International Monitoring Operation
Project for the Support to the Process of Temporary Re-evaluation of Judges and Prosecutors in Albania

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Tirana, 24, July 2019

To the
Public Commissioners
Bulevardi "Dëshmorët e Kombit", Nr. 6,
Tirana
Albania

Case Number **JAC/TIR/1/4**

Assessee **Kastriot Selita**

RECOMMENDATION TO FILE AN APPEAL
According to
Article B, paragraph 3, letter "c" of the Constitution of the Republic of Albania, Annex "Transitional re-evaluation of judges and prosecutors in the Republic of Albania", and Article 65, paragraph 2 of the law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania"

1. Introduction

Assessee Kastriot Selita, holds the office of the President of the Appeal Administrative Court. He is an assessee pursuant to article 179/b, paragraph 3 of the Constitution.
The decision to confirm the assessee in duty was announced on 18.6.2019.
The International Observers (IOs) submit a recommendation to appeal this decision.

2. Summary of recommendation

The IOs recommend the Public Commissioners to file an appeal against IQC's decision to confirm the assessee in duty, because of several asset and proficiency related shortcomings with regards to issues that in the view of the IOs, have not been fully investigated or are not clearly dealt with in the reasoning of the IQC.

The IOs estimate that an adequate reasoning based on a full investigation would possibly impact the assessment of the assets and proficiency of the assessee in such a way that, when applying article 61.3, 61.4 or 61.5 of the Vetting Law, the outcome of the decision of the IQC does not stand.

3. The decision of the IQC

The decision of the IQC to confirm the assessee in duty was, as a matter of logic, based on an assessment of all three pillar.

The background assessment did not lead to any substantial information so as to raise doubts on the involvement of the assessee with organized crime.

With respect to the assets, several issues still remain unclear as regards the performed investigation and/or assessment of the available evidence in the decision of the IQC, notwithstanding the explanations of the assessee and/or the reasoning of the IQC.

As regards proficiency, several shortcomings in the way the assessee handled cases were discovered, and, notwithstanding the explanations of the assessee, these issues still appear unclear and not thoroughly assessed by the IQC.
The panel decided to confirm the assessee in duty with a majority vote, whereas the dissenting panel member voted for dismissal.
The panel has administered in the file of the assessee two opinions filed by the first undersigning IO related to the (i) to the re-evaluation of the immovable assets as regulated by Law no. 10418/2011; and (ii) issues related to the conflict of interest (see attachments no.1 and no.2).

4. Reasons for an appeal

The IOs have doubts whether the IQC confirming the assessee in duty, has taken all indispensable investigative steps and duly evaluated the explanations and administered documents related to the asset and proficiency assessment.

More specifically:

4/1 Asset related issues

a) *The 30.000 Euro, in the name of the related person (spouse ***,***), received from her father in 2010, and other related amounts*

The contribution of the spouse to the construction of the two-story house in Linzë and maintaining of the asset and her legal involvement in the selling of the asset for 220.000 Euro, where the 30.000 Euro originated from, remain unclear.

Against this background it also remains unclear whether the 30.000 Euro should be qualified as a donation from the father, and if this is the case, whether monetary donations to assesses/related persons, should be considered as taxable income. The spouse does not seem to have been co-owner of the asset at the time of selling, whereas the IQC did not identify in a clear way any other legal relationship of the spouse with the asset. The conclusion that taxing the spouse for the 30.000 Euro would amount to double taxation is therefore not well grounded.

The same questions arise as regards the 61.758 Euro, originating from the same source (220.000 Euro) paid by her father for the purchase of an apartment, stipulated and registered in her name ***.*** as well as the 20.000 Euro provided by the father to ***.*** for the purpose of repaying the loan with *** bank and the 4.365 Euro used mainly for partial furniture of the apartment of 126 m2, purchased in 2007.

According to Law no.8438/1998 on the income tax, as amended, the taxable income includes any income produced in the Republic of Albania. Nor the assessee or his spouse ever paid taxes for these sums, which constitute part of the financial sources for their actual assets, as declared in the vetting declaration.

b) *The 2.900.000 ALL received by the assessee in 2006, after his divorce, based on a court decision on the division of common immovable property*

The 2.900.000 ALL were deposited by the ex-wife of the assessee in a bank account, before the court issued the second phase decision to divide the common immovable property. It appears that the IQC did not thoroughly investigate the source of creation of this sum. This leads to an unclear situation as to the lawfulness of creation of this sum. Furthermore, it remains also unclear whether the sum belonged at the time when the sum was deposited by the ex-wife, to the common property regime of the ex-spouses or not. If the assessee co-owned the sum, he is obliged to justify the source of this sum himself and he cannot limit himself to referring to the ex-wife who refuses to declare on this issue.

c) *Payment of taxes on income years later than due date*

The spouse of the assessee has declared to have sold in 2007 to ***.*** an apartment for 50.000 Euro. The tax on income for this sum, was declared to have been paid by the spouse of the assessee in January 2017, by referring to construction activities of December 2016, some days before the re-evaluation declaration was filed with HIDAACI. Apart from the doubtful description of the tax paid in January 2017 and the explanations of the assessee on this issue, given the circumstances and facts of the case, it remains unclear to the IOs whether taxes paid years later than due date as provided by the law were to be considered as legitimate by the IQC. With regard to the same asset, several other unclear issues remain on the way it was sold twice to ***.*** firstly by the spouse of the assessee for 50.000 Euro, and then by the construction company for 3.710.000 ALL. The explanations and documents submitted by the assessee on this issue, do not appear to clearly explain the difference in price as evidenced by the documents that LIPRO submitted on the same issue. It also remains unclear the methodology used and upon which sale contract did the tax authorities rely upon for calculating the due tax. Also, the reasoning of the IQC on this matter, does not clarify the issues at stake.

d) *The loan of 23.000 Euro in 2004, from* ***.*** *which was not declared in the re-evaluation declaration*

The explanations of the assessee on the purpose of this loan and how it was paid back to ***.*** are not corroborated by the documents submitted on the same issue by the bank (granting another loan of 23.000 Euro). Whereas the IQC has not provided a clear reasoning on this issue. It also remains unclear to the IOs what is the impact of non-declaring the loan of ***.*** in the vetting declaration, given that this sum was the initial financial source for the purchase from the spouse of the assessee of the apartment of 102 m2. It is also unclear the impact of the inaccuracies discovered in the explanations of the assessee on this issue. Furthermore, it remains unclear whether ***.*** had the financial capabilities to provide such loan, in the quality of the lender to the related person (spouse), since the IQC did not perform any investigation on this issue.

e) *Re-evaluation of an asset by the spouse of the assessee in 2012, based on Law no. 10418/2011, as amended*

The first undersigning IO has filed an opinion at the IQC, offering an analysis of provisions of this law and raising questions whether these provisions entitle the assessee/related person, in the quality of the declaring subject with HIDAACI, to have their real estate properties re-evaluated, or it rather excludes them from this benefit. Not being entitled to such a right, could have an impact in the overall financial analysis for this assessee, hence the IOs think that the Appeal Chamber should clarify this matter.

f) *The cost of the land and 2-story house of the in-laws in Linzë*

The assessee provided explanations and documents to evidence the cost for the construction of the house in Linzë in 2004, in the amount of 4.754.112 ALL. In 2008 this asset was sold by the in-laws for 220.000 Euro. Based on the administered documents in the file, it is found that the tax that the in-laws paid for the transfer of property, was calculated by considering the cost of the house in the amount of 7.241.400 ALL as documented by LIPRO. The IQC did not perform any investigative steps to clarify this discrepancy. Furthermore, the IQC appears to refer in its reasoning to other values for the construction, namely the 5.000.000 ALL declared and explained by the assessee and his spouse in the periodic declaration; and 6.556.417,2 ALL according to a calculation of the IQC. It also appears that the IQC has taken into account in its financial analysis the amount of 4.754.112 ALL, without providing any reasoning on this financial choice. The IQC appears to have failed to address these discrepancies in its reasoning, as well as their eventual impact on the financial analysis. Hence, the IOs think that the above-mentioned issues should be duly investigated and assessed by the AC.

g) *The purchase of an asset from a company in 2007 by the spouse of the assessee*

The assessee declared a purchase price of 48.070 Euro for the purchase of this asset, whereas the supporting documents provide for other prices such as 47.070 Euro or 43.370 Euro. Notwithstanding the explanations of the assessee on the lapsus of the notary, and the reasoning of the IQC, it still remains unclear to the IOs, the real value that the spouse of the assessee paid for this asset. The documents administered in the file on this asset do not fully corroborate the explanations of the assessee.

h) *Inconsistencies in the financial analysis*

Several inconsistencies appear of relevance in the financial analysis of the IQC, especially as regards the income of the spouse and in-laws justifying the purchase of the land and two-story house in Linzë.

(i) The IQC has included in the financial analysis referring to 1999-2004 income of the spouse for which it is not clear whether taxes have been paid.

(ii) The IQC appears to have included in the financial analysis on the same asset (land and construction in Linzë) income from the pyramidal financial schemes invested by the father-in-law *** *** which source and lawfulness remain unclear to the IOs. It is not clear whether this amount includes also income from the selling of the apartment in Peshkopi in 1995 (selling price: 850.000 ALL), as the basis for the investment. It is also not clear whether taxes had to be paid and, if so, were paid

on this income (850.000 ALL), and the eventual impact on the financial analysis, since no investigation was performed by the IQC on this issue.

(iii) Further inaccuracies are found in the financial analysis of the IQC as the income of the in-laws from 1996 (or even before) onwards is taken into consideration, whereas for the expenses, they are only considered from 1997 and onwards. The same could be argued on the income of 2005, which were included in an analysis on sources due until July 2004, and their impact on the financial analysis.

(iv) Other issues such as the disputable level of living expenses taken into account for 1997-2002, or the lack of any analysis of the need to face housing issues (the in-laws had no place to live at least from 1995-2004, appear to also have an impact in the financial analysis of the IQC.

Assessing these issues and other possible relevant issues, as well as their impact in the financial analysis, is crucial to an objective analysis and outcome. As per the above, the IOs recommend an investigation and clear and thorough analysis of the lawfulness of these incomes, as provided by the legislation in force.

One last remark goes to the recurring reference of the IQC to the fact that many of the assets at stake were created by the spouse of the assessee, before their marriage, as a circumstance that legitimizes the position of the assessee. The IOs would like to point out that the asset assessment should be objectively and thoroughly performed in compliance with the spirit and letter of the law, on the obligation of the assessee to explain and justify his related persons' assets independently from the date when the related person acquainted this status.

4/2 Proficiency related issues

a) IOs have doubts whether rating the assessee as "competent" is appropriate. Several proficiency shortcomings were detected in the way the assessee handled cases, as well as from the denunciations submitted against the assessee. The IQC shifted the burden of proof only for part of the findings. The IOs are of the opinion that other cases not considered by the IQC should have been included in the proficiency assessment as well.

As regards the cases for which the burden of proof was shifted, it is unclear whether the explanations of the assessee clearly and fully answered the raised issues.

More specifically:

a.1) Cases for which the burden of proof was not shifted:

(i) Submission from *** *** In the quality of the adjudicating panel member, the assessee appears, amongst others, to not comply with the Civil Procedure Code provisions and the jurisprudence of the Constitutional Court on the *right of the plaintiff to dispose the scope of the lawsuit, ... by amending, increasing or reducing the scope of the lawsuit according to his/her interests* (decision no. 16/2013 of the Constitutional Court).

(ii) The case with *** sh.p.k. The assessee purchased in 2010 from *** sh.p.k, with sole owner and administrator *** *** an apartment for 2.000.000 ALL. In 2015 the spouse of the assessee purchased from *** *** (shareholder of *** sh.p.k) and *** *** (spouse), an apartment for 177.370 Euro. In 2016 the assessee and his spouse purchased from *** *** (shareholder of *** sh.p.k) and *** *** an apartment for 46.000 Euro and a garage for 24.000 Euro.

In 2014, in the quality of the rapporteur of the case, the assessee adjudicated a case with *** *** sh.p.k participating as a third party to the proceedings (decision no. *** /2014 of the Appeal Administrative Court). The IOs are of the opinion that this issue should be analyzed, in order to assess whether the assessee, in the quality of the panel member, has acted in a situation of conflict of interest.

a.2) Cases for which the burden of proof was shifted, but which were not convincingly explained/reasoned by the IQC

(i) The case with plaintiff *** *** against defendant *** *** *** and plaintiff *** *** against *** It appears that, under the same circumstances arising from these cases, the assessee, in the quality of the rapporteur of the case, held different views in the legal analysis and referred to jurisprudence. Notwithstanding the explanations of the assessee and the reasoning of the IQC, it still remains unclear, whether the court used double standards in adjudicating these cases, which could lead to an impact of the rights of the parties in those proceedings.

(ii) In the case with plaintiff *** *** notwithstanding the explanations of the assessee and the reasoning of the IQC, it still remains unclear, whether the assessee, in the quality of the rapporteur of the case, addressed the claims of the plaintiff, and whether he acted in compliance with the jurisprudence of the Constitutional Court.

(iii) The case with plaintiff *** sh.p.k. The assessee sold in October 2015 to the sole shareholder and administrator of *** sh.p.k. *** *** an apartment for 115.000 Euro. In 2016, a case with *** sh.p.k as plaintiff, and Kamëz Municipality as defendant, was registered with the Administrative Court of Appeal. In March 2017, the court issued a decision on the case. The assessee was a member of the adjudicating panel.

Notwithstanding the explanations of the assessee and reasoning of the IQC on this issue, it still remains unclear to the IOs whether, in the quality of the member of the adjudicating panel, the assessee acted in a situation of conflict of interest.

(iv) The case with plaintiff *** *** against the President of the Republic. The IQC has referred the case to the HJC, for further investigative issues. The case is included in the recommendation to appeal, together with other not dealt with proficiency issues, for the same reasons mentioned in the analysis of the IQC.

b) The IOss also filed an opinion on some issues related to the conflict of interest, on which the assessee provided his explanations. Notwithstanding these explanations and the reasoning of the IQC, the IOs have doubts whether these findings were fully addressed and properly evaluated by the IQC. More specifically, the issues at stake are related to:

b.1) Cases where the assessee did not recuse himself from judicial proceedings with parties tax state bodies or agencies, were his related person (spouse) held important and influential positions

See attachment no. 2.

b.2) Cases where the assessee recused himself, but at a questionable moment of the proceedings

See attachment no. 2.

b.3) General remark on possible conflicts of interest

The IOs refer to the part of the opinion submitted to the IQC on the issue of conflicts of interest in which a general assessment is given with regard to the fact that the spouse of the assessee held influential positions at tax authorities while the assessee was adjudicating tax cases.

The IOs believe that this general context should be taken into consideration in order to achieve a complete assessment of the issue of conflicts of interest in the case of the assessee.

5. Recommendation

The IOs recommend the Public Commissioners to file an appeal against the decision of the IQC to confirm the assessee in duty.

This appeal would enable the Appeal Chamber to:

- perform investigative steps which were not thoroughly or comprehensively performed by the IQC;
- perform an accurate financial analysis where all issues at stake are clearly and duly evaluated;

- assess asset related issues which might have an impact also in other cases (like the taxation of monetary donations; taxes paid not in due time; or the right to the re-evaluation of immovable properties);
- perform a thorough and comprehensive proficiency assessment;
- take into consideration any possible unresolved issues that can have an impact in an overall assessment of the assessee.

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International Monitoring Operation
Project for the Support to the Process of Temporary Re-evaluation of Judges and Prosecutors in Albania

Funded by the European Union

Tirana, 31 May 2019

Prot. 147/1 No.

To the
Independent Qualification Commission
Rruga e Kavajës No. 4
Tirana
Albania

Case Number **JAC/TIR/1/4**

Assessee Kastriot SELITA

OPINION
according to
Constitution of the Republic of Albania, Annex "Transitional re-evaluation of judges and prosecutors", Article B, paragraph 3, letter b)

On possible situations of conflict of interest in the case of assessee Kastriot Selita

1. Introduction

In the case of assessee Selita, several investigative steps have been undertaken related to the proficiency assessment. Some of the outcomes of this investigation seem relevant to the issue of situations of *conflict of interest*.

It is therefore important to assess whether the assessee has been in situations of conflict of interest and, to the extent he has, to assess whether the assessee dealt properly with these situations.

From the investigation performed so far on the conflict of interest issues, it appears that in several cases, in different periods of time, the assessee (i) has been assigned cases, or (ii) has adjudicated cases, in which the defendant was a state body where the related person of the assessee (his spouse), has held positions.

This opinion addresses this issue in two ways, first more general and then more in detail. In the general approach I will focus on the relationship between the work of the assessee as a judge and the work of his spouse who worked in different tax agencies. In the more detailed part I will focus on concrete cases in which there are or might be interferences between the work of the assessee and the work of his spouse in order to assess the way the assessee dealt with them.

2. General approach

The question to be answered is, what impact the fact that the spouse of the assessee made a long career in the state tax institutions has on the assessment of the proficiency with which the assessee dealt with possible situations of conflict of interest.

The spouse of the assessee has held the following positions:

- ***.4.2006-*** 6.2006: Tax Inspector at the Big Taxpayers Unit;
- ***.6.2006-***4.2007: Responsible Officer of the Control Office at the Big Taxpayers Branch;
- ***.6.2006-***4.2007: Responsible Officer of the Control Office at the Big Taxpayers Branch;
- ***4.2007- *** 4.2007: Chief of the Big Taxpayers Branch;
- *** 4.2007- *** 9.2007: Responsible Officer of the Control Office at the Big Taxpayers Branch;
- *** 9.2007- *** 1.2008: Chief of the Tax Branch of Tirana;
- *** 1.2008- *** 2.2008: Inspector at the Risk Analysis Office, at the Big Taxpayers Unit;
- *** 2.2008- *** 7.2009: Director of the Appeal Directory at the General Tax Directory;
- *** 7.2009- *** 3.2010: Director of the Tax Control Directory at the Regional Tax Directory of Big Taxpayers;
- *** 3.2010- *** 10.2013: vice General Director of the Procedures and Information Technology in the General Tax Directory;

- *** 10.2013-*** 1.2014: Director of the Regional Tax Directory of Big Taxpayers;
- *** 1.2014-***1.2017: Director of the Regional Tax Directory of Big Taxpayers;
- *** 1.2017: dismissed from office upon personal request;
- *** .4.2017-current: Director of the Appeal Tax Directory at the Ministry of Finance.

In my view it is justifiable to conclude that the spouse of the assessee has had a long career in the state tax institutions, still works for one of these tax agencies and held and still holds influential positions within the tax administration.

The investigation revealed also at least 26 judicial cases assigned to the assessee between 2014-2018 to the assessee, during the career of his spouse in the tax institutions, in which the abovementioned tax agencies were involved as parties.

I will not go into the details of the links between the tax cases in which the assessee was part of the panel and the work and positions of his spouse. This will be done in the part on the specific approach to this issue. But I point out that there were links, ranging from abstract (the mere fact that she worked in tax institutions and the assessee did tax cases in the same period) to rather concrete (see part 3).

There is a window in time in which the spouse did not hold any position at tax institutions (*** 1.2017 – *** 4.2017). The assessee refers to this fact in explaining that there was no reason to recuse in cases that were adjudicated during this period. This explanation is not convincing in the context of the general approach to the issue of conflict of interest and the focus on the appearance of a conflict of interest. This is a very small window of not even 4 months in a career of more than 18 years. Furthermore, the decisions taken by the tax institutions that were object of these cases could have been taken at a moment in time at which the spouse held a position in a tax institution.

Given the situation as described above and given the fact that the assessee continued through the years dealing with tax cases, it is doubtful whether the assessee was sufficiently sensitive to the possibility that he *appeared* to parties and/or the general public to be in a conflict of interest. I take in my assessment into consideration the following factors:

- the fact that the assessee and his spouse appear to be involved in the same decision-making process (in the broad sense of the word), one as part of the highest levels of tax administration and the other at the highest levels where judicial control is exercised;
- the general situation in Albania, that is a situation with widespread corruption in and outside the judiciary, of which the assessee must have been aware;
- the vulnerability of the public trust when it concerns issues of tax paying and spending.

To avoid misunderstandings, I point out the following. My view is not about situations of "real" or "actual" conflicts of interest, but of situations of "apparent" conflicts of interest.

3. Detailed approach

Under the specific approach lens to the conflict of interest, several judicial cases involving the assessee, appear of relevance, as follows:

a) **Some cases related to the period 2010-2013, involving the General Tax Directory as a defendant (GTD)**[1]

The General Tax Directory together with other tax agencies, subordinate to the GTD, were involved as defendants in judicial cases, on several administrative acts issued by these bodies during 2010-2013[2]. More specifically:

(i) Case no. *** [3], registered on *** 11.2014, with:
- plaintiff: " ***.***.*** " sh.p.k.;
- defendant: General Tax Directory and the Regional Tax Directory of Tirana;
- object: invalidity of the administrative act no. *** dated *** 9.2012 (*issued by the RTDT at the GTD, based on another act issued on *** 7.2012 by the Directory of the Appeal Investigation at the GTD*). Annulment of decision no. *** dated *** 01.2013 (*issued by the Appeal Tax Directory at the GTD*);
- rapporteur of the case: K. Selita;
- date of the hearing (*in chambers*): *** 12.2014.

(ii) Case no. *** registered on *** 11.2014, with:
- plaintiff: " *** " sh.p.k..;
- defendant: General Tax Directory and the Tax Directory of Berat;
- object: repeal of the administrative act no. *** dated *** 3.2012 (*issued by the TDB*). Decision no. *** dated *** 08.2012 (*issued by the Appeal Tax Directory at the GTD*);
- panel member: K. Selita;
- date of the hearing (*in chambers*): *** 9.2016.

(iii) Case no. *** registered on *** 4.2014, with:
- plaintiff: " ***.*** " sh.p.k.;
- defendant: General Tax Directory and the Appeal Tax Directory;
- object: annulment of the administrative act no. *** dated *** 7.2013, issued based on act. No. *** dated *** 6.2013 (*probably issued by the Appeal Tax Directory*), and acts no. *** dated *** 6.2013 and *** dated *** 6.2013 (*probably issued by other bodies at the dependencies of the GTD*);
- rapporteur of the case: K. Selita;
- date of decision:*** 5.2014.

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[1] The related person served as vice general director at the GTD, during *** 3.2010-*** 10.2013.

[2] According to law no. 9920/2008, the General Tax Directory is. the highest administrative body in the central tax administration.

[3] As regards cases no. *** and *** the IQC received from the Appeal Administrative Court the relevant judicial files. For what regards the other cases, the information was taken from the online page of the Administrative Appeal Court, and the participation of the assessee as a panel member/rapporteur was confirmed by the latter through his replies after the first shifting of the burden of proof.

(iv) Case no. *** , registered on *** .9. 2014, with:
- plaintiff: ***.*** ;
- defendant: General Tax Directory and the Regional Tax Directory of Durres;
- object: annulment of decision no. *** dated *** 4.2013, termination of work contract (*probably issued by the RTDD*);
- panel member: K. Selita
- date of hearing (*in chambers*):*** 2.2016[4].

(v) Case no. *** registered on ***10.2014, with:
- plaintiff: " *** " sh.p.k.;
- defendant: General Tax Directory, the Regional Tax Directory of Vlore, the Legal Directory in Tirana (*at the GTD*)[5];
- object: annulment of act no. *** dated *** 5.2012; repeal of decision no. *** dated *** .7.2012;
- panel member: K. Selita
- date of hearing (*in chambers*): *** 5.2016.

I point out the following:

- In all cases the GTD participated the proceedings as a defendant, together with tax agencies such as the Appeal Tax Directory[6]; regional tax directories (Durrës, Tiranë, Vlorë)[7]; directories within the structure and subordinate to the GTD (the Legal Directory, or the Directory of Tax Investigation).

- The acts object of adjudication, were issued by these tax agencies. Nonetheless the GTD was always involved as a co-defendant, in the quality of the highest central tax administration body (in compliance with art. 13 and 14 of the law no. 9920/2008)[8]. In one case, the court has partially accepted the lawsuit, by charging both defendants (including the GTD) with the obligation to compensate the plaintiff.

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[4] In the ruling part of the decision, the Appeal administrative Court decided amongst others: ... *To partially accept the lawsuit; the obligation of the defendants* (both the Regional Directory and the General Tax Directory) *to indemnify the plaintiff* ...

[5] According to the approved organizational structure of the GTD, the Legal Directory was one of the directories falling within the GTD, specifically at the dependences of one of the vice General Directors (Supporting Services).

[6] From 2008 - 2016, according to law no.9920/2008, this directory was structurally part of the central tax administration (art. 18 of the law), although it was provided as independent in the decision-making process. After the amendments by law no. 112/2016, dated 3.11.2016, this directory is provided as a structural part of the Ministry of Finance, by maintaining the independent decision-making function.

[7] According to law no. 9920/2008, the regional directories are at the dependencies of the General Director of the GTD.

[8] According to art. 13 of the law, the GTD is part of the central tax administration; the tax administration is at the dependencies of the Ministry of Finance. Whereas according to art 14 of the law, the regional directories depend from the General Director of the GTD (Big Taxpayers Directory is also a regional directory).

- The acts object of adjudication were issued during 2010-2013, a period when the spouse of the assessee served as one of the vice general directors of the GTD, meaning a very high-level director of the GTD.

- her career shows that from 2008-2019 she has covered several other high-level positions in the tax administration, mostly falling under the dependencies of the GTD.

b) **Some cases involving the Appeal tax Directory/Commission for the Examination of the Tax Appeals, and the Regional Directory of Big Taxpayers as a defendant**[9]

This case was registered with the Administrative Appeal Court on*** 6.2018, as follows:

(i) Act. no. *** , registered on ***6.2018, with:

- plaintiff: " *** Bank" sh.a;

- defendant: Commission for the Examination of the Tax Appeals and others;

- object: … partial amendment of decision no. *** dated *** .9.2017 of the Commission …

- panel member as per lot procedure of *** 5.2018: K. Selita;

- request for recusal presented on: *** 2.2019.

(ii) Case no. *** registered on *** 10.2014, with:

- plaintiff: ". ***.***.*** ' sh.a;

- defendant: Regional Directory of Big Taxpayers;

- object: … repeal of the administrative act no. *** dated *** 5.2012 …;

- panel member as per lot procedure of ***4.2016: K. Selita;

- request for recusal presented on: *** 7.2016.

(iii) Case no. *** registered on *** .2.2015, with:

- plaintiff: ' *** " sh.a;

- defendant: Regional Directory of Big Taxpayers, Appeal Tax Directory at the GTD;

- object: … repeal of the administrative act no. *** , dated *** 12.2013 …;

[9] This Commission is the highest appeal body within the Ministry of Finance, composed by *ex lege* members, including the Director of the Appeal Tax Direction, a position covered by the related person of the assessee, from *** 4.2017 and on.

- panel member as per lot procedure on *** .4.2016: K. Selita;

- request for recusal presented on: *** 11.2016.

(iv) Case no. *** , registered on *** 4.2016, with:

- plaintiff: " ***.*** " sh.p.k;

- defendant: Appeal Tax Directory at the GTD;

- object: ... repeal of administrative acts ...;

- panel member as per lot procedure of *** 4.2016: K. Selita

- request for recusal presented on: *** 3.2018.

As regards case (i), after the shifting of the burden of proof, the assessee explained that in the quality of the panel member, he requested on *** 2.2019 to the President of the High Court to recuse himself, on grounds that the related person had participated the decision making process at the Commission for the Examination of the Tax Appeals. According to the assessee the case was assigned by lot to judge ***.*** by order no. *** dated *** 5.2018 (of the assessee in the quality of President of the Appeal Administrative Court). Through decision no. *** dated *** 2.2019, the President of the High Court accepted the request for recusal of the assessee.

It should be noticed that the assessee had knowledge of the litigants (the commission as a defendant) from the moment the case was assigned to him in the quality of the panel member (May or June 2018), but also in the quality of the President of the Court, who performs the lot procedure. Nonetheless, his request to recuse himself from a case in which his spouse was clearly involved as an *ex lege* member of the administrative authority was filed after more than 8 months from the assignment of the case.

The same could be argued as regards the other mentioned cases (in one case the recusal request was filed after almost 2 years).

Following the above, it is important to consider also the promptness of a judge to a react to an eventual situation of conflict of interest. Although the exact time when a request for recusal should be filed, is not explicitly provided in the legislation in force[10], nonetheless, the legislator has envisaged some guidelines, which appear to require a *prompt* response of the judge, or an as *early as possible reaction* (as provided in the law on the prevention of the conflict of interest), as well as an *efficient* reaction to avoid the conflict of interest. This kind of approach appears in line with the dynamics of the functioning of the Appeal Administrative Court (30 days to examine a case from the date of its registry) but also with the protection of the rights of the parties to the proceedings, for an efficient, transparent and impartial justice.

[10] Civil Procedure Code, or the law on the prevention of the conflict of interest no. 9367/2005, or the law on the administrative courts no. 49/2012.

Nowhere in the legislation in force, appears the judge prevented from reacting promptly and in an efficient manner to eventual issues of conflict of interest. On the contrary, the provisions in force appear to regulate the recusal as a preliminary issue to the examination of the case, as one of the legal requirements for a judge to participate the case[11].

4. Conclusion

Given the facts as of today and without prejudice to the replies of the assessee and his explanations during the public hearing, my conclusion is that:

- the assessee seems not to have been sufficiently sensitive to the possibility that he would appear to be in a conflict of interest because of possible interferences between his work and position and the work and positions of his spouse;

- in several cases the assessee seems not to have dealt with an apparent conflict of interest in a proper way.

This conclusion should be taken into account when assessing the proficiency of the assessee, and, as the case might be, in assessing whether art. 61.5 of law no. 84/2016 is applicable.

May 31, 2019

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[11] Chapter V "Recusal of the judge, Request for recusal", under Title III "Court, Jurisdiction and Competences", Part I, of the Civil Procedure Code.

International Monitoring Operation
Project for the Support to the Process of Temporary Re-evaluation of Judges and Prosecutors in Albania

Funded by the European Union

Prot. 147 no. Tirana, 7 February 2019

To the
Independent Qualification Commission
Rruga e Kavajës No. 4
Tirana
Albania

Case Number **JAC/TIR/1/4**

Assessee Kastriot SELITA

OPINION
according to
Constitution of the Republic of Albania, Annex "Transitional re-evaluation of judges and prosecutors", Article B, paragraph 3, letter b)

1. Introduction

In the case of the assessee Kastriot Selita, the assessee and his wife (related person) received a tax benefit resulting from the re-evaluation and selling of one asset.[1]

According to art. 27, paragraph 1, of the Law no.10418/2011 (the law), all individuals have the right to have their immovable property re-evaluated at the market value. Paragraph 10 of this article stipulates that for the sale of the property after the re-evaluation, tax has to be paid on the difference between the selling price and the price resulted from the re-evaluation.

Art. 27, paragraph 10, results in a tax benefit, because without re-evaluation tax has to be paid on the difference between the selling price and the purchase price, taking into consideration that the market value at the time of the re-evaluation is (substantially) higher than the purchase price because of the development of the immovable property market.

2. The question at stake

The question arises whether the assessee and/or his wife were entitled to this tax benefit, since the wife was a public official who had to declare her assets at the relevant moment in time.

3. Tax benefit as "amnesty"

Art. 18, paragraph 3, of the law excludes public officials who have the obligation to declare their assets, from the tax amnesties as regulated in Chapter III of the law. This exclusion is only applicable to the benefit provided for by art. 27, paragraph 10 of the law, if this benefit falls within the scope of art. 18, paragraph 3, of the law. To put it otherwise, the exclusion of art. 18, paragraph 3, of the law is applicable to the benefit provided for by art. 27, paragraph 10, of the law, only if this benefit is to be considered as an amnesty, as meant in article 18, paragraph 3, of the law.

There are arguments for concluding that Art. 27, paragraph 10, is outside the scope of Art. 18, paragraph 3. There are also arguments for the conclusion that it is within the scope.

Some elements that might be relevant in establishing the meaning of Art. 27 and 18 of the law and the relationship between them (non-exhaustive) are as follows.

- These articles belong to Chapter III which deals with amnesty and has as a heading "Amnesty from tax and custom duties", so interpreting Art. 27 as providing a tax amnesty is in line with this.

- The heading of Art. 27 does not contain the word "amnesty" while other articles of Chapter III contain the word "amnesty'. On the other hand, the heading of Art. 22 also not uses the word "amnesty" but clearly deals with an amnesty.

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[1] Reference is made to the apartment in Rr. ***.*** Tirana, of 94.6 m2, purchased in 2008 for 61.758 Euro (approx. 7.608.000 ALL), re-evaluated in 2011 for 17.000.000 ALL and sold on 21.10.2015 for 110.000 Euro (approx. 15.309.000 ALL).

The word "amnesty" does not seem to fit easily on the tax benefit resulting from a re-evaluation. Amnesty presupposes that an obligation is not met and that the person who did not meet the obligation is (partially) "pardoned" for this. It is not *prima facie* clear what concrete obligation is or was not met when re-evaluating an asset.

- All other relevant provisions of Chapter III relate to the past. The amnesty provided by these provisions relates to liabilities until a certain date (mostly 31 December 2011). Art. 27 has no time-limit and relates to future events (the re-evaluation and selling of the asset).

- The re-evaluation of real estate owned by legal persons is regulated in Art. 11 of the law, which belongs to Chapter II of the law which deals with the legalization of capital. Art. 11 and 27 of the law show a great resemblance in form and substance and it is not prima facie clear why the articles belong to different chapters.

- The Ministry of Finance issued a Guidance/instruction based on Art. 36 of the law on implementing, amongst other provisions, Art. 27 of the law.

4. Tax benefit as "legalization of capital"

The re-evaluation of real estate constitutes – as a general comparison with the provisions of Chapter II of the law shows – structurally "legalization of capital". This becomes even clearer, when Art. 27 is compared with Art. 11 of the law. Whereas Art. 11 regulates the re-evaluation of property of juridical persons (real estate, machinery and equipment), Art. 27 contains the rules for the re-evaluation of real estate for natural persons. A careful analysis of the two provisions shows that almost identical wording is used in the two provisions for the two categories of persons. Systematically the provision of Art. 27 of the law belongs thus clearly into Chapter II of the law.

Art. 6 of the law foresees that individuals who must declare their assets to HIDACCI, are excluded from benefitting from the rules of Chapter II of the law and thus, from the rules on the legalization of capital.

- It would therefore seem odd that the mere fact that the provision on re-evaluation of real estate for individuals is – out of whatever reason – part of Chapter III (Amnesty for Tax and Customs Duties) and not part of Chapter II (Legalization of Capital) of the law, could create a loophole to the benefit of public officials.

- The intention of both Art. 6 and Art. 18, paragraph 3, of the law seem to speak clearly against such an interpretation.

- Even if one were to conclude that direct applicability of Art. 6 of the law seems to be excluded according to the wording of Art. 6, a systematic interpretation of the different provisions of the law – especially Art. 6, 11, 18 and 27 of the law – seems to lead to the

conclusion that Art. 6 should at least apply *per analogiam* to the provision of Art. 27 of the law.

5. Conclusion

The analysis above results in the following.

- If the exclusion of Art. 18, paragraph 3, of the law is applicable, then the wife of the assessee was not entitled to the benefit provided for by Art. 27, paragraph 10, of the law.
- If the exclusion of Art. 18 is not applicable, then the exclusion of Art. 6 of the law might be applicable for the above-mentioned reasons either directly or *per analogiam*.

6. Opinion

In my opinion the IQC should decide whether the wife of the assessee was entitled to the benefit provided by Art. 27, paragraph 10, of the law, if this decision is relevant for making a final decision whether to confirm or suspend or dismiss the assessee from duty.

The IQC should in this case address the question whether the wife was excluded from the tax benefit because of the applicability of Art. 18, paragraph 3, of the law and, if not so, whether she was excluded from this benefit because of the applicability of Art. 6 of the law.

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