on the regulation of telework activity⁶, with subsequent amendments and completions. This law was intended to adapt, from a legal point of view, the labor relations in Romania to the new information and technologies specific to the current socio-economic reality.

Until its legal regulation, teleworking was considered, in the Romanian legal literature as a variation of home working, and this opinion was influenced by the legislation of the European Union and by the legal provisions of other member states.

The telework contract is defined⁷ as the agreement of will of the parties which expressly provides that the employee will perform, on a regular and voluntary basis, the duties specific to the position, occupation or profession he holds, in a place of work other than workplace organized by the employer at least one day a month, using information and communication technology. Since the law does not specify what this other workplace means, we appreciate that the intention of the legislator was to give priority to the will of the parties, as it results from art. 5 letter c) of the law, which specifies that the place or places of work, other than the employer's headquarters, are agreed by the parties. Labor relations become flexible, achieving an adaptation of labor relations to current socio-economic realities, in relation to the dynamic evolution of the labor market, which will provide benefits to both the employee and the employer. Specifically, for the employer, the costs of renting the spaces and utilities will be reduced. As for the employee, he will eliminate the consumption of money and time by moving to and from the employer's premises, will have the freedom to choose the workplace and use his working time, and will also have the possibility of optimizing the relationship between his professional and personal life.

From the law's wording of the teleworker's workplace, we may conclude that the parties, by their agreement, can establish the workplace, including at the employee's domicile. From this point of view, teleworking could be confused with working from home. The difference between the two contracts is given, on the one hand, by the categories of employees, by the place of work itself, but also by the alternation of work. In the first case, teleworking addresses the categories of employees who perform a job that includes the concept of distance, materialized, largely or exclusively, by computer means. Employees with such a contract are employees with a mobility developed as a consequence of their activity, characterized by the availability to provide information resources in the virtual

⁵ European Framework Agreement on Telework in Brussels S / 2002 / 206.01.02; For a full study of the evolution of this institution, see, M. Emin, From the original employment contract to the telework contract in the context of the Brussels European Framework Agreement on Telework, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/cidstue2016&div=25&id=&page>, accessed on April 29, 2021.

⁶ Published in Monitorul Oficial al României no. 296 of April 2, 2018.

⁷ Please see art. 2 and 3 of Laws no. 81/2018.

environment or to materialize professional activity in or through this environment, using specific technological equipment.

From a territorial point of view, teleworking, unlike work from home, can be performed in any other space than the employer's headquarters, while work from home can be performed only from employee's home.

Last but not least, teleworking involves an alternation of the employee's work, if we are referring to a month of work. Thus, some of the working days can be carried out at the employer's premises and others, in another location, according to the will of the parties. In case of work from home, unlike telework, the place of work is clearly established at the employee's home, without the possibility for the parties to derogate from this legal provision.

The rest of the provisions on teleworking are similar to those on working from home, but because the former benefits from its own legal regulation, working conditions, the rights and obligations of the parties are more clearly established in the case of telework.

It should also be noted that equal treatment between employees is expressly provided for, both in the case of working from home and teleworking. The need for this provision is obvious in the case of teleworking, because, at the level of an employer, part of the employees could have concluded a classic individual employment contract, and another part, a teleworking contract.

The relationship between work from home and telework is considered one of complementarity, from general to special based on the provisions of art. 10 of Law no. 81/2018 and, as a result of technological evolution, work from home, is considered outdated by the current economic reality⁸. Although the Romanian legislator focused mainly on telework relations, adopting a special law on the subject, the pandemic caused by the Sars-Cov-2 virus puts in a new perspective the work from home, which before the onset of the pandemic was considered outdated.

Therefore, although it seemed that the work from home would be completely replaced by telework, due to the widespread use of information and communication technology in employment relationships, the pandemic triggered by the Sars-Cov-2 virus made home working an alternative solution to the activity lock down even in the case of employment relationships in which information and communication technology is non-existent.

Thus, occupations in which information and communication technology is practically useless (tailors, turners, workers in the footwear industry, etc.) have suddenly become desirable for working from home. In these situations employers would prefer the home working of their employees than closing the business, with all the costs arising from this form of work – transport and installation at the

⁸ M. C. Preduț, *Munca la domiciliu și telemunca. Aspecte practice și legale*, available at: <https://www.universuljuridic.ro/munca-la-domiciliu-si-telemunca-aspecte-practice-si-legale/#r6>, accessed on April 24, 2021.

employee's home of various work equipment, transport of raw materials to the employee's home and takeover of goods made by the employee.

In situations where the use of information and communication technology is not part of the work process, it is obvious that telework cannot be used, and the employer and the employee have only the option of working from home contract.

In the context of the pandemic we are in, both employers and employees are tempted to accept alternatives to the traditional work process, as opposed to the alternative of bankruptcy for the employer and unemployment for the employee. As a consequence, occupations that traditionally took place in the employer's premises may be transferred to the employee's home.

This transfer may be caused by the fear of activity lock down as a result of the mandatory isolation or quarantine of employees who have either been infected with the new Sars-Cov-2 virus or have come into contact with infected people. The compulsory quarantine or isolation at home of one or more employees causes the alteration of the employer's activity, so a smart businessman would prefer to exclude such a risk which is greatly amplified by the physical presence of employees at work organized by employer. At the employer's working place, employees get in touch with each other, and also they get in touch with many other people by traveling to and from work.

With the onset of the pandemic, the demand for some products decreased and as a consequence the employer's income has also decreased. This is an additional reason for the employer to give up their own spaces and take over the product of the employee's work from the latter's home. We may take as an example, the textile and footwear industries, which have faced significant declines in income due to restrictions on the movement of people. Thus, the population no longer felt the need to purchase clothing and footwear, but redirected its income to housing and payment for utilities that increased significantly, as a result of spending most of their time at home.

Although the population fully feels the need for social interaction, as isolation measures often generate frustrations, some of the changes in the perception of labor relations may be irreversible.

In many cases, employers may find that the productivity of employees working from home has increased. The employees may find that they can save time and money by eliminating the traveling to and from the workplace organized by the employer and can use this time to spend with their family. Employees also realize that they can save significant resources by eliminating transportation and car maintenance or lunch expenses. They may also realize they can use these savings to their home designing, while also gaining the time to enjoy the comfort of their own home and taking care of their health by eliminating the time lost in traffic to get to and from work.

As a result of these social changes, companies, usually small ones, could focus on installing at the employee's home, with the consent of the latter, of some equipment that the employee uses in the work process. For example, the employer

could provide the employee with a sewing machine or a lathe for the employee to work from home.

If work at home and telework have some indisputable advantages both for the employee and the employer, these special employment relationships must also be analyzed from the perspective of expenses that are transferred from the employer to the employee.

If we consider the work performed by the employee at his home, obviously, his expenses with utilities will increase as long as he carries out his professional activity in this place. If energy-consuming equipment is also installed in his home, these costs will be significantly higher than those that would normally incurred in the normal use of the home. As mentioned above, the Labor Code does not oblige to the negociacion and inclusion in the labour contract of a clause regarding these expenses for the employee working from home, but neither does it prohibit such a clause.

In the case of the teleworker, the conditions under which the employer bears the expenses related to the telework activity are subject to a mandatory clause in the contract⁹.

The introduction in the individual employment contract of a clause on the employer to bear the expenses of the employee working elsewhere than that organized workplace by the employer is either possible – in the case of the employee working from home or mandatory – in the case of the teleworker. The issue of the deductibility of these expenses for the employer and the hypothesis of taxing these expenses as an income of the employee arises.

Romanian Tax Code contains express provisions only regarding telework and teleworkers, without any reference to work from home.

According to art. 25 para. (2¹) of the Fiscal Code¹⁰, the expenses beared by the employer related to the telework activity of the employees who carry out the activity in this regime, are deductible expenses for determining the fiscal result. We note that the tax law does not limit in any way the deductibility of expenses related to the work of the employee incurred by the employer, which means that the employer has the opportunity to deduct fully the expenses incurred for the employee to work elsewhere than at placework organized by the employer.

Also, by virtue of the provisions of art. 25 para. (1) and (2) of the Fiscal Code, which entitle the employer to deduct any expenses incurred for the purpose of carrying out economic activity, including expenses with salaries and those assimilated to salaries. The employer also has a legal basis for deducting in determining the fiscal result, the amounts granted to the home worker in supporting the expenses incurred for the purpose of carrying out the professional activity, agreed through the employment contract.

Therefore, as far as the employer is concerned, things are relatively simple, as he can deduct the expenses agreed with the employee who works elsewhere than the

⁹ Please see, art. 5 para. (2) letter j) of Law no. 81/2018.

¹⁰ Published în Monitorul Oficial al României no. 688 of September 10, 2015.

workplace organized by the employer, either on the basis of supporting documents or on the basis of the law conferring the possibility of granting sums below a certain ceiling, without requesting supporting documents. This last situation is provided by art. 76 para. (4) letter w) of the Tax Code, which exempts from the obligation of presenting supporting documents, for the amounts granted to employees who carry out telework activities for supporting their expenses with utilities at the place where employees carry out their activity, such as electricity, heating, water and data subscription, and the purchase of office furniture and equipment, within the limits established by the employer through the employment contract or the internal regulations, within a monthly ceiling of 400 lei corresponding to the number of days in the month in which the worker carries out telework activity.

From the employee's perspective, the granting of these amounts may generate certain conflicts between his rights and obligations and those of the state, remediable in tax litigation¹¹, which we will analyze below.

From a fiscal point of view, any amounts or benefits in cash or in kind, received by the employee from his employer, are assimilated to salaries and are subject to the rules of taxation proper to income from salaries¹². Incomes from salaries and the those assimilated to salaries, exempted from taxation are limited exposed by art. 76 para. (4) of the Tax Code. Benefits, in cash or in kind, are considered, *inter alia*, the use of any property in the patrimony of the business or rented from a third party, for personal purposes by the employee, as well as accommodation, food, clothing, housework staff, and other goods, or services offered free of charge or at a price lower than the market price¹³.

Among the non-taxable incomes, are included the amounts granted to the teleworker based on art. 76 para. (4) letter w) of the Tax Code, to which we also referred above. These incomes, granted to the teleworker for supporting their expenses with the utilities at the place where they carry out their activity, are non-taxable within the limits established by the employer through the employment contract or through the internal regulations and within a monthly ceiling of 400 lei corresponding to the number of days in the month that the natural person carries out teleworking activity, without the need to present supporting documents. From the legal text, we deduce that the amounts exceeding the ceiling of 400 lei will have to be justified with documents in order not to be considered salary advantages and not to be subjected to income tax.

We note that the tax legislator did not take into account the amounts granted to the employee with work from home as utility expenses, so the exemption from taxation of such expenses is not expressly provided.

The taxation of the amounts granted by the employer to the employee with work at home for supporting his utility expenses would constitute discrimination

¹¹ I. Lazăr, *Dreptul finanțelor publice, Volumul I. Drept bugetar*, Universul Juridic Publishing House, București, 2016, p. 92.

¹² Please see art. 76 para. (2) letter s) of the Tax Code.

¹³ Please see art. 76 para. (3) lit. a) and b) of the Tax Code.

compared to the teleworker, because the latter can benefit from such amounts without being subject to income tax, within the limit established by law, even when he carries out his activity at home.

Therefore, although there are no express provisions in the tax law, the amounts granted by the employer to support the utilities' expenses of the employee who is working from home should be exempt from taxation because these amounts do not represent a salary advantage and are not used for personal purposes, but represent the expenses compensation for carrying out employee's professional activity in the benefit of the employer. If the employee who is working from home would have carried out the activity in a workplace organized by the employer, the expenses related to the consumption of electricity, water, natural gas would have been borne by the employer, without the employee bearing any part of them or any tax related to them. These expenses are not granted for the purpose of offering a benefit to the employee, and cannot be considered income assimilated to salaries, because they are expenses that the employee could have avoided if he had carried out his activity in a workplace provided by the employer.

We consider that, when a ceiling for the amounts granted to the teleworker in order to support his expenses with the utilities was set, the legislator did not take into account an industrial consumption, although a higher consumption than the domestic use of the house was taken into account.

However, if telework or work at home involves the use of equipment that generates a consumption much higher than the ceiling set for utility expenses, we consider that based on the supporting documents of such consumption, these costs must be compensated by the employer to his employee.

Otherwise, if the amounts granted by the employer to the employee working from home for covering the expenses incurred by the latter with utilities were to be considered salary benefits and were to be taxed, we appreciate that we are starting to leave the realm of labor relations and enter the sphere of independent activities¹⁴. We are in the same situation when the amounts granted by the employer exceed the ceiling established by law in the case of teleworking, despite of providing supporting documents for these expenses.

Regarding the other advantages that can be offered to the employee, the tax legislator does not seem to treat employees with work from home differently compared to teleworkers. Thus, the benefits consisting in amounts offered for rent payment should be treated in the same way, being considered benefits offered to employees, as the teleworker cannot be assimilated to the seconded or delegated employee, whose accommodation expenses are fully covered by the employer. The telework is defined¹⁵ as that form of work organization through which the employee, regularly and voluntarily, fulfills his duties specific to the position, occupation or

¹⁴ For a study on the forms of organization of economic activity by individuals, please see C. Păun, *Dreptul afacerilor. Teoria. Profesioniștii. Impozitarea*, Universul Juridic Publishing House, București, 2015, pp. 159- 164.

¹⁵ Please see art. 2 letter a) of Law no. 18/2018.

profession he holds, in another place than the workplace organized by the employer at least one day a month, using information and communication technology. As it is a question of fulfilling the attributions of the position voluntarily and in another place than a workplace organized by the employer, we consider that this other place cannot be a place organized or chosen by the employer, since in this case we would be in the situation of delegation.

Both the telework contract and the one concluded for the purpose of working from home are special contracts. The essence of these special contracts is the element derogating from the common rule – the performance of work in another place than the one organized by the employer – an element that outlines the physiognomy of this contract. To the extent that the employer bears the rent of the home for the teleworker or the employee who would establish his domicile at that address, we consider that these expenses must be treated in the same way as for any other employee who is offered such a facility.

If the employee working from home or the teleworker to whom the employer offers amounts for rent would bear the income tax only for the part of the rent calculated in proportion to the time he uses the space for personal purposes, it would create an unjustified difference in tax treatment between these employees and the classic employee who works at the workplace organized by the employer. In the first case, the teleworker or the employee working from home would be taxed only for a part of the amount received from the employer for the payment of the rent, while the classic employee would be taxed for the entire amount.

Thus, even if the teleworker or the employee working from home uses part of the day, the dwelling or part of the rented dwelling in the interest of the employer, the difference in tax treatment in relation to the classic employee would not be justified because the rent is not set by daily duration of the use of the good, but is established in a global manner. Thus, the classic employee, who does not use the house while he is at the workplace organized by the employer, does not benefit from a rent reduction. At the same time, the employee will not pay an increased rent because he uses the space for a longer period of the day.

Point 12 para. (3) lit. f) of Title IV of the Methodological Norms for the application of the Tax Code¹⁶, provides that in accordance with the provisions of art. 76 para. (3) of the Tax Code, the advantages received by the natural person, may be the equivalent value of the use of a dwelling for personal purposes and related maintenance expenses, such as those related to water consumption, electricity and heat consumption and others like that, except those related to the equivalent value of the use of the service dwelling or housing within the unit or military garrison and unit dormitory, according to the service distribution appointment according to law or specificity of the activity through the normative framework of the field of activity, monthly rent compensation for personnel in the national defense, public order and

¹⁶ Approved by Government Decision no. 1/2016, published in Monitorul Oficial al României no. 22 of January 13, 2016.

national security sector, as well as the compensation of the rent difference, borne by the natural person, according to the special laws.

If the teleworker receives for use or the employee establishes his domicile in a building that is part of the employer's business patrimony, the property will have a mixed use. The evaluation of personal use in order to determine the advantage offered to the employee will be made compared to the residential areas owned by the state, respectively at the effective value of the related advantages, and the employee advantage should be determined in proportion to the number of square meters used for personal interest or the number of hours of personal use.

In conclusion, teleworkers and, in our opinion, employees working from home, can benefit of non-taxation of amounts received from the employer to compensate utility expenses, determined in relation to the period during which they worked for the benefit of the employer. In the situation of the employee who can justify higher utility expenses than the ceiling established by law, he should benefit from the amounts thus spent, without being taxed for the part exceeding the ceiling of 400 lei established by the Tax Code.

De lege ferenda, we consider it would be necessary to supplement the labor legislation with provisions regarding the obligation of introducing in the individual labour contract of the working from home employee a clause regarding the conditions under which the employer bears the expenses related to the work from home. The amendment to the Labor Code, which is an organic law, should also entail the completion of tax legislation with clear provisions, so as to include the amounts granted for utility expenses compensation to the employee working from home among income tax-exempt benefits similar to the provisions regarding teleworking.

It should also be expressly stated in the Tax Code that the amounts exceeding the ceiling set for amounts granted as expenses with employees' utilities, do not constitute salary benefits and are exempt from income tax, if the employee can justify with documents achieving higher consumption with utilities, in the interest of the employer.