CONTROVERSIAL ASPECTS REGARDING TAX EVASION

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Abstract

Throughout the paper, we have highlighted some controversial aspects regarding the crime of tax evasion, referring to some important decisions of the High Court of Cassation and Justice and also of the Bucharest Court of Appeal. Debating upon the impunity provision stated by art. 10 of Law no. 241/2005, the study also sheds light upon the issue of the perspective of the judicial organs regarding the juridical regime of the tax due for dividends. The main focus of the paper leads to the situations when there is legal ground for the tax due for dividends to be considered part of the damage caused by tax evasion crime. The study includes a short analysis of some relevant provisions of the Romanian Fiscal Code and also some aspects deriving from decisions issued by the Administrative and Tax Litigation Chamber of The High Court of Cassation and Justice concerning the legal regime of dividends. Consequently, the authors are presenting both perspectives of the interpretation of the issue regarding the tax due for dividends to be considered part of the damage caused by tax evasion crime, resulting from two decisions of the two Criminal Sections of The Bucharest Court of Appeal, also arguing in favour of the most solid interpretation among them.

Keywords: *evasion, dividend, tax, damage, court decisions, impunity.*

1. Introduction

The crime of tax evasion, provided for in Article 9 of Law no. 241/2005 on the prevention and combating of tax evasion, gave rise, both in doctrine and in judicial practice, to a multitude of opinions regarding the cause of impunity stipulated by art. 10 of the Law no. 241/2005 on the prevention and combating of tax evasion, as well as on the existence / non-existence of the crime unity regarding alternative variants for committing the offense, but also on the inclusion or the exclusion of the dividend tax as a component part of the damage brought to the consolidated state budget.

Starting from the analysis of the respective incrimination in the special law, the analysis continues with the most relevant decisions of the High Court of Cassation and Justice – the Panels for settlement of legal issues, as well as with the presentation of the relevant provisions of the Fiscal Code, as well as elements of judicial practice related to the Supreme Court Administrative and Fiscal Division. Last but not least, the study makes a comparative presentation of two solutions from the very recent judicial practice of the Bucharest Court of Appeal, belonging to both criminal departments, diametrically opposed solutions from the perspective of the judgment of the tax regime on dividends by relation to the damage caused to the state budget through the crime of tax evasion.

Given the existence of an obvious non-harmonized practice of the criminal justice authorities in this field, the authors propose to offer arguments, embraced by a part of the magistrates, in the sense of exclusion of the tax on dividends from the damage resulting from the crime of tax evasion, with direct consequences in terms of the individualization of criminal liability, in criminal cases having this object.

2. Paper Content

According to art. 9 of the Law no. 241/2005 on the prevention and combating of tax evasion, the following acts committed in order to avoid the fulfilment of fiscal obligations are considered tax evasion crimes which are punished by imprisonment from 2 years to 8 years and the prohibition of some rights:

a) the concealment of the taxable property or source;
b) the omission, in whole or in part, of recording, in the accounting documents or in other legal documents, of the commercial transactions or of the achieved revenues;
c) disclosure in the accounting or other legal documents of the expenses not based on actual operations or evidencing other fictitious operations;
d) alteration, destruction or concealment of accounting documents, memories of cash register tills or of other data storing devices;
e) the execution of double accounting records, using documents or other means of data storage;
f) avoidance from performing financial, tax or customs checks, by failure to declare, fictitious declaration or inaccurate declaration of the main or secondary premises of the persons checked;
g) substitution, degradation or alienation by the debtor or by third parties of the property seized in accordance with the provisions of the Code of Fiscal Procedure and the Code of Criminal

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Procedure.

If by the facts provided in paragraph (1) there was more than 100,000 Euro damage, in the equivalent of the national currency, the minimum limit of the punishment stipulated by the law and its maximum limit is increased by 5 years.

If by the facts provided in paragraph (1) there was more than 500,000 Euro damage, in the equivalent of the national currency, the minimum limit of the punishment stipulated by the law and its maximum limit is increased by 7 years.

From the perspective of the legal content of the crime, it should be noted that the High Court of Cassation and Justice, by decision no. 25/2017, ruled in the matter of the settlement of certain legal matters, established that the actions and inactions stated in art. 9 paragraph 1 letters b and c of Law no. 241/2005 on the prevention and combating of tax evasion, which refers to the same trading company, are alternatives to the committing of the act, constituting a single crime of tax evasion provided by art. 9 letters b and c of Law no. 241/2005 for the prevention and combating of tax evasion[1].

The aforementioned conclusion stems from the fact that, given the theoretical distinctions set out above, to the question of law subject to settlement, it follows that we are in the presence of a single crime of tax evasion, and not in the presence of multiple crimes, as one cannot retain a crime with alternative contents, but a crime with alternative content, the alternatives to commit the crime being equivalent in terms of their criminal significance.

The same conclusion is reached by means of the literal interpretation of the text, which unequivocally reflects the intention of the legislator to establish several alternative ways of the material element of the single crime of tax evasion and not distinct crimes of tax evasion.

The omission, or the disclosure in accounting or other legal documents of unrealistic, fictitious transactions under the same circumstances in respect of one or more commercial companies, the existence of short intervals and a single criminal intent or the committing of deeds at large intervals of time and on the basis of distinct criminal intents, either confers continuing character to deeds, or determines the existence of real multiple crimes, this attribute being exclusive the responsibility of the judicial authority called upon to enforce the law.

Concluding, it is noted that the actions and inactions stated in art. 9 paragraph (1) letters b) and c) of the Law no. 241/2005 on the prevention and combating of tax evasion, as subsequently amended, referring to the same trading company, are alternative variants for committing the offense, constituting a single crime of tax evasion provided by art. 9 paragraph (1) letters b) and c) of the abovementioned law.

It also presents importance in the economics of the topic under analysis, the provisions of art. 10 of the Law no. 241/2005 on the prevention and combating of tax evasion, meaning that the limits of punishment are directly related to the alleged damage caused to the consolidated state budget.

On the date of the entry into force of Law no. 241/2005 on the prevention and combating of tax evasion the text of art. 10 paragraph 1 of this provision stipulated that "*in the case of a crime of tax evasion provided by the present law, if during the criminal prosecution or the trial, until the first hearing of the trial, the defendant or the respondent fully covers the damage caused, the limits of the punishment stipulated by the law for the deed are halved. If the damage caused and recovered under the same conditions is up to 100,000 Euro in the equivalent of the national currency, the fine sanction may be imposed. If the damage caused and recovered under the same conditions is up to 50,000 Euro, in the equivalent of the national currency shall be subject to an administrative penalty, which shall be recorded in the criminal record.*"

Subsequently, art.10 paragraph 1 was amended by Law no. 255/2013 implementing Law no. 135/2010 on the Code of Criminal Procedure from February 1, 2014, the applicable text stating that "*in the case of committing a crime of tax evasion provided in art. 8 and 9, if during the criminal prosecution or trial the defendant fully covers the claims of the civil party until the first hearing of the trial, the limits provided by the law for the crime committed are reduced by half.*"

Regarding the nature of the cause of non-punishment / reduction of punishment limits, by Decision no. 9/2017, HCCJ - the Panels for settlement of legal issues accepted the petition filed by the High Court of Cassation and Justice, Criminal Department, file no. 9.131 / 2/2011, on the issuing of a preliminary ruling and, accordingly, determined that the provisions of art. 10 paragraph (1) of the Law no. 241/2005, as in force until February 1, 2014, regulate a cause of non-punishment / reduction of personal punishment limits[2].

In the sense of the aforementioned opinion there are also the decisions of the High Court of Cassation and Justice, the Criminal Department, as a court of second appeal, appeal or appeal in cassation, with reference to the Criminal Decision no. 1.386 of April 30, 2012, ruled in File no. 15.820 / 62/2010, by which the interpretation given by the Brașov County Court in the recitals of Criminal Sentence no. 120 of March 24, 2011, maintained by the Court of Appeal was appreciated as correct.

Brașov through Criminal Decision no. 95 / A of September 15, 2011, in the sense that only the

[1] Decision of the HCCJ (Panel DCD / P) no. 25/2017 (OG no. 936 / 28.11.2017): Article 9 (1) letters b) and c) of the Law no. 241/2005 for the prevention and combating of tax evasion – single crime

[2] Decision of the HCCJ (Panel DCD / P) no. 9/2017 (OG no. 346 / 11.05.2017): Article 10 (1) of the Law no. 241/2005 for the prevention and combating of tax evasion

defendants who have paid the entire damages, within the term stipulated by the legislator benefit from the provisions of art. 10 paragraph (1) the final sentence of Law no. 241/2005, the court stating in the reasoning of the solution the nature of personal circumstance of the conduct of the defendants to fully cover the damage caused by the crime of tax evasion; Criminal decision no. 1.425 / R of April 23, 2014, ruled in File no. 2.214 / 101/2013 by which it was correctly stated that through Criminal Sentence no. 142 of September 23, 2013, ruled by the Mehedinţi County Court (maintained in this respect by Criminal Decision No. 344 of November 7, 2013 of the Craiova Court of Appeal), the criminal proceedings against the defendant A were ordered to be terminated, since he fully paid the damage caused by committing the crime of tax evasion, provided by art. 9 paragraph (1) letter c) of Law no. 241/2005 with application of art. 41 paragraph 2 of the Criminal Code (1969), the value of which does not exceed 50,000 Euro in the equivalent of the national currency, considering that this circumstance cannot have consequences in the area of criminal liability and for the defendant legal entity B; Criminal decision no. 201 / A of June 27, 2014, ruled in File no. 263/35/2013, which stated that in order to be able to operate the provisions of art. 10 of the Law no. 241/2005, the damage must be recovered by the defendant and the civilly liable party; Criminal decision no. 368 / RC of December 11, 2014, ruled in File no. 3.447 / 1/2014, in which it was considered that, in order for the cause of non-punishment regulated by the provisions of art. 10 paragraph (1) the final sentence of Law no. 241/2005 to be incidental, it is necessary to ascertain the contribution of the defendant to cover all the criminal damage and not the attitude and the contribution of the civil party to recover their debts. In other words, not every way of recovering the damage leads to the incidence of the non-punishment cause, but only the active, strictly personal attitude of the defendant, to eliminate the consequences of the crime committed.

The relevance of the above resides in that the inclusion or exclusion of dividend tax as a component of the damage to the consolidated state budget may result in different punishment limits and implicitly the possibility of imposing a suspended sentence under supervision (the penalty imposed should not exceed 3 years).

In the judicial practice, there were conflicting views on the withholding of the tax on dividends alongside the corporate tax and VAT as part of the damage caused to the consolidated state budget, from the perspective of committing a crime of tax evasion.

In analyzing the topic under consideration, we must start from the legal regime of the dividend tax. According to art. 7 of the Fiscal Code a dividend is a distribution in cash or in kind, made by a legal person to a participant in the legal entity, as a consequence of the holding of shares in that legal person. It is also considered a dividend from a tax point of view and is subject to the same tax regime as dividend income:

- the amount paid by a legal person for the goods or services purchased from a participant to the legal person over the market price for such goods and / or services, if that amount has not been subject to taxation on income or profit;
- the amount paid by a legal person for the goods or services provided in favour of a participant to the legal person if the payment is made by the legal person for his personal benefit.

According to art.17 of the Fiscal Code, the net profit is obtained after the tax rate of 16% of the taxable profit is applied, which in turn is calculated according to art. 19 of the Fiscal Code as a difference between the revenues and expenditures registered according to the applicable accounting regulations, deducting the non-taxable incomes and tax deductions, plus non-deductible expenses.

It is apparent from the examination of these legal provisions that the situation in which a legal person pays money for goods or services which are not intended for the activity of the paying company but are carried out in the interest of the associate of this legal entity is assimilated to the factual hypothesis giving rise to the obligation to pay dividend tax.

In application of the legal rule mentioned, the High Court of Cassation and Justice (by Decision no. 3253 dated June 27, 2012) stated that: "*Expenses which have not benefited the contributing company, but its sole shareholder, are non-deductible, which is why it is justified to treat them as dividends for which the related tax is due"*.

Moreover, it is clear that the chargeability of the dividend tax requires the finding that the taxpayer's expense was made for the benefit of the company's shareholder, an aspect which must be examined in each case by reference to the evidence of the case.

In this respect, in a case, the Prosecutor's Office systematically took note in the indictment that the defendant committed the crime of tax evasion in order to reduce the tax liabilities of the company, but the fictitious invoices thus recorded benefit to this purpose and are not expenses incurred for the benefit of the defendant.

According to that reasoning, it does not follow that fictitious purchases from companies with inappropriate fiscal behaviour would have been made for the benefit of the shareholder, much less that the payments associated with those purchases would have been made in his favour.

Judicial practice (Bucharest Court of Appeal, 1st Criminal Department) [3] has argued, in a way worthy of admiration, what contains the damage caused to the state's consolidated budget in the case of the tax evasion, as will be shown below.

[3] Bucharest Court of Appeal, 1st Criminal Department, Decision no. 1656/A of November 28, 2017

By recording fictitious expenses in the accounting of companies, it is obvious that the decrease in taxable profit is pursued.

Correspondingly, by lowering taxable profits, the net profit, as well as the value of gross dividends, decreases. Thus, by recording in the accounts of commercial companies of fictitious expenses, the persons investigated in criminal proceedings duly diminish the value of the gross dividends to which a tax of 5%, 10% or 16% was to be applied (the amount of the tax according to the tax legislation applicable at the calculation time) in order to obtain net dividends.

However, there is no logical consistency that, by committing a crime, both the non-payment of the profit tax and the non-payment of the dividend tax are pursued, while the decrease in the net profit determines the decrease of the dividends due to the defendants.

In addition, if these fictitious expenses were intended to remove amounts of money as dividends, then the damage can only be 5%, 10% or 16% of the value of the fictitious expenses (the amount of tax according to the tax legislation applicable at the time of calculation) without taking the profit and VAT tax into account as damage.

In other words, the withholding of the profit tax and VAT as damage and the withholding of the dividend tax as prejudice are two incompatible situations because they cannot be both held for the purpose of committing the crime. Instead, what can be withheld as a double purpose in the case of registration of fictitious expenses is the unlawful removal of money from the company, which may embody the typical crime of misappropriation or the use of the assets of the company without right and the circumvention of the profit tax and VAT payment.

It should also be added that these dividends are not required to be distributed to shareholders. It can be decided that only a part of the net profit is distributed or that all the net profit is reinvested and not distributed as dividends so that withdrawing money from the company before the distribution of dividends may embrace the typical nature of the crime of embezzlement.

Therefore, in such cases, the prosecution must prove the purpose of recording fictitious expenses in accounting, embezzlement and / or evasion of the payment of profit tax plus VAT, which is very important in the analysis of whether the amounts of money for fictitious expenses were paid or not. If the amounts of money relating to fictitious expenses were not paid to the so-called service or goods provider, then it was certainly the case that these expenses were entered into the accounts solely for the purpose of evading VAT and profit tax payment.

As regards the hypothesis that, for the purpose of withholding the dividend tax as damage, the provisions of art. 21 of the Fiscal Code are applicable, as interpreted by HCCJ in Decision no. 3253 / 27.06.2012, according to which the goods and services acquired by a company, which by their specific nature are not related to the activity of the company and do not participate in the realization of its revenues but have been used by the sole shareholder of that company, are not deductible, their qualification as dividends for which tax is due being justified, it is appropriate to make the following clarifications.

Furthermore, Decision no. 3253 dated 27.06.2012 of the High Court of Cassation and Justice of Romania - The administrative and fiscal department, besides being a decision in the administrative field, considers a case that is not applicable to the present criminal case. Thus, the HJCCJ's decision, cited above, deals with a case in which the authenticity of the expenses is not claimed, but the nature of the expenses, which have been determined by the court to be made in the interests of the shareholders and not of the company, which imposed the provisions of Art. 67, paragraph 1, point 1 ^ 1 of Law 571/2003 amended and republished to be applied, which is not the case here. Moreover, the indicated case is one resulting from a tax inspection and not a result of a criminal case.

First of all, the above-mentioned case refers to goods and services that were actually purchased on the basis of commercial transactions actually in place, but these expenses either were not related to the object of activity of the company or did not bring profit to it.

Secondly, in order to meet the elements of civil tort liability, there must be, inter alia, a causal link between the unlawful act and the damage caused, but also the guilt. However, the illicit act is not the evasion of goods from a commercial company, that is the embezzlement or use of property belonging to the company without having the right, but the recording of fictitious expenses for the purpose of evading the payment of tax and duties (VAT and profit tax), and the purpose cannot be to circumvent the payment of the tax on dividends.

The contrary opinion, which we do not share, was also exposed by the Bucharest Court of Appeal, but the Second Criminal Department, stating that the full recognition of the accusations brought to the defendant following the trial of the case in the simplified procedure, also presupposes an acknowledgment of the damage, the more so since he has paid the alleged damage[4].

It has been shown that, in relation to the fact that the defendant on his own initiative has appropriated the amount of the damage, in the realization of the principle of availability that governs the settlement of the civil side, his statement is first of all determining the amount of civil damages, against any other element of the cause that diminishes the obligation.

By analyzing the arguments of the court, we observe that they relate rather to procedural aspects regarding the possibility of invoking the non-withholding of dividend tax as a component of the

[4] Bucharest Court of Appeal, 2nd Criminal Department, Decision no. 168/2018 of February 8, 2018

damage in the procedure for the recognition of guilt and not aspects related to the legality and merits of including dividend tax as part of the damage.

However, although it exceeds the scope of this article, we consider that the full recognition of the deeds the defendant is held responsible for and the payment by the defendant of the damage does not equate with an assumption of the amount which represents the damage to the state budget.

Thus, the defendant acknowledges the deeds, namely the omission, in whole or in part, of the disclosure in the accounting or in other legal documents of the commercial transactions performed or of the achieved revenues and / or the disclosure, in the accounting documents or other legal documents, of expenses that are not based on actual transactions or the disclosure of other fictitious transactions, and not the amount of the damage, and the payment of the alleged damage is a guarantee to the judicial bodies that if the defendant is convicted, the judicial bodies can satisfy their claim and not an implicit assumption of the amount of the damage.

Conclusions

In view of the above, it is noted first of all that we are in the presence of a single crime of tax evasion in the event that the actions and inactions provided by art. 9 paragraph (1), letters b) and c) of Law 241/2005 on the prevention and combating of tax evasion, as amended, refer to the same trading company.

At the same time, for the incidence of art. 10 paragraph (1) of the abovementioned law, the attitude of the defendant in the process of removing the consequences of the crime is taken into account.

Although in court practice there are non-conforming views on the withholding of dividend tax along with profit tax and VAT as part of the damage caused to the consolidated state budget, starting from the idea that the dividend category can also include expenses incurred by the taxpayer for the benefit of the shareholder of the trading company, we underline once again the need for a thorough analysis in each case in the light of the evidence in question.

Moreover, the incidence of legal provisions as well as their applicability (Article 7 of the Fiscal Code) must be *a priori* analyzed by the judicial bodies and, after this stage, to proceed to the analysis of the other aspects related to the merits of the accusation.

Concluding, we fully agree with the arguments of the Bucharest Court of Appeal, the 1st Criminal Department, and we consider that the dividend tax, in the context described above, cannot be a component part of the damage caused to the consolidated state budget because it cannot be simultaneously dealt with as a goal of the crime together with the damage represented by the profit tax and VAT.

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