Prot. 356 no.

Tirana, 12 May 2020

To the
Independent Qualification Commission
Rruga e Kavajës, no. 7
Tirana
Albania

Case Number: **AC/TIR/1/04**
Assessee: **Andi Civici**

Concurring Opinion
pursuant to
Constitution of the Republic of Albania, Annex 'Transitional Qualification Assessment', Article F, paragraph 4
and
Law No 84/2016 'On the transitional evaluation of judges and prosecutors in the Republic of Albania, Article 55, paragraph 5

1. The Independent Qualification Commission, with decision n. 243 of 4.3.2020, dismissed assessee Andi Civici from duty.

2. The undersigned International Observer concurs with the conclusion of the panel, while however dissenting with the interpretation of the facts, and the legal argument used by the panel when assessing in paragraphs 72-to 85 of the decision, the financial capacity of the "other related person" – Duke Habazaj (hereafter DH)- to provide to the assessee a loan of 42.000 Euro on 21 December 2011, which eventually is converted by the same DH into a donation in 2014.

3. The loan is one of the sources for the financing of the apartment with surface. 147.80 m², Rr. "Sami Frashëri", p. TID, h / 7/3, Tirana, with the value of EUR 155,000 (one hundred and fifty five thousand euros), fully liquidated by the buyer, acquired by the contract of sale with reserve no. 3088/1544, dated 22.12.2011, and with the final contract of sale no. 2167/952, dated 1.10.2012, and therefore relevant for the asset assessment of the assessee Andi Civici.

4. The facts relevant to this loan are clearly summarized in the decision, reported here for easy reference include:
    a. DH, on 01 August 2011 open the bank account number 40839/143 at BKT and deposits the amount of EUR 55.000.
    b. On 24 November 2011, DH withdraws the whole amount of 55.000 Euro from the same bank account, contextually closing it.
    c. On 21 December 2011, as declared by the assessee but with a non-registered transaction – cash at hands-, DH lends 42.000 Euro to the assessee financed with part of the withdrawn amount of 55.000 Euro.
    d. In 2014, the 42.000 Euro loan is commuted into a donation to the assessee, as stated in the notarial declaration of Duke Habazaj dated 25 March 2014.

5. To check DH's financial capacity, the Panel verified "certified and legitimate incomes" of DH and his wife for the period 2004-2010, concluding that in the reference period DH had the capacity to save, up to the end of 2010, the amount of ALL 7.265.293, compatible with the loan of 42.000 Euro (equivalent to approximately ALL 5.808.600 at the time); the panel however erroneously did not consider:
    a. The expenses for the purchase of immoveable assets done by DH before the date of the loan, up to end of 2010 for an overall amount of ALL 16.379.580, which become until 21 December 2011 the overall amount of ALL 29.068.500.
    b. The assets in form of bank savings and certified deposits created in the same reference period until the end of 2010, in the amount of ALL 27.139.742, growing in 2011 up to a total of 41.949.725 ALL, as per the IQC Financial Analysis.
    By this, the panel concluded for the legitimacy of the loan, even though DH earlier expenses are well beyond his legitimate incomes and saving capacity and amount to a total of 36.254.029 in December 2010.

6. The panel instead took the stance that the inclusion of those expenses in the financial analysis performed on DH would fall outside the scope of the law, and therefore concluded that, DH's

incomes, deducted of the living costs, are sufficient to justify the loan of 42.000 Euro, reasoning in paragraph 84 of the decision that:

Evaluating the private activity of the lender resulting in the investigation, his financial situation resulting from the state of liquidity and savings in the bank, knowing the Albanian reality of those years where informality has been visible and real for everyone, regarding other assets of Mr. Duke Habazaj and his wife, bought with income available through the banking system, the trial panel considers that, they may be from the legal activity of the late Duke Habazaj, and the commercial activity exercised by him over the years (1998-2015), and that they cannot be assessed in the context of the re-evaluation process of Mr. Andi Civici. This conclusion of the trial panel is in line with the constitutional and legal provisions, as well as the jurisprudential orientations, confirmed and consolidated by some decisions of the Special Appellate Panel (such as: decisions: no. 9, dated 18.4.2019 , no. 14, dated 9.7.2019; no. 15, dated 17.07.2019; no. 20 dated 31.7.2019).

7. The undersigned observer disagrees with such standing because it is contrary to the general duties of the re-evaluation institutions and furthermore it leads, in the concrete case, to an illogical result. In fact:
   - "Members of the Commission, judges at the Appeal Chamber and international observers shall investigate on all facts and assess all necessary circumstances for the re-evaluation procedure." (art. 45 V.L.). The same law in Art. 30 defines "The object of asset assessment is the declaration and audit of assets, the legitimacy of the source of their creation, of meeting the financial obligations, including private interests, for the assessee and persons related to him or her."
   - Assets for the purpose of the law are meant – as defined in art. 3 para 13 VL- "*all movable and immovable properties in the Republic of Albania or abroad, under the provisions of Article 4 of the Law no 9049 dated 10/04/2013 "On the declaration and audit of assets, financial obligations of elected persons and certain public officials", as amended, being in the ownership, possession or use of the assessee.*" This clearly includes assets the assessee receives in donation or use by third parties, as it is the monetary loan in this case.

8. Most importantly, art. 32 of the Vetting Law states that "*all assessee and his or her related persons or other related persons who have been declared in the capacity of donors, lenders and borrowers, when they confirm these relations, shall bare the obligation to justify the legitimacy of the source of the creation of these assets".* Such provision postulates the right/duty of vetting bodies to perform all investigative actions which are necessary in order to ascertain whether the sources of creation of the assets are justified: thus an investigative action shall be considered admissible and proportionate in so far as it is necessary and relevant.

9. In the specific case, the loan is one of the sources of the assessee's and, therefore, an investigating of the financial capacity of the lender, is both: relevant and necessary for the financial re-evaluation of the assessee; meaning a full analysis of DH finances up to until the moment of the loan, is proportional and within the scope of this assessee re-evaluation.

10. Contrary to the above, the panel creates an artificial distinction within the finances of DH, considering all legitimate incomes as source of the loan, while refraining from assessing the legitimacy of "earlier and certified" expenses: even in instances when the panel acknowledged that such expenses were beyond DH's legitimate incomes, they failed to draw the necessary consequences in terms of legitimacy of the asset; this is not in line with the standard foreseen under the V.L. and it is factually inaccurate, as it is clear from the IQC's financial analysis that DH did not use his bank savings for his expenses before 2011, as his liquidity in those years, does not decrease while the value of the asset purchased increases.

11. Therefore there is not a clear link between DH lawful sources and the 42.000 Euro loan, as the bank deposit declared to be the source of the loan, was in fact created with a onetime cash deposit shortly before, and closed few months after with the withdrawal of the full amount used to finance the loan. Such unclarity in DH finances, contrary to the panel's standing, should have been investigated in order to confirm the legality of the loan, especially when the very same panel concluded, assessing DH previous loan to the assessee in 2003, that DH lacked legitimate financial resources to justify it.

12. Verifying the legitimacy of the source of the 42.000 Euro in this case, means ensuring that money used for the loan has a clear and legitimate origin. This requires a full financial evaluation of the capacity of the other related person to finance the loan, which entails not only a verification of the incomes, but also the verification of the expenses in the reference period before the loan.

13. This reading is in line with the principles expressed by the Special Appeal Chamber in its Jurisprudence which provide some "guidance", but do not limit the possibility to investigate assets of the other related persons only to the living expenses, as instead the panel *de facto* concluded.

14. The logical process adopted by the Special Appeal Chamber, tailors to principle of proportionality in the investigation of the other related person, on the concept of relevance for ascertain relevant facts for the investigations, and it identifies two logical steps in the process of analysis, primarily to consider whether the other related person was able to earn an income; successively, assess whether "a*fter a logical and overall evaluation of each case, the other related person had the means to lend this amount to the assessee."*

15. The AC in Decision JR 36 nr. 20/2019, indeed states that "*given that the other related persons are not themselves subject to the re-evaluation, the analysis and assessment of their assets must be restricted to the asset lent or donated and be in line with a logical and reasonable assessment of the specific case and its respective circumstances"* Furthermore, whenever *"there are suspicions of concealed assets in the name of the other related person"* the vetting bodies have a duty to investigate in order to discover whether, indeed, there are undeclared assets beyond what was declared by the assessee (ibid. para. 31).

16. According to this principle, when the lack of resources is proven, no further investigation is needed to draw a vetting relevant conclusion, as the AC concluded in the case JR 14 decision no. 9/2019, it is not necessary to perform an in depth financial analysis on the (alleged) other related person, because in that specific case the Company's balance sheets were *per se* clear about the insufficiency of the financial means in order to cover the loan. In this case, where the panel concluded the incomes of DH were *in abstracto* sufficient to cover the loan, the panel could not stop at the first step of the logical process, but instead should have verified if the lending capacity existed in the specific case.

17. Limiting the investigation of the other related person on "*the asset lent or donated*", means that only actions which are necessary and relevant in order to prove or disprove the existence of the specific loan, its lawfulness and the financial capacity to lend or donate can be undertaken (thus, e.g., no investigation on circumstances which are posterior to the loan or gift can be made). But such investigative actions, in so far as they are relevant and necessary, can and must be undertaken.

18. This distinction is made clear also by the AC decision in the case JR 37 nr. 15/2019, para. 110, where it is stated that "*the Chamber holds that if the assessee is found in one of the conditions stipulated by Article 32 paragraph 4 of Law no.84/2016, he should bear the obligation to prove the lawfulness of the source of creation of that asset which is subject to donation or loan; this obligation should not extend further to all assets of other related persons.*" In the assessment of the AC, it would be contrary to the proportionality principle to investigate on private citizens when there is no proven loan/gift relationship (which is quite obvious, because in this case the very quality of "other related person" is lacking); whereas, if the loan/gift relationship is proven, then there is a full-fledged obligation to prove (and investigate) its lawfulness.
In addition to the above, the AC explicitly admits the possibility to investigate even when the assessee does not declare the existence of an "other related person", but the factual circumstances show a "*dubious situation where the assessee's other related persons hold the assessee concealed assets , or that they are used to conceal the existence of a relationship that leads to a situation of conflict of interest of the assessee with another person, a suspicion that should be founded on objective circumstances*".

Therefore, in light of the foregoing, it is the conclusion of the undersigned observer that, once the panel ascertained DH had *in abstracto* sufficient resources to cover the amount of the loan, should have nonetheless verify if those legitimate resources were in fact the object of his loan to the assessee, having failed to do so, the panel was not in the position to confirm the legality of the loan and the legitimacy of its sources.

Respectfully,

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Theo Jacobs
International Observer