LEGAL ISSUES REGARDING THE INVESTIGATION OF TAX EVASION OFFENCES

Claudiu – Constantin TALABĂ
Police officer – General Inspectorate of Romanian Police – Transport Police Directorate – Bucharest Transport Police Regional Section – Head of Frauds Investigation Biro.

Vasile-Cătălin GOLOP
Police officer – „Al. I. Cuza" Police Academy – Department Director.

ABSTRACT: *ON MAY 18, 2017 WAS HELD, IN BUCHAREST, THE MEETING OF THE PRESIDENTS OF THE CRIMINAL SECTIONS OF THE HIGH COURT OF CASSATION AND JUSTICE (Î.C.C.J.) AND THE COURTS OF APPEAL, TOGETHER WITH THE CHIEF PROSECUTORS OF THE CRIMINAL PROSECUTION SECTION FROM THE PROSECUTOR'S OFFICE ATTACHED TO THE HIGH COURT OF CASSATION AND JUSTICE, CHIEF PROSECUTORS FROM SPECIALIZED ANTICORRUPTION NATIONAL DIRECTORATE (D.N.A.) AND ORGANIZED CRIME AND TERRORISM OFFENCES INVESTIGATION DIRECTORATE (D.I.I.C.O.T.) STRUCTURES AND ALSO CHIEF PROSECUTORS FROM THE PROSECUTOR'S OFFICES ATTACHED TO THE COURTS OF APPEAL. THE PREVIOUSLY MENTIONED MEETING WAS DEDICATED TO DISCUSSING ASPECTS OF NON-UNITARY PRACTICE IN THE FIELD OF CRIMINAL LA[1]W AND CRIMINAL PROCEDURAL LAW. THE ARTICLE IS GOING TO FOCUS ON PRESENTING SOME ECONOMIC CRIME DEBATES, DISCUSSIONS AND LEGAL PROPOSAL AND DIRECTIVES IN THE FIELD OF TAX EVASION INVESTIGATIONS AND OTHER RELATED CRIMES.*

KEYWORDS: *TAX EVASION, LEGAL ISSUES, CRIMINAL PROCEDURES, LEGAL PRACTICES, PROBLEM OF LAW.*

In the present article we intend to reveal and debate a series of criminal law issues, legislative interpretation of the incriminating norms provided by Law no. 241/2005 for the prevention and combating of tax evasion (updated and republished) and, also, the conclusions and solutions that the criminal investigation / judicial bodies came up to (during the official previously mentioned meeting, which took place in Bucharest, on May 18, 2018 and was attended by representatives of several bodies, with criminal investigation attributions), all in the view of an unitary judicial practice.

[1] See also Ina Raluca Tomescu, Flavius Cristian Mărcău „European Policies and strategies for combating cross-border criminality. implications for the internal legal system", in *International Conference "New Criminal Legislation - important phase in the development of Romanian law",* Bologna (Italy), Medimond, pp. 291-296

I. Title of the problem of law:

- ***The legal classification of the offences consisting on non-payment of taxes for the income resulting from online sales conducted by individuals*** (Prosecutor's Office near The Bucharest Court of Appeal)

The problem arouse due to the fact that many and different solutions are adopted in cases involving tax evasion, incriminated by art. 9 (a), of Law no. 241/2005. Some of this solutions result in incrimination, court trials, also convictions, but there are also cases were criminal offenders are acquitted, or not incriminated (based on the motivation of a specific decision pronounced by The Bucharest Court of Appeal – criminal Decision no. 319 A / 02.03.2017 – according to which the debated matter does not represent a „hidden source" for obtaining income).

II. Title of the problem of law:

- ***The legal classification of the offences consisting on second-hand vehicles (used cares) sold by individuals, without later paying the related taxes*** (Prosecutor's Office near The Bucharest Court of Appeal)

Some legal opinions classify this offence as a tax evasion crime, in accordance with art. 9 (a), of Law no. 241/2005.

Other legal opinions state that, whenever the tax authorities have the possibility to ascertain and verify the operations performed (the sale-purchase operations being declared at the local tax authorities, in order to register them as taxable goods), the judicial authorities cannot incriminate this act as a tax evasion offence (in this respect, the Decisions no. 174/2014 and 3907/2012, pronounced by The High Court of Cassation and Justice, have been invoked).

● Conclusions and legal directives regarding *Case I* and *Case II*

The National Institute of Magistracy (I.N.M.) opinion, on which all participants in the meeting unanimously agreed, stated that the Criminal Section within The High Court of Cassation and Justice (Î.C.C.J.) judicial practices stand as relevant.

Regarding the existence of tax evasion crimes, in the hypotheses of cases similar to the ones mentioned above, the Supreme Court of Justice (Î.C.C.J.) has stated as follows:

Tax evasion crimes, in accordance with art. 9 (a), of Law no. 241/2005 for the prevention and combating of tax evasion, consists in the concealment of the goods, or taxable sources, for the purpose of withholding from the fulfilment of fiscal obligations.

The offence has, as a premise, the existence of a legal obligation to pay taxes for certain activities performed or property / goods held.

Omission to pay a legally due tax is not a tax evasion offence if the the goods, or taxable sources, have not been hidden. In this case, taxpayers that don`t comply will not be facing a criminal liability, but only the obligation to pay the residual tax obligations.

When a natural person does not register as a VAT payer, tax evasion exists only if the goods, or taxable sources, have been hidden. This is not the case, nor the same situation when the tax authorities had knowledge (information) regarding the taxable source (for example information about: the number of signed contracts, the duration of the contracts, the number of apartments sold / rented, the incomes obtained by the defendants, the number of sold vehicles, etc.).

„Goods" or „taxable source" means all taxable incomes and assets. The „concealment of goods" refers to both physical and legal sense of the phrase.

Regarding the non-declaration of the income of a natural person, the distinction must be made between the incomes for which the obligation to declare occurs both with the obligation to register them, on the one hand and the incomes for which occurs only the obligation to declare them, on the other hand:

a. In the situation of incomes that have not been declared to the competent fiscal bodies, for which the obligation to declare occurs both with the obligation to register them, we will find ourselves in the case were the constitutive elements of the offence regulated in art. 9, paragraph (1), let. b) of Law no. 241/2005 are applicable, without being able to incriminate a plurality of crimes, respectively the offence regulated in art. 9, paragraph (1), let. a) and the offence regulated in art. 9, paragraph (1), let. b), both of Law no. 241/2005.
If the incomes have been recorded in the accounting documents or other legal documents, but they have not been declared to the competent fiscal bodies, then the constitutive elements of the offence, stipulated in art. 9, paragraph (1), let. a) of Law no. 241/2005, will not be met.
This is due to the fact that one cannot be incriminated for hiding taxable incomes as long as tax authorities have the possibility to become aware of the incomes by simply checking the accounting documents of the taxpayer. Nor the offence provided by art. 9, paragraph (1), let. b) of Law no. 241/2005 (the omission to register) will be applicable in this situation, as long as the taxpayer registers the incomes, but only omits to declare them to the competent tax authorities.

b. In the situation of incomes for which only the obligation to declare occurs, that have not been declared, we will be in the case of the offence provided by art. 9, paragraph (1), let. a) of Law no. 241/2005.
As an example, in the case of the transfer of the real estate property through the notarial procedure, the tax authority, however, became aware of the existence of the taxable source / income, bearing in mind the fact that the Notary Offices transmit the documents on which the transfer operated to the competent fiscal bodies, together with the related documentation, so we will not be in the case of the offence provided by art. 9, paragraph (1), let. a) of Law no. 241/2005 (according to Decision no. 3907/28.11.2012 pronounced by The High Court of Cassation and Justice)

III. Title of the problem of law:

- ***Interpretation of Decision no. 23/2017, pronounced by The High Court of Cassation and Justice. The possibility to confiscate the difference between the amount of money recycled and the one used to pay the damages corresponding to the crime from tax evasion*** *(the Prosecutor's Office attached to The Bucharest Court of Appeal)*
- ***The method of applying the criminal Decision no. 23/2017, pronounced by The High Court of Cassation and Justice, in the matter of applying the confiscation security measure, according to the provisions of art. no. 33 of Law no. 656/2002*** (for the prevention and sanctioning of money laundering, as well as for establishing measures to prevent and combat terrorist financing)***, at the same time with the obligation to pay the***

amounts representing fiscal obligations according to art. 9, paragraph (1), let. a) of Law no. 241/2005

In one opinion, it is appreciated that, in the hypothesis of obliging the defendants to pay the amounts representing obligations due to the state, the rest of the amount left, after the deduction of these damages from the amounts that constituted the object of the money laundering offence, will be confiscated, while another opinion argues that no amount should be subject to any confiscation, in the cases where the defendants were obliged to pay the prejudices under the provisions of art. 9, let. c) of Law no. 241/2005.

● **Conclusions and legal directives regarding *Case III***

The National Institute of Magistracy (I.N.M.) opinion, on which all participants in the meeting unanimously agreed, stated that the difference between the amount of money recycled and the one used for the payment of the prejudices in tax evasion cases should be subject to confiscation. The measures regarding the same amount of money cannot coexist within the same case.
Only the amount representing the tax due as a result of the commercial operation, could be the subject in tax evasion cases, not the entire amount withdrawn to simulate the operation. The difference represents the object of misappropriation, or the lawless use of the company credit, depending on the quality of the offender.
Part of the amount that forms the object of tax evasion cases, will also represent the object of money laundering crimes, respectively the part that is being reintroduced in the economic circuit, usually dissimulated as loans from the associate to the company.
This amount is subject to confiscation under the special law, but under the terms and provisions of the Criminal Code, to which it refers.

IV. Title of the problem of law:

- ***The application of art. no. 10 of Law no. 241/2005 in the situations where both the commercial company and its administrator have the quality of defendants, and the payment of the prejudice is made entirely from the patrimony of the legal person*** *(the Prosecutor's Office attached to The Bucharest Court of Appeal)*
- ***The concrete, practical mode of implementing the criminal Decision no. 9/2017, pronounced by The High Court of Cassation and Justice, in the matter of the personal circumstance of the cause of non-punishment / reduction provided by art. no. 10 of Law no. 241/2005***

The problem is related to the incidence of this text in the event of the full payment of the damage by the accused legal person, legally represented by the accused natural person (statutory administrator), in the sense in which the payment of the damage also benefits the natural person from the perspective of the Decision no. 9/2017 (which refers to the hypothesis of the existence of several natural persons defendants, or of several legal persons defendants and not to the hypothesis of the accused administrator, or accused legal entity).
If the matter does not also apply to natural person defendants, it means that the later mentioned will have the obligation to cover the entire prejudice, in order to benefit from the effects provided by art. 10 of of Law no. 241/2005. Another issue that arises in such situations refers to

the way the amount paid in addition (double payment, in other word) is going to be refunded, taken in consideration that this kind of double payments are considered as amounts that are payed to the state budget on no legal grounds (without a legal justification).

● Conclusions and legal directives regarding *Case IV*

The National Institute of Magistracy (I.N.M.) opinion, on which all participants in the meeting unanimously agreed, stated that, in this case, the solution does not differ from the case where there are two natural persons accused and the solution results from the considerations of the Decision no. 9/2017, pronounced by The High Court of Cassation and Justice.
The Decision stated, amongst others, that „the application of an administrative sanction (for acts committed prior to February 1, 2014, when the old criminal law is more favorable), of a special mitigating circumstance, could not have, as a consequence, the obligation of full coverage of the prejudice by each of the participants that participated to the committing of the crime, which stands as the object of the accusation, so that it cannot be argued that the defendants could be asked to cover more than the actual prejudice created by placing, on the name and at the disposal of the injured person, an amount equivalent to the prejudice in question.
Both the Criminal Procedure Code and the Civil Code, respectively the Civil Procedure Code, provide solutions for the parties to contribute to the prejudice coverage by depositing amounts corresponding to the contribution of each participant in the crime, or by returning the corresponding amount to the person who has already paid the entire prejudice, until the deadline provided by the law."
Therefore, in the debated hypothesis, both the accused legal entity and the accused natural person can benefit from the application of the provisions of art. no. 10 of Law no. 241/2005, to the extent that the established prejudice is covered by each of the participants to the crime, within the limits of the actual contribution to the offence committed.

V. Title of the problem of law:

- ***The application of art. no. 10 of Law no. 241/2005 in the situations where payment of civil claims is made up to the first term, in front of the judge notified with an agreement to recognize the guilt*** *(the Prosecutor's Office attached to The Bucharest Court of Appeal)*

● Conclusions and legal directives regarding *Case V*

The National Institute of Magistracy (I.N.M.) opinion, on which all participants in the meeting unanimously agreed, stated that it is not possible, for the notified court of justice, to apply the provisions stated by art. no. 10 of Law no. 241/2005 together with a guilt recognition agreement, this being contrary to the provisions stipulated by art. no. 485 of the Criminal Procedure Code.
If the defendant agrees and makes the payment of the civil claims until the first court term, the court can give effect the provisions of art. no. 485, para. (1), let. b) of the Criminal Procedure Code, considering that, in these circumstances, the punishment negotiated and established through the guilt recognition agreement procedure stands as illegal.

VI. Title of the problem of law:

- ***The offence provided by art. 272, para. (1), let. b) of Law no. 31/16.01.1990 regarding companies, cumulated with the offence provided by Law no. 241/15.07.2015 (tax evasion)*** *(the Prosecutor's Office attached to The Bucharest Court of Appeal, The Bucharest Court of Appeal)*
- ***The objective side of the offence provided by art. 272, para. (1), let. b) of Law no. 31/16.01.1990 regarding companies***
- ***The hypothesis in which the use of the goods, or the credit of the company, constitutes itself the offence of tax evasion, provided by art. 9, paragraph (1), let. c) of Law no. 241/2005***
- ***The hypothesis in which the goods, or the credit of the company, originate from the offence provided by art. 9, paragraph (1), let. b) of Law no. 241/2005 itself***
- ***The provision of the crime / offence in the criminal law***

Summary of the pronounced solution:

In the hypothesis in which the use of goods, or credit of the company, constitutes itself the offence of tax evasion, provided for by art. 9, paragraph (1), let. c) of Law no. 241/2005, or in the hypothesis in which the goods, or the credit of the company, originate from the offence of tax evasion, provided by art. 9, paragraph (1), let. b) of Law no. 241/2005, it was considered / stated that this are cases of a criminal law offences.

Basically, when an administrator withdraws, on the basis of false documents, amounts of money from the accounts of the company he runs, the full use of these amounts, strictly in the interest of the company, is not plausible.

Presentation of the legal problem, showing the factual situation:

- The hypothesis in which the actual action of using the goods / assets, or the credit of the company, represents the offence of tax evasion, provided for by art. 9, paragraph (1), let. c) of Law no. 241/2005, respectively the hypothesis in which the goods or the credit of the company come from the committing of the crime provided for by art. 9, paragraph (1), let. b) of Law no. 241/2005.
- The possibility to incriminate the founder, administrator, general manager, director, member of the supervisory board, or the directorate or legal representative of the company

Regarding the provision of crime / offence in the criminal law:

In one opinion, the pronounced solutions, in the hypothesis in which the actual action of using the goods / assets, or the credit of the company, represents the offence of tax evasion, provided for by art. 9, paragraph (1), let. c) of Law no. 241/2005, or in the hypothesis in which the goods or the credit of the company come from the committing of the crime provided for by art. 9, paragraph (1), let. b) of Law no. 241/2005, state that *the committed crime / offence does not represent a criminal act / it is not provided by the criminal law*.

In a second opinion, the pronounced solutions, the pronounced solutions, in the hypothesis in which the actual action of using the goods / assets, or the credit of the company, represents the

offence of tax evasion, provided for by art. 9, paragraph (1), let. c) of Law no. 241/2005, or in the hypothesis in which the goods or the credit of the company come from the committing of the crime provided for by art. 9, paragraph (1), let. b) of Law no. 241/2005, state that *the committed crime / offence represents a criminal act and it is provided by the criminal law*.

● Conclusions and legal directives regarding *Case VI*

The National Institute of Magistracy (I.N.M.) opinion, opinion, on which all participants in the meeting unanimously agreed, stated that, in this case, a correctly judicial practice would be the cases which incriminate the offence provided by art. 272, para. (1), point 2 of Law no. 31/16.01.1990 regarding companies, both with the offence provided by the one in which a in a cumulated criminal version.

If the money is transferred to the account of some fictitious operations, this is performed in order to provide a legal appearance to these operations (to make them look like real operations).
The prejudice caused by the tax evasion offence is represented by the amount consisting in the unpaid tax, due to the fictitious payment mentioned above which decreased the revenues. So the prejudice is not represented by all the amount that flowed through the accounts.
Then, it depends what happens with the amounts transferred between the accounts of the companies involved in the fraudulent scheme. If the money is transferred, let`s say from the accounts of company „X", to the accounts of company „Y", as a general rule, they will be withdraw, as cash, from the accounts of company „Y", after which the amounts will be returned to company „X".
In the opinion of The National Institute of Magistracy, the withdrawal of money represents, by itself, another crime / offence – embezzlement, or illegal usage of the company`s credit, the incrimination depending on the quality of the subject performing the withdrawal.
Afterwards, two types of situations can emerge:

a. if the money was withdrawn for a personal purpose, we will be in the situation when two type of offences should be incriminated: *tax evasion and embezzlement / illegal usage of the company`s credit*;
b. if, on the other hand, as it usually happens, a part of the money is reallocated to the commercial activity / circuit (most often as loans of the associate for the company), we will be in the situation when the offence of *money laundering*, provided by Law no. 656, of December 7, 2002 (for the prevention and sanctioning of money laundering, as well as for establishing measures to prevent and combat terrorist financing) should be incriminated, the relocated money being the actual amount that is being „laundered".

Bearing in mind the above argumentations, what should also be mentioned is The High Court of Cassation and Justice judicial practice, which state the following:
„The crime / offence committed by the defendant, how holds the title of administrator of the company, consisting in the fact that he used the money withdrawn from the company's cash register for his own use, or to pay the debts of another company, which he also manages, meets the constituent elements of the crime provided by art. 272, para. (1), point 2 of Law no. 31/16.01.1990 regarding companies (according to Decision no. 1818 / 28.05.2014 of The Criminal Section of The High Court of Cassation and Justice)".

REFERENCES

[1] The minute of the meeting of the presidents of the criminal sections from The High Court of Cassation and Justice and the appeal courts, with the chief prosecutors of the criminal prosecution section from the Prosecutor's Office attached to The High Court of Cassation and Justice, the specialized Anticorruption National Directorate (D.N.A.) and Organized Crime and Terrorism Offences Investigation Directorate (D.I.I.C.O.T.) structures and the prosecutor's offices attached to the courts of appeal, The National Institute of Magistracy, May 18, 2018, Bucharest.

[2] Law no. 286, of July 17 2009, regarding the Criminal Cod (updated and republished)

[3] Law no. 135, of July 1, 2010 regarding the Criminal Procedure Cod (updated and republished)

[4] Law no. 241, of July 15, 2005, for preventing and combating tax evasion (updated and republished)

[5] Law no. 656, of December 7, 2002 for the prevention and sanctioning of money laundering, as well as for establishing measures to prevent and combat terrorist financing (updated and republished)

[6] Legea nr. 31/16.01.1990 regarding companies (updated and republished)