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CURRENT ISSUES ABOUT TAX EVASION

(LAW No. 50/2013)

Călina Andreea MUNTEANU[1]

Abstract

The present article proposes to examine latest legal changes in tax evasion area. Tax evasion could be defined as the avoidance by any means, in whole or in part, of the payment of taxes, fees and other amounts owed to the state budget, local budgets, the state social insurance budget and extra-budgetary special funds by Romanian or foreign individuals legal entities.

Legislation on tax evasion still arouses extensive debate both in the doctrine and in the specialty practice.

Law no. 241/2005 on preventing and combating tax evasion was last amended by Law no.50/2013, which was published in Official Gazette no. 146 of 19 March, with effect from March 22, 2013.

Recent changes relate mainly to higher limits of punishments for certain crimes.

Keywords: *tax evasion, Law no.50/2013, taxpayer, punishments.*

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Although it is a concept on which there are various points of view, we could define tax evasion as the avoidance by any means, in whole or in part, of the payment of taxes, fees and other amounts owed to the state budget, local budgets, the state social insurance budget and extra-budgetary special funds by Romanian or foreign individuals legal entities (Turianu, (2001), : 129; N.C. Dariescu. C. Dariescu (2006); 49-53); Postolache, (2009), : 350-351).

In any democratic state, the taxpayer is considered to be a subject of law in good faith and, therefore, the tax obligations assumed are the foundation on which tax administration is based when it sets and registers in the debt securities the amounts of taxes due.

Problems occur when some taxpayers try to position themselves so as to evade the proper fulfillment of tax obligations.

People who commit illegal tax evasion acts demonstrate unimaginable inventiveness, but it can also manifest itself in the manner of rudimentary facts[2] (Hotca, Dobrinoiu, (2010), : 225; Dariescu, Mogos (2002): 198-205).

Legislation on tax evasion still arouses extensive debate both in the doctrine and in the specialty practice.

The first law through which they have tried to define and control, including with means of criminal law, tax evasion was Law no. 87/1994 for combating tax evasion[3].

After the repeal of Law.87/1994, the matter is now included in Law no. 241/2005 on preventing and combating tax evasion[4] (Păvăleanu, (2006), : 39 Dariescu, (2004) : 273-285).

Law no. 241/2005 on preventing and combating tax evasion was last amended by Law no.50/2013, which was published in Official Gazette no. 146 of 19 March, with effect from March 22, 2013.

Recent changes relate mainly to higher limits of punishments for certain crimes.

Thus a first update concerns the crime referred to in article 3, which is in fact the act of the taxpayer who does not intentionally or

[2] The illicit tax evasion may consist in keeping some false legal documents, destruction of legal documents, elaboration of fictitious evidence of payment, unjustified change of supply price change and other expenses.

[3] Law no. 87/1994 to combat tax evasion was published in Official Gazette no. 299 of 24 October 1994.

[4] Law no. 241/2005 on preventing and combating tax evasion, published in the Official Gazette no. 672 of 27 July 2005.

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unintentionally restore the destroyed accounting documents, within the time entered in the records of control and which is punishable with imprisonment from 6 months to 5 years.

In the previous form of law, the act of the taxpayer who intentionally did not restore destroyed accounting documents, within the time entered in the records of control, although he/she may do so, was punishable only by a fine, from 5,000 to 30,000 lei .

The incrimination of this act aims to prevent tax evasion, the inaction of the taxpayer creating favorable conditions for tax evasion.

This crime is part of the category of crimes performing the so-called early protection of social values. In case of such offenses stipulated by the criminal law, the legislature must act cautiously when it incriminates them because they do not directly cause any damage to social values.

The special judicial object of the crime is the social relations arising from the obligation of restitution of the destroyed accounting records, in order to adequately collect fiscal revenue and prevent tax evasion.

The crime does not have a material object (Minea, Costas, Ionescu (2006),: 58; N. C. Dariescu. C. Dariescu. (2006): 43-48.), the social value protected by the incrimination of fact having an abstract in nature, as the failure to meet the restoring obligation does not determine any physical injury.

The active subject of the crime is qualified, being the taxpayer[5] who does not restore the destroyed accounting documents within the time entered in the records of control. For the criminal liability to be committed, the control body should have established by means of its disposition the obligation of the taxpayer to re-elaborate the destroyed accounting documents.

The passive subject of the crime is the state and not the control body which established the obligation of restoring the destroyed fiscal documents.

The prerequisite lies in the requirement for the pre-existence of certain destroyed documents, regardless of the cause of their destruction.

Regarding the objective side, the material element of this crime is the omission of the taxpayer to restore destroyed accounting documents within the time established by the control documents. So, in addition to the prerequisite condition (the preexistence of destroyed documents), the

[5] We refer both to individual taxpayers, and to but also legal taxpayers

inaction representing the material element of the crime must meet two requirements: the establishing of a term in the control documentation that was breached, and the possibility to restore the destroyed accounting documents.

The immediate result is a state of danger for the society because without legal documents, the possibility of committing a tax offense increases.

Causation should not be demonstrated, as it simply results from the simple fact of committing in full the material element of the crime.

According to the latest modifications established by Law 50/2013, the omission of restoring destroyed accounting documents can be both intentional and unintentional. Prior to this Law, the act could have been committed only with the guilt form of intention.

Another modification refers to the crime referred to in article 4. According to the latest changes, the unjustified refusal of a person to submit to the competent bodies legal documents and property assets, in order to prevent financial, tax or customs control, within 15 days from the notice is a crime and is punishable with imprisonment from one year to 6 years.

While the old regulation provided as prerequisite the pre-existence of repeated requests (three summons) addressed to the taxpayer by the competent authorities with regard to the presentation of legal documents and assets from the taxpayer's property, the new regulation provides that the unjustified refusal of a person to submit to the competent bodies legal documents and property assets within no more than 15 days from notice is a crime.

The summons is an address that the competent body issues to the taxpayer by which it asks him/her, while observing the law, to submit legal documents or property owned by the taxpayer. The summons shall have a determined recipient and a clearly defined object. Also, the tax body must prove that the notice was received by the taxpayer or that he/she has been notified according to law.

Penalties are more severe compared to the previous provisions of the law, which provided for this classification, imprisonment from 6 months to 3 years or a fine.

The offense referred to in article 5 has undergone some changes. Thus, preventing in any form, competent bodies to enter, as provided by law, establishments, offices or lands, for the purpose of financial, tax or

customs control is a crime and shall be punished with imprisonment from one to 6 years. For the same acts, the previous form of the law provided sentences of 6 months up to 3 years or a fine.

Also, law no.50/2013 amends art.6 of Law 241/2005. Intentional retention and unshedding, within 30 days of the due date, of the amounts representing taxes or withholding contribution are a crime and shall be punished with imprisonment from one year to 6 years. For these acts, penalties were also increased, while the law previously stipulated imprisonment from one year to 3 years or a fine.

The aggravating conditions regarding the tax evasion crime under Article 9 of Law no. 241/2005 were also modified. Under paragraph (1) of this Article, the following acts committed for the purpose of avoiding tax obligations shall be punished with imprisonment from 2 years to 8 years and interdiction of certain rights:

- Concealment of taxable goods or source;
- Omission, in whole or in part, to highlight in the accounting documents or in other legal documents, the commercial operations performed or revenues;
- Highlighting in the accounting documents and other legal documents, of the expenses not based on actual transactions or highlighting other fictitious operations;
- Alteration, destruction or concealment of accounting documents, of memoirs of electrical or electronic cash registers or of other data storage means;
- Execution of double accounting records using documents or other means of data storage - Avoidance of financial, tax or customs checks by failure to declare, fictitious or inaccurate declaration on main or secondary offices of persons checked;
- Substitution, degradation or transfer by the debtor or by third parties of property seized under the provisions of the Fiscal Procedure Code and of the Criminal Procedure Code.

The classifications of sentences in aggravating circumstances were modified, so that:

- if the facts in paragraph 1 caused a prejudice greater than EUR 100,000, in the national currency equivalent, the minimum limit of the penalty provided by law and its

maximum is increased by 5 years (as compared to the 2-year increase from the previous version).

- in case of a prejudice greater than EUR 500,000, in the national currency equivalent, the minimum limit of penalty provided by law, and its maximum shall be increased by 7 years (as compared to an increase of 3 years, according to the foregoing provisions of law).

The provisions on causes for non-punishment and causes of sentence reduction remained unchanged. Thus, if an offense of tax evasion provided by law is committed, if during the prosecution or trial until the first hearing, the accused or defendant fully cover the damage, the limits of the punishment provided by law for the offense committed is reduced by half (Neagoe, (2006): 83-85; Dariescu N.C.. Dariescu C.,(2006): 43-48).

If the damage caused and recovered under the same conditions is up to EUR 100,000 in the national currency equivalent the fine punishment may be applied.

If the damage caused and recovered under the same conditions is up to EUR 50,000 in the national currency equivalent, an administrative penalty is applied, which is recorded in the criminal record.

These provisions do not apply if the perpetrator has committed another crime provided by law within 5 years of the offense for which he/she benefited from non-punishment or penalty reduction.

To combat tax evasion, which has deep implications economically, socially and even politically, a unified strategy and especially persevering should be identified and implemented. Instead, governments have so far opposed it an imperfect, incomplete and evasive legislation, implemented by a shy and hesitant staff, to which we can add the lack of harmonization between state institutions involved in tax administration.

We believe that a first step in trying to solve the problem of tax evasion was made by law no.50/2013, which has tightened penalties applicable to persons who commit such acts.

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