

CERTAIN CONSIDERATIONS REGARDING THE METHODOLOGY OF INVESTIGATION OF THE TAX EVASION CRIMINAL OFFENCES

Mihuț Elena - Ana

*Univeristatea AGORA, Facultatea de Drept și Științe Economice, Piața Tineretului nr.8,
email:elena_mihut@univagora.ro, tel. 0744.640.051*

In all its ways of committing, tax evasion consists either in an action or a non-action of the doer, in the sense that the person in question did not fulfil the task he/she was compelled to fulfil. The basic law in this matter is Law no. 241/2005 for the prevention and control of tax evasion.

Specific activities consist in: investigation on the crime scene, questioning the persons involved in the case in different capacities, using technical-scientific findings and criminal or accountancy expertise, etc., identifying all documents of the accountancy field and other types of documents for the purpose of outlining and gathering evidence about the real commercial activity performed by the tax payer that he/she did not highlight in the account books and other documents.

Key words: tax evasion, investigation, law

I. Introductory notions. Tax evasion takes different forms and displays various degrees of intensity and aggressiveness, representing one of the phenomena whose existence has a negative impact on the state consolidated budget and the evolution of which leads directly to a reduction of the income proceeding from the budget as well as to disturbances in the business environment. It manifests itself in all fields of the market economy, but this phenomenon is developing especially in the field of dutiable products, of the use of documents with a special regime and also in the field of service providing.

Among the causes and conditions that encourage tax evasion we may mention: uncertainties (weak points) of the legislation that accompanied economic changes; uncontrolled economic division, appearance of small industrial units with a temporary, speculative activity; the somewhat permissive attitude of the authorities and of the population towards the violation of regulations, a certain reticence to discipline; little knowledge, no knowledge or ignorance of tax legislation and of the obligations that result from its enforcement; wrong interpretation and enforcement of the tax legislation.

In all its ways of committing, tax evasion consists either in an action of the doer, or in his/her non-action, in the sense that the person in question did not perform the action he was compelled to perform.

In legal practice the most common ways of operating are:

- the unrightful circulation of documents with a special regime: tax bills, notifications that accompany goods, receipts;
- merchandising alcoholic drinks while using for the purpose of tax marking unlawfully possessed or forged bands/strips.
- justifying the origin of the goods during the transportation by using tax documents that were not issued by real suppliers.
- the reduction of the tax base or the claim for value added tax repayment by including in the bookkeeping unreal expenses on the basis of documents issued on behalf of bogus firms.
- producing dutiable goods elsewhere than inside authorized tax warehouses.
- setting up trading companies that have as associates Arab citizens, for the purpose of outsourcing towards them debts to the state budget, debts that will never be acquitted.
- conveyance of trading companies with debts to the state budget to foreign citizens who, once they have taken over the respective company, leave the territory of Romania.
- booking fictitious expenses by making up unreal circuits of documents in the field of service providing (management, marketing, know-how, advisory services, etc.) which subsequently

can no longer be quantified or identified because for that purpose off-shore companies or bogus firms (which do not exist from the point of view of commercial activity) are used.

- outsourcing profits earned by certain economic agents to companies of the small business type, which benefit from lower taxes.

II. Legal framework of deeds in the field of tax evasion. The following actions constitute criminal offences:

- the deed of the taxpayer who, intentionally, does not remake the documents representing financial books that have been destroyed, before the deadline mentioned in the control documents, although he/she had the opportunity of doing it;
- the unjustified refusal of a person to present to the qualified authorities, after having received three subpoenas, the legal documents and goods of his/her patrimony, in order to hinder financial, tax and customs checkings.
- the hindrance, in any way, of the qualified authorities, to enter, under the conditions covered by the law, offices, precincts or lands, for the purpose of performing financial, tax or custom checkings.
- the willful withholding and unpayment, within 30 days at most from the deadline, of the amount of money representing pay-as-you-earn taxes and contributions
- the unlawful circulation of stamps, bands/strips or boilerplates used under a special regime in the tax field.
- the deliberate printing or circulation of forged stamps, bands/strips or boilerplates used in the tax field under a special regime.
- the setting by the tax payer, in bad faith, of taxes, duties and contributions, which results in the unlawful attainment of amounts of money as repayments or restitutions from the consolidated general budget or compensations due to the consolidated general budget.

The following deeds committed for the purpose of avoiding the fulfilment of tax liabilities also constitute criminal offences:

- hiding the good or source that is taxable or dutiable;
- omitting, entirely or partly, the recording, in financial books or other legal documents, of commercial operations performed or of the income attained;
- emphasizing, in financial books or other legal documents, expenses that are not based on real operations or emphasizing other fictitious operations;
- deterioration, destruction or hiding of financial books, of the memory of electronic taxing or marking machines used in the tax field or of other means of stocking data;
- keeping two parallel financial books, by using documents or other means of stocking data;
- eluding the subjection to financial, tax or custom checkings, by non-declaration, fictitious declaration or inaccurate declaration with regard to the main or secondary offices of the persons that are being checked out;
- the substitution, degradation or embezzlement by the debtor or by third parties of the goods impounded in accordance with the provisions of the Code of tax procedure and the Code of criminal procedure.

III. Activities that must be performed during the stage of investigation and penal action. The main activities that must be performed when investigating criminal offences regarding the regime of taxes and duties owed to the state budget, the state social welfare budget, the local budgets and the special funds budgets are:

1. The recording of the complaint or notification, and in the case when the body of criminal investigation initiates an inquiry about the committing of criminal offences in the field, the minute of the internally generated inquiry will be drawn up, in accordance with the provisions of the Code of criminal procedure.
2. The submission of the whole brief to the prosecution department that monitors the activity of criminal investigation for the purpose of being allocated a single

registration number and for the appointment of a prosecutor who should supervise the activity of criminal investigation in question.

3. The identification of the tax payer suspected of having committed the criminal offence and, in the case of legal persons, their legal representatives will be taken into account, as well as their representing authorisation. In performing this activity, all efforts must be directed at determining the following data:

- the registered office, residence for tax purposes, secondary offices (work spots, branch offices, affiliate companies, agencies, deposits, warehouses);
 - the number of tax registration and tax attribute (value added tax payer R, duty payer — A);
 - the number of registration at the Register of Commerce Bureau;
 - the fulfilment of all conditions imposed by the law for the performance of certain activities specifically regulated, such as tax paying warehouses, companies mediating transferable securities as well as other categories of activities;
 - the identification of persons who performed bookkeeping activities.
4. Identification of all the persons involved in the case.
 5. Using professional valuations and technical-scientific findings to clarify certain aspects, such as: alcohol blood value, type of the mineral oil, veracity of the documents presented, etc;
 6. Identification of all documents of the accountancy field and of other fields for the purpose of outlining and gathering evidence about the real commercial activity performed by the tax payer that he/she did not highlight in the account books and other documents;
 7. When finalizing preliminary acts, the movable goods and fixed properties belonging to the persons that are being investigated will be identified. The identified goods will be registered in a minute that will be submitted to the prosecutor together with the resolution for beginning the criminal investigation.
 8. After the confirmation of the fact that the criminal investigation has been initiated, when there are clues that the persons that are being investigated want to alienate the goods they have in their property, impounds will be applied as a safety measure.
 9. Starting legal proceedings against persons who elude activities of investigation and criminal pursuit.
 10. Ordering rogatory (international) commissions with a view to asking for the performance of procedural acts and the retrieval of documents and objects liable to clarify aspects of the case.
 11. In the case of value added tax²²⁶(VAT), certain specific activities will take place. In these situations, the purpose will be to establish the truth with regard to the following aspects:
 - a) whether the operations performed and belonging to the field of application of the VAT have been correctly divided into compulsorily taxable operations and operations of tax exemption with a zero-rating;
 - b) the situation of all inflows (buying) of products, services, commodities, etc.
 - c) the way the products, the services and commodities (outflows) are invoiced by the economic agent.
 - d) the legality of the greatly delayed invoicing of goods delivery and of service providing.
 - e) the legality of the use of the adequate tax rate;
 - f) the correct establishment of the basis of taxation;
 - g) the legality of the correct customs value for imported goods;
 - h) the legality and accuracy of the data in the settlement of accounts (the accurate transcription of the figures in the journals, the correct establishment of the proportion, the accurate takeover of the balance of the previous month, etc.);
 - i) the legality of the deposit of the settlement of accounts in due time, etc.

12. In the case of profit tax, activities must be performed which will result in establishing:

- a) whether all the operations that resulted in earnings by the taxpayer were correctly and completely highlighted both in the basic books and in financial books;
- b) the checking of the way of determining the margin and its comparison to the margin of other merchants from the same field and of about the same economic power;
- c) the checking of the expense accounts by examining their supporting elements in order to identify the accuracy of the calculation of the taxable profit with a view to establishing: (the recording in financial books of expenses that are not related to the income achieved, the supervision of expenses which result from the payment of fines and penalties, the inclusion among costs or expenses of fictitious salary rights, the recording of documents that are not based on real operations, etc.);
- d) the checking of elements of expenses for which the lawmaker does not admit their deduction from the income;
- e) the legality of the way in which the taxable profit and the profit tax were calculated and emphasized;
- f) the violated legislation, the prejudice caused and, if possible, the guilty persons.

13. In the investigation of criminal offences in the field of *salary tax*, the most important data and pieces of information are obtained by questioning the persons, sometimes even the employees. The tactics of questioning the persons and examining the documents involved in the case has as a goal to establish:

- a) the correct tax base, as it is prescribed by the law;
- b) the way of applying the single tax rate;
- c) the real situation with regard to certain tax subsidies;
- d) the performance of the monthly calculation of the tax (its withholding and payment within the legal deadline to the budget), etc.

14. If the way the tax was paid by dividends is being investigated (naturally, in the case when we have in view people who obtain earnings in the shape of dividends), the following aspects will be taken into account:

- a) whether the taxable profit and the profit tax (the tax that was withheld) have been correctly and legally established;
- b) whether the dividend tax has been correctly calculated in accordance with the legislation in force regarding the net profit appropriated and paid as dividends to shareholders or associates;
- c) whether the maximum legal deadline of payment of the dividend tax has been complied with, possible evasions from paying it;
- d) the legality of the cashing of certain amounts of money by the associates, representing "dividend advance" or simply "advance to be reimbursed" and particularly the committing of criminal offences after the inclusion of the balance sheet for the respective tax year.

15. In practice there are situations when criminal offences in the field of excise duties are investigated. In order to determine the real situation activities will be performed the purpose of which will be to establish the following elements:

- a) whether the economic agent has performed operations (production, import or commercialization) on dutiable products, their legality;
- b) whether the tax base has been correctly established in accordance with the legal standards for every particular operation;
- c) whether the shares/quotations used are those established by the law and whether they have been correctly applied to the tax base;
- d) whether tax facilities prescribed by the law have resulted in benefits, in strict accordance with the law;
- e) whether there have been cases of products established by the law that were returned from the export and turned to account in the country and whether the economic agent has calculated and disbursed the excise duties to the state budget, in accordance with the legal standards established for products delivered from the beginning to the home market.

In the case of committing criminal offences of tax evasion as covered by Law no. 241/2005 for the prevention and control of tax evasion, if during the criminal investigation or during the trial, until the first hearing date, the defendant or the accused makes up entirely for the prejudice he/she caused, the limits of the punishment will be reduced by half. If the prejudice caused and recovered under these circumstances is up to 100,000 Euro in the national currency equivalent, a fine can be applied, and if the prejudice is up to 50,000 Euro, in national currency equivalent, recovered under the circumstances mentioned above, an administrative sanction will be applied, which is registered in the criminal record²²⁷.

It must be mentioned that, in compliance with the provisions of art. 10, alignment 2 of Law 241/2005, the provisions of alignment 1 cannot be applied to the wrongdoer who has committed another criminal offence covered by the law that we have just mentioned, within an interval of 5 years from the committing of the deed for which he has benefited from the provisions of alignment 1.

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