THE INFRACTIONS OF TAX EVASION

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Abstract
In order to avoid the problems regarding the carrying out of the duties that come to the public institutions and authorities, the state regulates a tax system, the finality of which consists in assuring the revenues necessary for the optimal functioning of the state institutions and authorities, as well as of their obligations. The prevention and fight of the tax evasion represents a constant concern of the legislator. One of the latest laws in this matter is Law no. 241/2005. This law was adopted in order to prevent and fight the taxpayers' eluding the carrying out of the tax obligations. Law no. 241/2005 has two purposes: the first one consists in setting the measures meant to prevent the infractions of tax evasions and other infractions related to that and the second one is to fight the infractions of tax evasion and other infractions related to the above- mentioned infractions. Through the deeds forbidden by the norms of this law, it damages the social values regarding the taxation and the social relations generated by this one. Through Law no. 241/2005, the Romanian legislator incriminated more deeds of tax evasion. Also in the case of committing these infractions, the legislator regulated certain causes of unpunishment and reduction of the punishments. The current study deals with the analysis of the infractions of tax evasion and of the causes of unpunishment and reduction of the punishments.

Keywords: *tax evasion; infraction; causes of unpunishment; causes of reduction of the punishments*

Introduction

The existence of the state depends, among others, on the participation of the taxpayers, natural persons and legal entities, to the setting of the public funds. The functioning of the etatic or administrative institutions implies the carrying out of some very high expenses that depend in their turn on the existence of some previous public revenues. The prevention and fight of the tax evasion represents a constant concern of the legislator. One of the latest laws in this matter is Law no. 241/2005 regarding the prevention and fight of the tax evasion.

The purpose of Law no. 241/2005, as well as that of any law that contains penal norms of accusation, is to defend the society against some antisocial deeds. Through the deeds forbidden by the norms of this law, it damages the social values regarding the taxation and the social relations generated by this one. Corresponding to the gravity of the deeds forbidden through the special penal norms contained by Law no. 241/2005, the sanctions of penal law stipulated by this one are the most severe legal sanctions for illicit deeds related to taxation existing in the Romanian legal system.

In the field of taxation, the prevention and fight of the deeds of tax evasion or of those related to these ones take place through various types of instruments, such as those of economic, politic, legal etc. nature etc. The legal measures can be from the domain of commercial law, penal law etc.

The prevention and fight of the tax evasion are carried out also through other instruments than those stipulated by Law no. 241/ 2005; one of these is the fiscal certificate regulated by Government Ordinance no. 75/ 2001. The prevention and fight of the tax evasion is also carried out through other normative documents. Among these, it is also the Fiscal code, Law no. 82/ 1991, Customs code etc.

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Next we shall analyze the content of art. 9 of Law no. 241/ 2005 that stipulates the infractions of tax evasion and art. 10 that regulates certain causes of unpunishment and reduction of the punishments.

Literature Review

The doctrine is quite scarce regarding the analysis of the infractions of tax evasion stipulated by Law no. 241/ 2005. Amount the representative works for this subject, we mention the works of M.Ş. Minea, C.F. Costaş, D.M. Ionescu, Law of the tax evasion. Comments and explanations, Bucharest, 2006.

Beside the present paper, the specialty literature records also other works that I have mentioned in the bibliographic list in the end.

1. Content of art. 9 of Law no. 241/2005

According to art. 9 paragraph (1) of Law no. 241/2005, the following deeds committed for the purpose of eluding the carrying out of the tax obligations are infractions of tax evasion and are punished with imprisonment from 2 years to 8 years and the forbiddance of some rights:

a). hiding of the asset or of the imposable or taxable source;

b). total or partial omission of marking the afferent trading operations or the obtained incomes in the accounting documents or in other legal documents;

c). marking of the expenses that are not based on real operations in the accounting documents or in other legal documents and marking of other fictive operations;

d). alteration, destruction or hiding of the accounting documents, memories of the fiscal electronic taxation devices or cash- registers or of other data storage devices;

e). drawing up of double accounting registers by using documents or other means of data storage;

f). eluding of performing the financial, tax and customs verifications by not declaring, fictively or inexactly declaring with regard to the main or secondary offices of the checked persons;

g). substitution, degradation or giving away of the assets put under distraint according to the provisions of the Tax procedure code and of the Penal procedure code by the debtor or other third parties.

If, through the deeds stipulated by paragraph (1), it was caused a prejudice higher than EUR 100.000 in the equivalent of the national currency, the minimum limit of the punishment stipulated by Law and its maximum limit is increased with 2 years. If, through the deeds stipulated by paragraph (1), it was caused a prejudice higher than EUR 500.000 in the equivalent of the national currency, the minimum limit of the punishment stipulated by Law and its maximum limit is increased with 3 years.

2. Analysis of the infractions stipulated by art. 9

2.1. Hiding of the asset or of the imposable or taxable source.

The hiding is an activity through which the active uncircumstanced subject places in safety the asset or the imposable or taxable source, depending on the case. The imposable and taxable object (asset or source) represents, from the tax point, an income or a good for which it should be paid up tax obligations.

The hiding of the asset or of the imposable or taxable source can take place both through the action of putting in safety the asset or the source for the purpose of not being known by the competent authorities, and through the omission of declaring an income or asset that has to be declared for the purpose of taxation. For instance, the omission of declaring some incomes resulting from the cession of the right of use of an asset. In doctrine and practice, it was mooted the question of setting the content of letter a) in correlation to letter b) of art. 9 paragraph (1). The offered solution is that that the non- declaring represents „hiding" in the sense of art. 9 paragraph (1) letter a) if there is only the obligation of declaring for that particular income. If the income eluded from the tax or fine payment has to be both marked and declared, the deed has to be framed within the provisions of art. 9 paragraph (1) letter b) and the concurrence of infractions is excluded.

2.2. Total or partial omission of marking the afferent trading operations or the obtained incomes in the accounting documents or in other legal documents.

The content of the infractions is fulfilled no matter of the circumstance that there is or there is not an accounting register. The examined infraction of tax evasion can be committed in numerous factual modalities. For instance, a taxpayer purchases a quantity of goods that he does not register in accounting and later on, after he sells these goods, he does not register the income from the sale of the goods either.

In a case, it was retained that the defendant, in its capacity of driving instructor auto, taught a number of 63 persons from whom he cashed in amounts between ROL 450.000 and 700.000 in 1997 and for each person he issued an invoice that recorded a lower amount that the one that had been cashed in and, in this manner, he avoided the tax payment amounting ROL 3.259.812. According to art. 13 [the correspondent text to art. 9 paragraph (1), letter a) of Law no. 87/1994], it is an infraction of tax evasion the deed of not totally or partially recording the obtained revenues in the accounting registers or of recording expenses that are not based on real operations, if they had as result the unpayment or diminution of the taxes, fine or contribution. In this case, in the accounting registers, the defendant marked as cashed in lower amounts than the ones cashed in in reality and the expenses assumed to be made in addition and to be unmarked were not proved, so that he is guilty of committing the infraction.

In literature and jurisprudence, it was mooted the question of the report between the infraction stipulated by art. 9 paragraph (1) letter b) and the infraction stipulated by art. 43 of Law no. 82/1991. The solutions for this matter were both in the sense of retaining a concurrence of infractions, and in the sense that the infraction stipulated by art. 43 of Law no. 82/ 1991 is absorbed by the complex infraction stipulated by Law no. 241/2005. Here is an example. A person with the intention of omitting to record certain operations submitted to the taxation in the accounting having as result the distortion of the imposable and taxable revenues.

According to art. 43 of Law no. 82/1991: „The witting performance of inexact recordings, as well as the witting omission of the recordings in the accounting that have as result the distortion of the revenues, expenses, financial results, as well as of the elements of assets and liabilities that are recorded in the balance sheet, represent an infraction of intellectual dishonesty and are punished according to the law". From reading the norm, it can be noticed that there are certain resemblances, but also differences, between this norm and the one stipulated by art. 9 letter b).

Being confronted with this matter [under the regulation existing on the settling date of the case, the equivalent of art. 9 letter b) was art. 13 of Law no. 87/1994], the Supreme Court did not have a unitary practice. So, in a process, it considered that the deed of not marking the revenues obtained by a company through the accounting documents that had as result the unpayment of the tax represented both an infraction of tax evasion stipulated by art. 13 of Law no. 87/1994, and one of intellectual dishonesty described by art. 43 of Law no. 82/1991.

In other decisions, the High Court of Justice and Cassation also considered that the infraction of intellectual dishonesty stipulated by Law no. 82/1991 is absorbed by the complex infraction stipulated by Law no. 87/1994.

The above- presented law matter was settled by the Reunited Sections of the High Court of Justice and Cassation, in the sense that the deed of total or partial omission or the marking of the run trading operations or of the obtained revenues in the accounting documents or in high legal documents or the marking of the expenses that are not based on real operations in the accounting documents or in other legal documents or the marking of other fictive operations represent a complex infraction of tax evasion stipulated by art.9 paragraph 1 letter b and c of Law no. 241/2005 (former art.11 letter c, former art.13 of Law no. 87/1994). The solution of the High Court of Justice and Cassation is questionable because art. 43 of Law no. 82/1991 refers only to the recordings in the accounting and it does not include the activity of marking the economic- financial operations in the justifiable documents according to art. 6 of the same law, and in fact, the infraction of tax evasion has in view also the justifiable documents. On the other hand, the accusation in Law no. 82/1991 refers to all the economic- financial operations while the infraction of tax evasion refers only to the trading operations, obtained revenues and fictive expenses or operations.

In order to have a concurrence of infractions, it is necessary that the inexact recordings or their omission should be reflected in the balance sheet and should lead to the eluding of payment of the tax obligations. Otherwise, it is retained only the infraction stipulated by art. 9 paragraph 1 letter b) or c) of Law no. 241/2005, if the case.

2.3. Marking of the expenses that are not based on real operations in the accounting documents or in other legal documents and marking of other fictive operations.

The marking of some operations or unreal (fictive) expenses in the accounting documents and other official financial- fiscal documents consists in the activity through which, in these documents, it is performed recordings that are not based on totally or partially valid justifiable documents. In the judicial practice, it was decided that this infraction can not be retained in the case that the action of rectifying a book- keeping error of the unreal operations took place due to the annulment of a document. In a different case, the court retained the existence of the infraction by taking into account the fact that, at the request of her husband, the defendant drew up 74 fictive invoices from which it resulted the delivery of spare parts to companies that did not exist in reality. The blue exemplars of these invoices were torn up by the defendant and the red and green exemplars were recorded in the accounting.

2.4. Alteration, destruction or hiding of the accounting documents, memories of the fiscal electronic taxation devices or cash- registers or of other data storage devices.

The alteration of the accounting documents, memories of the fiscal electronic taxation devices or cash- registers or of other data storage devices consists in their modification or forgery. The destruction means the cancellation of such documents, data, and the hiding consists in their putting in safety, so that they can not be found by the competent authorities. The activity through which it is fulfilled the content of the examined infraction can not be framed in other accusation norms at the same time, because this does not come in concurrence with other infractions, the material elements of which can be found in the text of the special norms (for example, false material, destruction and theft).

2.5. Drawing up of double accounting registers by using documents or other means of data storage.

We are in the presence of a double accounting register, in the sense of the accusation norm, then when, beside the apparent accounting register and inadequate to the reality, there is a parallel

real accounting register that totally or partially covers the activity of the taxpayer in question. As we have already said, judiciously, for the existence of carrying out a double accounting register, it is necessary to exist enough official accounting documents that should contain real data about the taxpayer' s financial- accounting activity, and not certain isolated recordings. If a taxpayer holds two identical accounting registers, even inadequate to the reality, the content of this infraction is not fulfilled either. But we can talk about a different infraction of tax evasion [for example, the one stipulated by art. 9 paragraph (1) letter b].

2.6. Eluding of performing the financial, tax and customs verifications by not declaring, fictively or inexactly declaring with regard to the main or secondary offices of the checked persons.

In order to exist this infraction, it should be fulfilled a prime essential requirement, namely, that the eluding of performing the (financial, tax and customs) verifications should take place by not declaring, fictively or inexactly declaring with regard to the main or secondary offices of the checked person. The secondary and main offices should be declared at the trade register according to Law no. 26/1990, as well as at the tax authorities. The content of the infraction implies also the carrying of the essential requirement referring to the existence of the tax control, because this is the only way that it can be established the taxpayer's eluding the performance of the financial, tax and customs verifications. Of course, the eluding of performing the verifications takes place for the purpose of evading from the carrying out of the tax obligations.

2.7. Substitution, degradation or giving away of the assets put under distraint according to the provisions of the Tax procedure code and of the Penal procedure code by the debtor or other third parties.

In order to fulfill the content of the infraction, it is necessary that the substituted, degraded and given away assets should be legally put under distraint. This infraction can come in concurrence with other infractions and it can also be excluded by other infractions (for instance, in the case of eluding the putting under distraint) or it can exclude other infractions (such as the destruction). So, if through eluding, the legally applied seal was broken, it is a concurrence of infractions between this infraction and the infraction of breaking the seal (art. 243 of Penal code); if the legally put under distraint asset is given away, it will be only an infraction of tax evasion; if the legally put under distraint asset is destroyed, we will deal only with the infraction of destruction (art. 217 of Penal code).

3. Causes of unpunishment and causes of reduction of the punishments

3.1. Content of the legal text

According to art. 10 (1) of Law no. 241/2005, in the case of committing an infraction of tax evasion stipulated by the current law, the limits of the punishment stipulated by law for the committed deed are reduced to half, if during the penal pursuit or during the trial, until the first term of the trial, the accused or defendant entirely covers the caused prejudice. If the prejudice caused and recovered in the same conditions is of up to Eur 100.000 in the equivalent of the national currency, it can be applied the punishment with the fine. If the prejudice caused and recovered in the same conditions is of up to Eur 50.000 in the equivalent of the national currency, it is applied an administrative sanction that is recorded in the criminal record.

The provisions stipulated by paragraph (1) are not applied if the doer has committed another infraction stipulated by the current law within 5 years since the committing of the deed for which he benefited from the provisions of paragraph (1).

3.2. Analysis of the causes of reduction or replacement of the sanctions

The utterance of the legislator contained in art. 10 is unsuitable under more aspects.

First, the 2nd thesis – according to which it can be applied the punishment with the fine if the caused and recovered prejudice (during the penal pursuit and during the trial, until the first trial term) is of up to Eur 100.000 in the equivalent of the national currency – can not be considered a cause of reduction of the punishment or of unpunishment, because it takes place a replacement of the punishment.

Secondly, the 3rd thesis – according to which it is applied an administrative sanction that is recorded in the criminal record if the prejudice caused and recovered in the same conditions is of up to Eur 50.000 in the equivalent of the national currency – is not exactly a cause of unpunishment, but a cause of replacement of the penal liability. On the other hand, given the fact that the administrative fine is to be recorded in the criminal record, the purpose of changing the nature of the applied sanction is practically imperceptible.

3.3. Conditions of application of art. 10

The application of the cause of reduction of the punishment or replacement of the sanctions is three times conditioned. The first requirement is to deal with an infraction of tax evasion, which means that only the infractions stipulated by art. 9 of Law no. 241/2005 enter the application domain. The second – negative – condition is that the causes of reduction of the punishment or replacement of the sanctions are not applied if the doer another infraction stipulated by Law no. 241/2005 within 5 years since the committing of the deed for which he benefited from these causes. The third condition regards the entire recovery of the prejudice at latest until the first trial term.

In the case of the deeds committed under Law no. 87/1994, if the penal pursuit or the trial takes place after the coming into force of Law no. 241/2005, the defendants can benefit from the causes of impunity or reduction of the punishment regulated by art.10 of this law only if, by application of art.13 of Penal code, it can be retained the committing of a tax infraction stipulated by art.9 of Law no. 241/2005 and it is covered the prejudice at latest at the first trial term.

In this situation, the first trial term can be considered the one immediately after the date of coming into force Law no. 241/2005, no matter of the stage the penal trial is.

3.4. Effects of incidence of art. 10

The first question is if the prosecutor can apply art. 10 of Law no. 241/2005 in the case of incidence of the 3rd thesis, respectively when the application of an administrative sanction is imposed. We think that the prosecutor can apply the sanction with administrative character, because, according to the special norm, the application of this sanction is made because there is a „cause of unpunishment”, so, it can not be explained why the legislator named it like this. Consequently, *volens nolens,* we have to accept that art. 10 paragraph (1) of 3rd thesis is dedicated to a special cause of unpunishment with the possibility for the prosecutor to give a solution based on art. 11 point 1 letter c) of Penal procedure code by applying a sanction with administrative character stipulated by art. 91 of penal code, if the conditions of incidence are also fulfilled. In order to support this interpretation, there is also the legal observation regarding the covering of the prejudice during the penal pursuit.

Conclusions

From the above- said, it results that the infractions of tax evasion are incriminated unsuitably in the Romanian penal law. We have in view also the fact that there is a lack of

correlations between the content of art. 9 of Law no. 241/2005 and the content of other accusation norms, such as art. 43 of Law no. 82/1991.

On the other hand, the utterance of the legislator contained in art. 10 of Law no. 241/2005 is unsuitable under more aspects. First, the 2nd thesis – according to which it can be applied the punishment with the fine if the caused and recovered prejudice (during the penal pursuit and during the trial, until the first trial term) is of up to Eur 100.000 in the equivalent of the national currency – can not be considered a cause of reduction of the punishment or of unpunishment, because it takes place a replacement of the punishment. Secondly, the 3rd thesis – according to which it is applied an administrative sanction that is recorded in the criminal record if the prejudice caused and recovered in the same conditions is of up to Eur 50.000 in the equivalent of the national currency – is not exactly a cause of unpunishment, but a cause of replacement of the penal liability.

In conclusion, Law no. 241/2005 is far from being a corresponding law; it is a law that, on the contrary, can be considered to be a law of „stimulation” of the tax evasion.

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