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The 14th Economic International Conference: *Strategies and Development Policies of Territories: International, Country, Region, City, Location Challenges* | May 10-11, 2018 | Ștefan cel Mare University of Suceava, Romania

Tax Evasion in Romania – Between Past and Present

Marian SOCOLIUC¹, Camelia MIHALCIUC²,
Gabriela COSMULESE^{3*}

Abstract

The main purpose of this article is to study the concept of tax evasion by reference to the Specialty literature, as well as to the current and past regulatory framework in Romania. It can be noticed that, an official definition is not attributed by the law in force to the phrase "tax evasion", which mainly deals with the manifestations of the phenomenon and the penalties and sanctions applicable in case of violation of the law. In this context, this article presents a self-defined definition of tax evasion, including by reporting and delimiting it against neighboring concepts, namely abuse of law, avoidance of taxation, informal economy and tax fraud.

Keywords:

Tax evasion, Romania, abuse of law, tax fraud, tax avoidance, informal economy

¹ Lecturer PhD. at "Ștefan cel Mare University", Suceava, Romania, e-mail: marians@seap.usv.ro

² Associate Professor PhD. at "Ștefan cel Mare University", Suceava, Romania, e-mail: cameliam@seap.usv.ro

³ PhD. Student at "Ștefan cel Mare University", Suceava, Romania, e-mail: c.gabrielacosmulese@gmail.com

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Corresponding Author: Gabriela COSMULESE^{1*}

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1. Introduction

Tax evasion is a complex socio-economic phenomenon, born with the emergence of the taxes and fees system and can be considered to be an attempt to conceal, shelter, shade or a state of neutrality before taxes or duties.

Tax evasion is [1] "an actual or potential behavior of the economic subject (individually or collectively, as the case may be) that could lead to avoidance of payment of some legal obligations owed to the state. Therefore, not any evasion of legal obligations is tax evasion, but only the evasion of payment of legal obligations owed to the state. This is logical, given that tax obligations are set by the State for the benefit of the state (more specifically, for the benefit of the social community). Therefore, the evasion of contractual obligations or even the evasion of legal obligations owed to the private sector does not constitute tax evasion, falling into other categories of defeat of law or contracts. "

In the Dictionary of Criminal Law and Criminal Procedure [2], tax evasion is defined as "the avoidance by any means, in whole or in part, from the payment of taxes, fees and other amounts due to the state budget, local budgets, state social insurance budget and special extrabudgetary funds by Romanian and foreign natural and legal persons. In the law to prevent and combat tax evasion, the facts that are considered such offenses are provided."

In another sense [3], tax evasion is defined as "the totality of illicit means by which the persons concerned wholly or partly deprive the taxable material of the obligations established by the tax laws".

Tax evasion was defined as [4]"an intentional act of taxpayers to evade taxes and this always leads to a reduction in state revenues ".

In Romanian law and in the specialized literature [5] "criminal acts affecting the fiscal interests of the state or of other public institutions are, within the meaning of art. 9 of the Law no. 241/2005 [6], called tax evasion offenses. The use of this name at a normative level limits the notion of tax evasion to designating criminal offenses against the tax system. "

2. Problem Statement

In national legislation, tax evasion is the deliberate avoidance of tax obligations by one of the arrangements provided for in Article 9, (1) of Law no. 241/2005 on the prevention and combating of tax evasion [6], in practice, in particular, by any of the methods described in paragraph b) and

c), respectively: failure to highlight the commercial transactions performed or earnings, as well as highlighting fictitious operations or expenses that are not based on actual operations.

From the analysis of the law, respectively of art. 1 of the Law no. 241/2005 [6] we find that only a series of offenses affecting the fiscal interests of the state or of other public institutions are referred to as tax evasion offenses, namely those provided by art. 9 of the aforementioned normative act, the rest being offenses related to them.

Per a contrario, in the previous legislation [7], tax evasion was defined as "the avoidance by any means, in whole or in part, from the payment of taxes, fees and other amounts due to the state budget, local budgets, state social insurance budget and special extrabudgetary funds by any Romanian and foreign natural and legal persons called taxpayers".

Subsequently, with the republishing of the law [8], tax evasion was presented as "the evasion by any means of the imposition or payment of taxes, duties, contributions and other amounts due to the state budget, local budgets, state social security budgets and special fund budgets by any Romanian and foreign natural and legal persons referred to in the law as taxpayers. "

It can therefore be concluded that at present the regulatory framework does not provide for a formal definition of the concept of tax evasion, the law dealing mainly with the ways of manifestation of the phenomenon and the penalties provided in case of violation of its provisions.

3. Research Questions/Aims of the research

In this context, we consider it necessary to define the notion of tax evasion, including by reporting and delimiting it with neighboring concepts, namely abuse of law, avoidance of taxation, informal economy and tax fraud.

4. Findings

From the point of view of European jurisprudence, with regard to the abuse of rights, it involves, first of all, a combination of objective factors which, beyond the formal fulfillment of the conditions required by the Community rules, have not achieved the purpose of those rules. Secondly, it presupposes the existence of a subjective element consisting of the intention to obtain an advantage (be it fiscal or represented by access to one of the freedoms conferred by Community law) in the light of the application of

Community rules in such a way as to create artificially the conditions necessary to obtain that advantage [9].

The principle of prohibiting abuse of law (abusive practices) is also an incident in the field of value added tax, even if the transactions are carried out exclusively for the purpose of recovering VAT, the notions of economic activity and deliveries of goods not being altered in their substance, thus preserving their autonomy [10].

In national law abuse of rights is dealt with in art. 11, par. (12) of the Law no. 227/2015 regarding the Fiscal Code [11] ⁴.

Regarding the distinction between tax avoidance and tax evasion (tax fraud), it is necessary to start from the fact that the first notion implies only an objective situation, while in the latter case we are in the presence and of an intentional element [12].

For example, in the UK [13] ⁵ tax evasion is defined as the illegal activity of omission, concealment or deliberate distortion of information by taxpayers, whether individuals or legal entities, in order to reduce tax liabilities. This often involves fictitious, artificial transactions that do not serve an economic purpose but seek to produce an undue fiscal advantage. On the other hand, tax avoidance is the exploitation of tax rules in order to obtain a tax advantage that the legislator never intended (foreseen). This involves functioning within the letter, but not the spirit of the law.

It should also be pointed out that between abuse and tax evasion, the distinction that operates consists in the fact that, in the case of abuse of rights, the damage to the public creditors is the effect of the operation, while in the case of tax fraud the damage is the aim pursued [14] ⁶.

As for the informal economy, as defined by Smith [15], it includes "all unregistered productive economic activities, whether legal or illegal, which escape detection and inclusion in the official reporting of gross domestic product." Therefore, all economic activities carried out outside the legal framework, or those that are not enumerated in national accounts,

⁴ Legea nr. 227/2015 privind Codul fiscal, publicată în M.OF. nr. 688 din 10 septembrie 2015, cu modificările și completările ulterioare www.anaf.ro, art.11, alin. (12): „*In order to invoke the abuse of rights, two cumulative conditions must be met: a) the transactions in cause, despite the formal application of the conditions provided by the legal dispositions, have as result the guarantee of some tax benefits which would contravene the aim of those legal dispositions; b) must be objectively proven the fact that the essential aim of the operations in cause is to obtain a tax benefit.*”

⁵ According to the official website of the UK Tax Administration, HM Revenue & Customs, Available <https://www.gov.uk/government/organisations/hm-revenue-customs>

⁶ Luca Cerioni, *The „abuse of right” in the EU Company law and EU tax law: a re-reading of the ECJ case-law and the quest for a unitary notion*, 9, <https://core.ac.uk/download/files/14/336607.pdf>

although legal, form the underground or informal, obscure, hidden economy.

It can be noticed, therefore, that the notion of informal economy is more extensive, including activities within the scope of tax evasion.

Also, the concept of tax fraud is one that can be considered to include the notion of tax evasion as well, this being a deliberate violation of the law in force, which may entail either contravention or criminal liability.

By taking into account the above, in our opinion, tax evasion represents a violation of the law committed intentionally, which implies certain actions or inactions that lead to the circumvention of the tax obligations as provided by the tax legislation in force. The fiscal consequence of the behavior of the economic subject is the prejudicing of the consolidated general government budget and the obtaining of undue pecuniary advantage.

5. Conclusions

In conclusion, from the many definitions attributed to the concept of tax evasion that can be found in the literature, a series of common elements can be revealed:

is a deliberate violation of the law;

leads taxpayers to fail to meet their tax obligations;

avoidance of tax obligations may be made in whole or in part;

involves prejudicing the consolidated general government budget;

leads to avoidance of the payment of taxes and duties owed to the general consolidated budget of the state with the impact on budget revenues.

Starting from the current national legislative framework, it can be noticed that the term tax evasion does not appear defined, but only its modalities of manifestation.

Tax evasion is delineated in relation to other connotations used when discussing this phenomenon, namely the abuse of the law, the avoidance of taxation, the informal economy and tax fraud, especially from the point of view of the subjective, intentional side, namely the purpose pursued, the type of liability which he undertakes in the case of the manifestation, as well as the sphere of the illicit situation in which he is present. It is also a more restrictive notion than tax fraud or informal economy.

In our opinion, tax evasion is an intentional violation of the law, which implies certain actions or inactions that lead to the evasion of the tax

obligations as provided by the tax legislation in force, with the consequence of prejudicing the general consolidated budget of the state.

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