

# SPECIAL CONFISCATION IN THE CASE OF THE OFFENCE OF MONEY LAUNDERING OF PROCEEDS FROM TAX EVASION

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## Abstract

*The academic literature and the case-law are concerned with the relationship between the tax evasion offence and the money laundering offence, when the money laundered come from the first offence. More exactly, the question is whether the penalty of special confiscation of the proceeds from tax evasion may still be imposed on a person who committed both offences and is ordered to pay the tax liabilities.*

*In this article we would like to answer this legal issue, taking into account the relevant legal provisions and case-law.*

**Keywords:** tax evasion, money laundering, offences, first offence, confiscation.

## 1. Introduction

Decision no. 23/2017, published in the Official Journal of Romania, Part I, No 878 of 8 November 2017 deals with the legal issue of whether : *”When interpreting the provisions of Article 33 of the Law no. 656/2002 on preventing and sanctioning money laundering and of Article 9 of the Law no. 241/2005 on preventing and fighting tax evasion, in the case of concurrent offences consisting of the tax evasion offence and the money laundering offence, it is necessary to take the security measure of special confiscation of the amounts of money which were the subject of the money laundering offence and which derive from the commission of the tax evasion offence and to order the defendants to pay the amounts representing tax liabilities due to the state as a result of the commission of the tax evasion offence and, if so, the amount subject to confiscation is represented by the total amount of the expenses which are not based on real operations or by the value of the damage caused to the state budget as a result of the commission of the tax evasion offence provided for in Article 9(1)(c) of the Law No 241/2005?”.*

Prior to this Decision, the relevant case-law was not unitary, the following views being expressed, as far as we know:

- The special confiscation, pursuant to Article 33 of the Law no. 656/2002, is not required in conjunction with the obligation to pay the amounts representing the tax liabilities due to the state as a result of the commission of the tax evasion offence;
- The special confiscation, pursuant to Article 33 of the Law no. 656/2002, may be ordered, but only in respect of the assets derived from the

commission of the pre-requisite offence (tax evasion);

- The special confiscation, pursuant to Article 33 of the Law no. 656/2002, shall be ordered in respect of the difference between the value of the recycled assets and the value of the assets which are the subject of the tax evasion offence;
- The special confiscation, pursuant to Article 33 of the Law no. 656/2002, shall be ordered in respect of the value of the recycled assets, regardless of whether the active subject was required to pay or not or has actually paid the amounts representing the consideration for the assets which were the subject of the tax evasion offence.

## 2. Applicable legal provisions

According to Art. 29 of the Law no. 656/2002 :”(

1) The following shall constitute money laundering offence and shall be punishable by 3 to 10 years of imprisonment:

- a) the change or transfer of assets, knowing that they derive from the commission of offences, for the purpose of hiding or concealing the unlawful origin of those assets or in order to help the person who committed the offence of which the assets derive to circumvent the investigation, the trial or the enforcement of the penalty;
- b) The hiding or the concealment of the true origin, location, arrangement, movement or ownership of the assets or of the rights over them, knowing that the assets derive from the commission of offences;
- c) The acquisition, the possession or the use of assets, knowing that they derive from the commission of offences”.

According to Art. 33 of the Law no. 656/2002:

”(1) In the case of money laundering and terrorist

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financing offences, the provisions of Article 118 of the Criminal Code<sup>1</sup> on confiscation of assets shall apply.

(2) *If the assets subject to confiscation are not found, their cash equivalent or the assets acquired shall be confiscated instead...*

(3) *The revenue or other material benefits obtained from the assets referred to in paragraph (2) shall be confiscated.*

(4) *If the assets subject to confiscation cannot be individualised from the assets legally acquired, assets up to the value of the assets subject to confiscation shall be confiscated.*

(5) *The provisions of paragraph (4) shall apply accordingly to the revenue or other material benefits obtained from the assets subject to confiscation, which cannot be individualised from the assets legally acquired.*

(6) *In order to ensure the enforcement of the confiscation of assets, the adoption of the precautionary measures provided for in the Code of criminal procedure is mandatory*".

According to Art. 9 para (1) of the Law no. 241/2005:"The following acts committed for the purpose of avoiding the discharge of tax liabilities shall constitute tax evasion offences and shall be punishable by 2 to 8 years of imprisonment and the prohibition of certain rights:

a) *The concealment of the asset or of the taxable or chargeable source;*

b) *The omission, in whole or in part, of disclosing in the accounting records or other legal documents, the commercial operations carried out or the revenue obtained;*

c) *The disclosure in the accounting records or other legal documents, of the expenditures which are not based on real operations or the disclosure of other fictitious operations;*

d) *The alteration, the destruction or the concealment of accounting documents, memories of*

*ticketing machines or electronic tax cash registers or of other means for data storage;*

e) *The preparation of double accounting records, using documents or other means of data storage;*

f) *the circumvention of financial, tax or custom checks by failing to declare, fictitiously declaring or inaccurately declaring the principal or secondary places of business of the persons checked;*

g) *The substitution, the degradation or the disposal by the debtor or by third parties of seized assets, in accordance with the provisions of the Code of tax procedure and the Code of criminal procedure*".

According to Article 112 of the Criminal Code :"( 1) The following shall be subject to special confiscation:

a) *assets produced by perpetrating any offence stipulated by criminal law;*

b) *assets that were used in any way, or intended to be used to commit an offence set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;*

c) *assets used immediately after the commission of the offence to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;*

d) *assets given to bring about the commission of an offence set forth by criminal law or to reward the perpetrator;*

e) *assets acquired by perpetrating any offence stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;*

f) *assets the possession of which is prohibited by criminal law*".

<sup>1</sup> Article 118 belongs to the former Criminal Code. Now, it is Article 112 of the Criminal Code. According to Article 112 of the Criminal Code: "(1)The following shall be subject to special confiscation:

a) assets produced by perpetrating any offence stipulated by criminal law;

b) assets that were used in any way, or intended to be used to commit an offence set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;

c) assets used immediately after the commission of the offence to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;

d) assets given to bring about the commission of an offence set forth by criminal law or to reward the perpetrator;

e) assets acquired by perpetrating any offence stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;

f) assets the possession of which is prohibited by criminal law.

(2) In the case referred to in par. (1) lett. b) and c), if the value of assets subject to confiscation is manifestly disproportionate to the nature and severity of the offence, confiscation will be ordered only in part, by monetary equivalent, by taking into account the result produced or that could have been produced and asset's contribution to it. If the assets were produced, modified or adapted in order to commit the offence set forth by criminal law, they shall be entirely confiscated.

(3) In cases referred to in par. (1) lett. b) and c), if the assets cannot be subject to confiscation, as they do not belong to the offender, and the person owning them was not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the stipulations of par. (2).

(4) The stipulations of par. (1) lett. b) do not apply to offences committed by using the press.

(5) If the assets subject to confiscation pursuant to par. (1) lett. b) - e) are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(6) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such, except for the assets provided for in par. (1) lett. b) and c), shall be also confiscated".

### 3. Solution of the legal issue and main considerations

By Decision No 23/2017, the High Court of Cassation and Justice - the formation for solving criminal law issues decided: "In interpreting the provisions of Article 33 of the Law no. 656/2002 on preventing and sanctioning money laundering and of Article 9 of the Law no. 241/2005 on preventing and fighting tax evasion, in the case of concurrent offences consisting of the tax evasion offence and the money laundering offence, **the adoption of the security measure of special confiscation of the amounts of money which were the subject of the money laundering offence and which derive from the commission of the tax evasion offence in conjunction with the obligation of the defendants to pay the amounts representing tax liabilities due to the state as a result of the commission of the tax evasion offence is not required**".

The supreme court has held in the reasoning of the decision: "Given that the amount of money acquired as a result of the commission of an offence is no longer in possession of the offender, but it has been used for compensating the injured person, the prerequisite of possessing the result of an offence no longer exists and, by default, there is no state of danger, and the security measure of special confiscation is not justified in any way (...).

*In case of a damage resulted from the commission of the tax evasion offence, this must be compensated, the confiscation measure as a result of the money laundering offence being no longer operable, whereas we are in the presence of a single damage, and the simultaneous application of the two measures would result in a double punishment of the person charged and convicted for committing both offences".*

### 4. The effects of the Decision No 23/2017 and other consequences of the concurrent offences of tax evasion and money laundering

**4.1. The special confiscation, pursuant to Article 33 of the Law no. 656/2002, shall be excluded if the court ordered „the payment of the amounts representing tax liabilities due to the state as a result of the commission of the tax evasion offence"**

It follows from the Decision No. 23/2017 that both the payment of the amounts representing tax liabilities due to the state, as a result of the commission of the tax evasion offence, and the special confiscation measure having the same object may not be ordered.

The assets which may be the subject of the money laundering offence are always assets derived from the commission of offences. It can be said about the object of the money laundering offence that it coincides, partially (when only a part of the assets of criminal origin are laundered) or totally (when all assets of

criminal origin are laundered) with the object of the pre-requisite offence (predicate, main).

In other words, **the value of the object of the money laundering offence may be lower or equal to that of the object of the offence from which it is derived. In principle, the value of the object of the money laundering offence may not exceed the value of the object of the main offence.**

There is one exception to this rule. It is the case in which the dirty assets laundered had results [revenue or benefits, in accordance with Article 33(2) of the Law No 656/2002].

For illustration, we offer an example. Let's suppose that a person (the defendant X) is charged, as offender, together with an accomplice (the defendant Y), with the commission of the tax evasion offence [Article 9(1)(c) of the Law No 241/2005] and money laundering offence [Article 29(1)(b) of the Law No 656/2002], consisting in the circumvention of the payment of the VAT (amounting to Lei 38,000) by recording fictitious operations (amounting to Lei 200,000), in the accounting records of the company that he managed, and then used the amount evaded (Lei 38,000) for the purchase of land. In fact, the amount of Lei 200,000 (of lawful origin) was paid by bank transfer into the account of the company that issued invoices concerning the unreal operations, and was subsequently withdrawn from the ATM by the administrator (Y) of this company and then refunded to the perpetrator (X) of the tax evasion offence.

The amount of Lei 38,000 was subsequently used for the purchase of a plot of land, and the amount of Lei 162,000 (the lawful amount) was used for crediting the company. We specify that the company pays the turnover tax.

In such a case, if X did not pay voluntarily the tax liabilities, the court will order him to pay the tax liabilities due to the state as a result of the commission of the tax evasion offence, i.e. the amount of Lei 38,000.

In such a case, the possibility of ordering the confiscation of the amount of Lei 38,000 is excluded, because this amount has already been taken into account for establishing the liability for the damage caused as a result of the commission of the tax evasion offence.

**4.2. May the special confiscation be ordered, pursuant to Article 33 of the Law no. 656/2002, in respect of the assets which do not derive from criminal activities?**

The answer is definitely no. The special confiscation, pursuant to Article 33 of the Law no. 656/2002, may only be ordered in respect of the assets of criminal origin, i.e. the dirty assets derived from offences and certainly not in respect of assets of lawful origin.

Moreover, it follows very clearly from the operative part of the Decision no. 23/2017 that **"the security measure of special confiscation of the**

**amounts of money which were the subject of the money laundering offence and which derive from the perpetration of the tax evasion offence in conjunction with ordering the defendants to pay the amounts representing the tax liabilities due to the state as a result of the commission of the tax evasion offence is not necessary”.**

Where the dirty money derives from the commission of the tax evasion offence, if the active subject, common to both offences (tax evasion and money laundering), was ordered to pay the amount which represents the value of the tax liabilities, according to Decision No 23/2017, the security measure of special confiscation may no longer be taken against him.

Thus, in the example above, where the amount transferred within the framework of the fictitious operation amounted to Lei 200,000, the application of the provisions on special confiscation is excluded *de plano* because this entire amount had a lawful origin. The fact that, following the bank transfer into the account of the company managed by Y and the disclosure of the fictitious operations in the accounting records, a part (Lei 38,000) of this amount (Lei 200,000) acquired criminal origin does not entail the contamination and the dirtying of the entire amount transferred<sup>2</sup>.

#### **4.2. May the special confiscation, pursuant to Article 33 of the Law no. 656/2002, have as their object clean money?**

The special confiscation, pursuant to Article 33 of the Law no. 656/2002, may not have as object clean money of lawful origin. In the example above, the amount of Lei 162,000, which consists in the difference between the amount transferred and the amount evaded, may not be confiscated, whereas it has a lawful origin.

The only amount that could be subject to special confiscation was the amount of Lei 38,000, which was excluded from the payment to the general consolidated budget, but in this case only provided that the civil party (the state) does not join proceedings as civil party or if the value of its claims are lower than the evaded amount. In our example, taking into account that the defendant X was ordered to pay for the damaged caused by the tax evasion offence, i.e. the amount of Lei

38,000 (amount equal to that of dirty money), the special confiscation measure may not be ordered against him.

#### **4.3. May the special confiscation, pursuant to Article 33 of the Law no. 656/2002, be ordered when the damage consisting in the evaded amount was voluntarily paid during the criminal investigation or trial?**

The answer is negative. We have seen above that, according to Decision no. 23/2017, the security measure of special confiscation, pursuant to Article 33 of the Law no. 656/2002, may not be taken if the court ordered the “*payment of the amounts representing tax liabilities due to the state as a result of the commission of the tax evasion offence*”.

That being the case, *a fortiori*, the same solution is also valid when the damage consisting in the evaded amount was voluntarily compensated during the criminal investigation or trial.

## **5. Conclusions**

On the basis of the above, it may be concluded that, when the dirty money comes from commission of the tax evasion offence, if the active subject, common to both offences (tax evasion and money laundering), was ordered to pay some amounts which represent the value of tax liabilities, the security measure of special confiscation may no longer be ordered against him, according to Decision No. 23/2017.

The main conclusion of this article is that the security measure of special confiscation, pursuant to Article 33 of the Law no. 656/2002, may not have as object clean money, of lawful origin, but only dirty money. In this case, the security measure may only concern the dirty money and only if the active subject of the offence was not ordered to pay these amounts by way of tax liabilities and only if he did not perform those obligations voluntarily.

After the publication in the Official Journal of the Decision No. 23/2017 on solving the legal issue examined in this article, the case-law began to change according to this Decision.

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<sup>2</sup> Furthermore, the amount of Lei 38,000 may be considered dirty only when the entire content of the tax evasion offence is achieved, namely on the date of disclosure of the fictitious operation in the accounting records, which is committed on the date of the VAT return. The damage to the consolidated state budget is not yet caused up to submission of the VAT return, meaning that there is no black money (dirty, of criminal origin).