GENERAL CONSIDERATIONS ON THE APPLICATION OF ART. 90 OF EC TREATY, NATIONAL VEHICLE TAX REGIME

Petria Licuţa
*"Constantin Brâncoveanu"University - Piteşti Faculty of Management Marketing in Economic Affairs - Rm. Vâlcea e-mail: licutapetria @yahoo.com.**tel.0751125689***
Cebuc Maria - Iuliana
*"Constantin Brâncoveanu" University – Piteşti Faculty of Management Marketing in Economic Affairs – Rm. Vâlcea e-mail: iuliacebuc@yahoo.com. **tel.0729080711***

Vehicle tax, regardless of the name under which it was perceived, respectively special tax for cars and vehicles, the pollution tax, generated so many discussions both on the amount and on the legality. The tax was initially perceived from the 1st of January 2008, under the name special tax for cars and vehicles in accordance with the previous provisions of art.214 index 1-art.214 index 3 of the Taxation Code, and from the 1st of July 2008, under the name of pollution tax, according to the provisions of Law no. 50/2008. The rules from the Taxation Code as well as those from Law no. 50/2008 interfere with the provisions of community rules, to the extent that by domestic rules it is established, for the products of other states, a greater tax than those which are applicable to the national products.

Key words: Vehicle tax, European legislation, tax law, compatibility

JEL classification: K34

1. Prior notions

Vehicle tax, regardless of the name under which it was perceived, respectively special tax for cars and vehicles, tax on pollution, generated so many discussions both on the amount and on the legality.

Special tax for cars and vehicles has been perceived starting with January 01st, 2007 under the provisions of art. 214 index 1 - 214 index 3 of Taxation Code. The fee was introduced in Taxation Code by Law no. 343/2006 [1] and was initially perceived for all vehicles. After changing the Law no. 343/2006 by G.E.O. no. 110/2006[2], special tax was levied on cars and commercial vehicles except those specially equipped for disabled people and those exempted under art. 214 index 3 of the Taxation Code.

After July 07th, 2008, the fee for cars and special vehicles has been replaced with tax on pollution perceived under G.E.O. nr. 50/2008[3], art. 214 index 3 index 1 -214, being repealed by art. 14th of the Ordinance.

By G.E.O no. 50/2008, shall be charged pollution produced by cars registered in Romania after the date of August 01st, 2008, according to the established criteria for tax calculation. Romanian Government has justified the need for O.U.G. no. 50/2008 which established tax on polluting vehicles through the fact that to ensure environmental protection is necessary to adopt measures ensuring compliance with the applicable Community law, including the Court of Justice of the European Community, taking into account that these measures should be adopted in an emergency regime to avoid adverse-negative legal consequences of the current situation.

1 Published in O.M. of Romania Part I no. 662/01.08.2006.

2 Published in O.M.of Romania Part I no. 1028/27.12.2006 approved with amendments by Law no. 372/2007, published in O. M. Of Romania no. 899/28.12.2007.

3 Published in O.M. of Romania Part I no. 327/25.04.2008, G.E.O. no. 50/2008 was modified and completed by G.E.O. no. 208/04.12.2008 published in O.M. no. 825/08.12.2008, repealed by G.E.O. no. 218/10.12.2008, published in O.M. no. 836/11.12.2008 and G.E.O. no. 7 /18.02.2009 published in O.M. no. 103/19.02.2009.

2. Compatibility of the taxation system stipulated by domestic law with art. 90 provisions of the EC Treaty

The problem which must be cleared is if the provisions of the inland law which established the special tax for cars and vehicles and tax on pollution are compatible or not with art. 90 of the EC Treaty.

In the following we briefly analyze the compatibility of former provisions of art. 214 - index 1 214 – index 3 of the Taxation Code (now repealed by Article 14 of Government Emergency Ordinance no. 50/2008) and the provisions of the GEO no. 50/2008, Article. 90 of the EC Treaty.

a)Compatibility of the provisions of art. 214 index 1 - 214 of index 3 with the tax law

Under the former provisions of article 214 index 1 of the Taxation Code special tax is charged for cars and vehicles, including commercial vehicles including except those equipped for people with disabilities and tax-free vehicles under art. 214 index 3.

According to art. 214 index 2 special fee is levied at the first registration of cars and vehicles in Romania. From legal provisions set out followed that special fee for cars and vehicles was paid at the first registration in Romania, by natural or legal persons as appropriate, who effectuated registration for new cars produced in Romania, as well as for new cars and second hand cars imported from the Community or other states.

From the wording of the former provision of art. 214 index 2 arises that special tax was not paid for cars and vehicles registered in Romania in case they were later sold and reregistered According to art. 90 part 1 of the Constitutive Treaty of the European Union, "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products". Furthermore, according to art. 90 part 2, "no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other manufacturing sector".

Community legislation aims principally to ensure free movement of goods between the Community under normal conditions of competition by removing any form of protection resulting from the application of direct and indirect domestic taxes which are discriminatory against products coming from other Member States (E.C.J. Decision in Weigel Case, 2004).

Therefore community regulation tends to prevent any tax discrimination between imported products and similar domestic products. As it can be seen, art. 90 of the EC Treaty does not prohibit the establishment of internal taxes for registering motor vehicles and cars, but it only prohibits discriminatory taxation of products coming from other countries.

By domestic provisions set out above Romania created a taxation system that allows protection of domestic products by applying similar taxes on imported products, which exceeded the residual value of the vehicles. And, accordingly, the tax system imposed by Romania in the registration of cars and vehicles is incompatible with the provisions of art. 90 of the EC Treaty.

Because there is incompatibility between the internal and the Community laws, the question which arises is which one of the two types of rules has priority.

The solution to this problem is detached by the Romania's Constitution and jurisprudence of The European Court of Justice. In this respect, we underline that Romania became a member of the European Union on January 01st, 2007 under the Accession Treaty of Romania and Bulgaria to the European Union ratified by Law no. 157/2005[4].

According to art. 148 par. 2 of the revised Constitution of Romania, "as a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act".

4 Published in O.M of Romania no. 465/01.06.2005, Part I.

According to art. 148 par. 4 of the Basic Law, "The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented."
Therefore the constitutional provisions clearly show that the Community regulations take precedence over contrary provisions of domestic laws. .
European Court of Justice has stated in Decision stated in Costa / Enel (1964) that "Community law and national law of Member States, is an independent legal order that has priority in being applied even upon the subsequent national law."
So that, Community rules take precedence over the provisions of Law no. 343/2006 which introduced special tax for vehicles and cars. The fact that the rules stipulated in art. 214 index 1 and art. 214 index 3 of the Taxation Code were not compatible with Community rules can be demonstrated by the fact that on 20 March 2007, the European Commission has unleashed the "infringement" procedure (violation of treaties) against Romania, being called in question the tax calculation method because for old vehicles the residual value was exceeded, and the second-hand cars sold by Romanian citizens were not charged when sold same as those imported were.
From those stated above, we appreciate that the rules stipulated by the Taxation Code which instituted special tax for vehicles and cars, were not compatible with Community rules, the tax being lawlessly collected and as such it should be returned upon request to the concerned person.
We specify that the provisions of art. 11 of G.E.O. no. 50/2008 for the establishment of pollution tax, which stipulates that "the tax resulted as difference between the amount paid by the taxpayer between January 01st, 2007 – June 30th, 2008 as a special tax for vehicles and cars and the amount resulting from application of provisions concerning pollution tax on vehicles is reimbursed based on a procedure established in the application rules of the ordinance " are not applicable because under the constitutional provisions and art. 1 of the Civil Code, civil law disposes only for the future, not having retroactive nature.

b) The compatibility of the provisions of G.E.O. no 50/2008 with the rules of the community right

As we have pointed out, by G.E.O. no. 50/2008 it has been established a pollution tax, this tax being retrievable from the 1st of August 2008 for the vehicles from M(1)- M(30) and N(1)-N (3) category, with the exception of those provided by law.
According with the 4th article letter a) from the ordinance, the payment obligation of tax interferes on the occasion of the first registration in Romania as well as setting- back in circulation of a vehicle after the ceasing of an exception or exemption stipulated on the articles 3 and 9, and the tax is being calculated by the efficient fiscal authority (art.5, 1st alignment).
Subsequent to G.E.O. no. 218/2008 (recalled G.E.O. no. 208/2008 coming into force on 15 December 2008), the pollution tax was removed for the cars M (1) and N (1) with the pollution regulation Euro 4 which is registered for the first time in Romania or in other Member States of the European Union during 15 December -31 December 2009 included.
This tax is retrievable for the vehicles registered for the first time outside the European Union which are registered in Romania.
Concerning the original provisions of the G.E.O. no. 50/2008 it has been sustained that these provisions are contrary to the community regulations because the pollution tax is perceived only for the new and second-hand cars imported while for those registered in Romania and resold, the tax is not anymore retrievable.
In this case, the problem which is going to be imposed to be cleared is that to establish if the regulations stipulated on G.E.O. no. 50/2008 are compatible with the regulations of the community right respectively with the provisions of art.90 from the EC Treaty.
From our point of view we consider that if the tax stipulated by the G.E.O. no 50/2008 is a pollution tax (as it is called by the legislator), it is normal that this tax should be retrievable for the new vehicles manufactured in our country and for the new and second-hand vehicles

manufactured in the community states or in other states and registered for the first time in Romania, as they pollute during their entire duration of functioning.
The fact that for the vehicles manufactured in Romania and registered after the sale, the pollution tax is not anymore retrievable, as for those imported it is not considered to be discriminatory, because for those vehicles the pollution tax was retrievable at the first registration in Romania, and it cannot be retrievable just once at the first registration and not for each registration after the sale, because it is the same car in question.
What has to be taken into consideration in order to establish if the domestic regulations are compatible with the community ones, is if by the domestic regulations is protected the internal production, as the discriminatory taxing cannot be argued by reasons of ecological degree.
Concerning this aspect, the following can be mentioned: if initially the government has justified the necessity of adopting the G.E.O. no.50/2008 in order to assure the environment protection, meaning that the retrievable tax on basis of this normative act was a pollution tax, from the G.E.O .no. 218/2008 preamble, concerning the alteration of the G.E.O. no. 50/2008 for the establishment of the pollution tax for the vehicles, it results that this normative act was adopted in order to establish the internal sector of vehicles affected by the international financial crisis and in order to assure the keeping of the working places in the Romanian economy.
Accordingly the national fiscal regulation is susceptible to decrease the importation of vehicles originated from other countries and to influence the consumers' choice in the purpose of redressing them to the new and second-hand products found on the Romanian market, this aspect leading to the breach of the principle of free circulation of goods, controlled by the EC Treaty.
The fact that a protection of the internal production of vehicles has been followed results from the way in which the government has proceeded to the alteration of the quantum of this tax. Or beginning with 19 February 2009 the pollution tax has been reduced with a third in contrast with the tax applicable during 15 December 2008- 19 February 2009, but however, the retrievable tax during this period is double in contrast with the one applicable during 01 July-15 December 2008. We consider that the tax increase/extension has represented/constituted an essential criterion in order to reduce/cut down the importation of vehicles.
Another problem which is imposed to be elucidated/ cleared up is to establish if the provisions of the art.90 from the EC Treaty are applicable also in the case of the products imported from other countries which are not Member States of the European Union.
From the provisions of the 2nd alignment of the art.90 from the EC Treaty it results that a Member State cannot apply to the products of a different country direct taxation in order to protect indirectly other fields/areas of activity. As a result, the community provisions are applicable only to the Member States of the European Union and not to the states outside/beyond the community.
Against the facts above mentioned we consider that the initial/primary regulations/rules of the G.E.O. no.50/2008 are in contradiction to the community rules/regulations only in the case in which the pollution tax exceeds the residual value of the car (see the pertinent cause/cause related to Nadasdi and Nedeth).
Concerning the rules/regulations stipulated by subsequent alterations of the G.E.O. no.50/2008, we consider that these rules/regulations are contrary to/in contradiction to the rules/regulations of the community right, as through/by the domestic dispositions is being protected the internal field/area of vehicles, in this way being breached the provisions of the art.90 from the EC Treaty.

3. **Final dispositions/ conclusions**

Having in view the necessity to protect the environment and taking into account the principle of " the one who pollutes will pay" we consider that the pollution tax must be paid at the first registration in Romania of the vehicle, irrespectively of the country in which this is manufactured.

At the calculation of the pollution tax what does not have to be taken into account is the fact that a vehicle as it is older, the pollution tax must be less justified by the fact that this has a less duration of functioning, as the vehicle is older the number of kilometers run is greater and the pollution produced is greater in proportion to the pollution produced by a new vehicle.
Implicitly, the criterion according to which the tax level must be established is the one of the number of kilometers run, justified by the fact that a person who uses the vehicle once, twice a year as it is the case of the persons coming from the countryside, this person does not have to pay a tax which is equal to the tax of a person who goes daily with the vehicle.
We agreed with this because a vehicle that moves daily pollutes more than a vehicle that moves very rare and runs less kilometers.
For this reason, we consider that the pollution tax must be included in the fuel equivalent value, so that the tax level will be according to the number of kilometers run by each vehicle.

Bibliography

1. The Law no. 571/2003- concerning the fiscal code with the subsequent alterations and addenda.
2. G.E.O. no. 50/2008- concerning the establishment of the pollution tax with the subsequent alterations and addenda.
3. The EC Treaty.
4. The CEDO Jurisprudence.
5. http://www.bizcity.ro