

ACCOUNTING AND LEGISLATIVE INTERPRETATIONS OF TAX EVASION FACTS - BETWEEN REALITY AND LEGALITY

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Abstract:

Enforcement of the Law 241/2005 on preventing and combating tax evasion gave rise, in the current specialized practice, to some interpretations, the practice not being consistent, due to the fact that the authorities that apply it also interpret it differently, from situation to situation, and from one area of application to another, and the ways in which the facts of tax evasion are performed varies, from case to case. At present, the main offenses investigated by the criminal investigation authorities are determined by the taxpayers' misapplication of the provisions in art 6 and 9 of the aforementioned law.

Key words: Accounting interpretations, legislative interpretations, unreal and false damages, tax evasion facts, preventing and combating tax evasion

JED Classification: M41

Introduction

Tax evasion is the means by which economic subjects respond to the tax burden when it exceeds a certain threshold considered necessary for initiating, maintaining and developing their business or any business activities as well as aspects pertaining to their current wealth or income. Although tax evasion has semantic connotations that enter the field of the underground economy, it is not a component of the economy, but rather lies at the inherent interference with the official underground economy¹.

According to Law 87 of 1994², tax evasion is the process of evading, by any means, in whole or in part, from the fees and other amounts owed to the state budget, local budgets, state social insurance budget and social funds, by natural or legal persons, hereinafter referred to as taxpayers.

In what concerns the level of the underground economy and tax evasion (the shadow economy is estimated at 30.2% of the GDP), Romania is among the EU countries, being exceeded only by Bulgaria³.

"The illegally obtained cash must be introduced by any method into the financial system. The vulnerable points identified the **money laundering** process targets placing cash in the financial system and its transfer across borders, as well as transferring cash into and from financial system"⁴.

¹ Dinga, Emil (2008). Considerații teoretice privind evaziunea fiscală Vs fraudă fiscală, *Studii Financiare (Financial Studies)*, 2008, vol. 12, issue 4, [ftp://ftp.repec.org/opt/ReDIF/RePEc/vls/vls_pdf/vol12i4p20-50.pdf](http://ftp.repec.org/opt/ReDIF/RePEc/vls/vls_pdf/vol12i4p20-50.pdf), p. 21

² Legea nr. 87/1994, republicată prin Legea nr. 241/2005 pentru combaterea evaziunii fiscale (Law no. 87/1994, republished by Law no. 241/2005 against tax evasion)

³ <http://ziarulmar.ro/wp-content/uploads/2012/08/nr1511.pdf>

⁴ Haranguș, Daniela (2013). *Money Laundering in the Offshore Financial Centers*, in *Annals of Tibiscus University of Timișoara*, Economic Science Series. Timișoara, Vol. XIX / 2013, pp. 339 – 342

Results and discussion

The need to raise amounts to "the consolidated state budget", under the law 241/2005 on preventing and combating tax evasion is "the set of all public budgets, budgetary system components, aggregated and consolidated, in order to form a whole"; this has led to the strengthening of the fight to combat tax evasion in the Romanian society in 2015, battle fueled by the NAFA control bodies and by its criminal investigation authorities and the courts.

The ways in which the facts of tax evasion are performed differ from case to case, and, currently, the main offences investigated by the criminal investigation authorities are determined by the taxpayers' misapplication of article 6 and 9 of the aforementioned law.

Thus, according to article 6 of the Law 241/2005, those acts, performed by an economic entity, that detain and not contribute, within 30 days of the due date, with the amounts of taxes or withholding contributions, are punishable by law.

According to legal interpretations of the act referred to in this article, we can find ourselves in many situations provided by the law, as follows:

- a) Detaining and withholding, within 30 days of the due date, of the amount of staff salaries of a business entity representing the payroll taxes, employee social security contributions, health insurance and unemployment.
- b) The income tax at 16% and the environment fund at 3% of the receipt and payment certificates performed by the taxpayers dealing with the recycling of metallic and non-metallic products.
- c) Detaining and withholding, within 30 days of the due date, of the tax of 0.5% of turnover for entities exploiting mineral deposits, except methane.
- d) Any other taxes due for the consolidated state budget, which was incorporated from the collection of one entity to another entity.

All these types of taxes, withheld at the source, are nominated by Statement 100 and is payable no later than the 25th of the month following the reporting period.

The interpretation of the laws of the offense under article 6 for this act to meet the conditions of a crime, it must be done intentionally; the taxpayer must demonstrate the intentionality and criminal investigation authorities must prove these facts.

In order to solve these cases, criminal investigation authorities have performed the technical-scientific reports by NAFA representatives or fraud inspectors, in the prosecutors' offices found in the proximity of the county courts.

In practice, it is found that by the reading of financial and accounting documents provided by the taxpayer, data recorded into accounting documents are given various interpretations and often the conclusions included in these reports show personal opinions of those who expose them.

Thus, the existence in the account balance 5311 "Register lei" and 5121 "Available in lei at the bank at the end of the administration period of some money are considered amounts that the entity has detained intentionally, in order to evade the payment of such taxes.

We consider that it is an incorrect statement, according to which the entity was evading intentionally to pay such obligations, as the correct interpretation of the financial accounting, which is being analyzed, is that it must take into account all the commitments that the entity had at the date of the analysis, such as the existence in the economic cycle of checks, promissory notes, bank payments, obligations to third parties, commitments that, if the entity would not pay, would obstruct its normal functioning, reaching the inability to even carry out the activity for which it was created.

Another wrong accounting interpretation, formulated in the specialty practice, is found when it is ascertained that the entity has incurred financial and operating leases, which the criminal investigation authorities consider as not necessary investments to the conducting of its business, and the amounts for the payment of those are considered diverted from the real liabilities that the taxpayer had.

The conclusion above is found frequently in the solving of these cases, although it is contrary to all principles of management of an entity, administration belonging to the one running the business entity.

Tax evasion has been created by the need to tackle tax burden often created by poor management of the existing amounts in the consolidated state budget, loans made by the Government to support social policies that encourage unemployment, management of public funds for projects that are unnecessary and not mandatory, the creation of unrealistic and damaging annual budgets.

Most often, we find in practice that the sanctioning of some acts that are not crimes, but contraventions, because both control bodies and criminal investigation authorities do not understand that when it is not about performing a withholding of an amount, it is not about a withholding situation, but about a contravention provided and sanctioned by GO 92/2003 on the fiscal procedure code.

Another important aspect sanctioned by the Law 241/2005 on preventing and combating tax evasion is represented by taxpayers' investigation on Article 9, which sanctions those acts committed in order to escape tax obligations, such as:

- a) the concealing of goods or taxable sources;
- b) failure, in whole or in part, of evidencing, in the accounting or other legal documents, of performed commercial transactions or incomes;
- c) the evidence, in the accounting or other legal documents of expenditures not based on actual transactions or highlighting other fictitious transactions;
- d) alteration, destruction or concealment of accounting documents, data of electronic charging devices or electronic cash registers or other data storage means;
- e) performance of double accounting records, using documents or other data storage means;
- f) flight from conducting financial, tax or customs evaluations, by not declaring, declaring fictitious or inaccurate facts with regards to the head or secondary offices of the persons under evaluation;
- g) the substitution, degradation or transfer by the debtor or by third parties of property seized under the provisions of the Fiscal Procedure Code and the Criminal Procedure Code.

Among the most common offenses sanctioned by law are found those in paragraph b, the failure, in whole or in part, to highlight accounting documents, or other legal documents, performed business transactions or incomes.

Thus, in the sense of those who feel these provisions to be infringed, withholding incomes earned and received is a clear form of tax evasion.

Not declaring, in whole or in part, these revenues are subject to registration in the accounts of purchased goods or merchandise which, when acquired illegally, generate immediate tax evasion and when inputs of goods or merchandise are legally purchased, they generate only a deferred payment of taxes, arising from these incomes.

We believe that the analysis and interpretation of laws and accounting of facts derived from the commercial activity of a taxpayer must be considered in light of all the correlations achieved in relation to third parties.

In the current fiscal control activity, in many of the calculations made to determine the taxes, we proceeded to estimate their calculation by the method used and appreciated by those who calculate future damages, most of the times, without knowing the real tax situation.

A good example of this is found in the fact that some fiscal control authorities proceeded to recalculate the income of taxpayers based on the fact that their records have not properly recorded the earned incomes from the simple fact that these statements do not correspond to those of other taxpayers-(Statement 394)- preferring to calculate the estimate of incomes at the expense of making a simple inventory, to determine the real tax situation.

The conclusion drawn from the fiscal control documents was that they estimated unreal and false damages in relation to conditions in the taxpayer's records.

From the sequence of acts sanctioned by article 9 of this Act, a legislative and accounting interpretation we can find in point e of the law, where the law penalizes the

enforcement of double accounting records, using the documents or other storage media data.

From the specialized practice, one can notice that the criminal investigation authorities consider the double registration records of any records found on the premises of taxpayers, in the form of notebooks, but also records on personal computers, notes and other documents.

We found that incomes are restated according to those found in various records, tax evasion cases are prepared for which their solving requires time and money from the taxpayer who is being investigated.

Offenses covered by Article 9 are researched, in many instances, currently in Romania, but proves to be tested few times, since, in many cases, the taxpayer may not use the sample with specialized accounting expertise anymore, no longer having the liquidity for the payment of specialized expertise.

The calculations made by antifraud investigators, based on various documents collected from the taxpayer, fail to comply with the statutory legal provisions, as incomes and expenditures of a taxpayer must result in the preparation of official accounting records in accordance with the law and order 3512/2008 on documents used in business accounting.

In practice, there have been cases of downloaded memories from personal computers in the research phase of the criminal offenses of tax evasion in order to calculate additional income, finding that they were not addressed to a taxpayer person or entity, by not being mentioned.

Using this type of discharge can be achieved when switching from downloading overall management of value to quantitative value, to reconsider stocks, in which case we are in the recalculation of income as assessed by the criminal investigation authority.

When a computer program is used only in certain sequences, one cannot conclude that these sequences require a misinterpreted double accounting.

Another aspect found in the specialty practice is that of reconsidering the expenditures from the accounting of the business entity, those charges that tax inspectors and the criminal investigation authorities reinterpret them as tax deductible, which were also necessary to achieve the business activity of the company, even if they did not lead directly to incomes within the business entity.

Reconsideration of certain expenditures cannot be considered facts of tax evasion, as they are being interpreted and the recalculation of taxes and fees in what regards the reconsideration of expenditures are not viewed as crimes, but as legitimate expenditures required to bring the company incomes.

Some of these expenditures are incurred for the production of new investments that do not lead to the achievement of immediate income, although from the point of view of the legislator, he provided a reduction of tax for reinvested profit; it has proven difficult for the measure to be legally applicable, because it applies to a single category of assets, which can be reinvested provided that they are new machinery, usually, production equipment.

Conclusions

Since the tax burden imposed on taxpayers is very high and tax law is chaotic and dense, we must distinguish between its misapplication and the entity's intention to evade payment of taxes.

Any incorrect simple accounting record cannot be regarded as an evasion of duties and taxes under the general chaos created by the application of measures to reduce tax evasion, mechanism that, at present, proved to be destructive and useless.

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