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The Actual Tax Evasion Offences Under Article 9 of the Law No 241/2005 on Preventing and Combating Tax Evasion - Theoretical and Practical Skills –[1]

Nadia-Cerasela ANITEI[1]

Roxana Elena LAZĂR[2]

[1] PhD Univ. Prof. Faculty of Law and Administrative Sciences, "Dunărea de Jos" University, Galaţi, Romania, ncerasela@yahoo.com, nadia.anitei@ugal.ro
[2] Assoc. Prof. Dr., Faculty of Law, "Petre Andrei" University, Iasi, Romania, rxn_ele@yahoo.com

Abstract: *Law no. 241/2005 for preventing and combating tax evasion is currently in force, the latter being in force also today, as amended by O.U.G. no. 54/2010 on some measures to combat tax evasion, by Law no. 50/2013 amending Law no. 241/2005 for preventing and combating tax evasion, by the sole article of Law no. 55/31 March 2021 and OUG 130/2021 on some fiscal-budgetary measures, extension of some deadlines, as well as for amending and supplementing some normative acts.*
Law no. 241/2005 introduces four new elements from the first article itself, establishing measures to prevent tax evasion, establishing new offences called offences in connection with the offence of tax evasion, incriminating several facts as offences of danger and defining several terms used by the law for greater precision, in contrast to the previous regulation.
We will present the actual offences of tax evasion provided for by Article 9 of Law no. 241/2005 by inserting practical aspects and comments.

Keywords: *tax evasion, taxpayer, tax evasion offences.*

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1. Introductory aspects

Law no. 241/2005 on preventing and combating tax evasion is currently in force, the latter being also in force today, as amended by GEO no. 54/2010 on some measures to combat tax evasion, by Law no. 50/2013 on amending Law no. 241/2005 on preventing and combating tax evasion, by the sole article of Law no. 55/31 March 2021 and GEO 130/2021 on some fiscal-budgetary measures, extension of some deadlines, as well as for amending and supplementing some normative acts.

In 2018, it was intended to amend Law no. 241/2005, through a Law amending and supplementing Article 10, but on which the Constitutional Court admitted the exception of unconstitutionality, finding that "the provisions of the sole article of the Law for amending and supplementing Article 10 of Law no. 241/2005 for preventing and combating tax evasion are unconstitutional"[2]. However, the draft amendment to Law 241/2005 was not abandoned, and the Legal Committee of the Chamber of Deputies adopted a number of amendments in an attempt to bring the draft law into line with the Constitutional Court's observations.

At the end of March 2021, Law no. 241/2005 was amended by the single article of Law no. 55/31 March 2021 and is in line with the existing trend at the European level regarding the way to punish tax evasion.

From March 2022, the following legislative amendment came into force - OUG NO 130/2021 on some fiscal-budgetary measures, extension of some deadlines, as well as for the amendment and completion of some normative acts as follows:[3]

ART. XXIX Law no. 241/2005 for the prevention and combating of tax evasion, published in the Official Gazette of Romania, Part I, no. 672 of 27 July 2005, with subsequent amendments and additions, is amended and supplemented as follows: 1. After Article 6, a new article is inserted, Article 6^1, with the following content: "ART. 6^1 (1) The withholding and non-payment, collection and non-payment, within 60 days of the due date provided for by law, of taxes and/or contributions provided for in the Annex to this Law shall constitute offences and shall be punishable by

[2] Decision No 147/2019 on the admissibility of the objection of unconstitutionality of the provisions of the sole article of the Law amending and supplementing Article 10 of Law No 241/2005 on preventing and combating tax evasion, published in the Official Gazette No 338/03.05.2019, Part I.

[3] published in the OFFICIAL MONITOR No. 1202 of 18 December 2021 and consulted on 28 April 2022 at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/249349

imprisonment for a term of one to five years or a fine. (2) The provision of para. (1) shall enter into force on 1 March 2022."

2. In Article 10, paragraphs (1), (1^1) and (2) shall be amended and shall read as follows: "(1) In the case of the commission of an offence referred to in Article 6^1, 8 or 9, if during the criminal proceedings or trial the damage caused is fully covered and its amount does not exceed 100,000 euro, in national currency equivalent, a fine may be imposed. If the damage caused and recovered under the same conditions is up to EUR 50,000, in national currency equivalent, the penalty shall be a fine. (1^1) If the damage caused by the commission of the acts referred to in Article 6^1, 8 or 9 does not exceed EUR 100,000, the penalty shall be a fine. 000 euro, in national currency equivalent, and in the course of the criminal proceedings or in the course of the trial until a final judgment is rendered, this amount, increased by 20% of the calculation basis, plus interest and penalties, is fully covered, the offence shall not be punished and the provisions of Art. 16 para. (1) letter h) of Law no. 135/2010 on the Code of Criminal Procedure, as amended. (2) The provisions of para. (1) and (1^1) shall not apply if the offender has committed another offence provided for by this Law within 5 years of the commission of the offence for which he/she benefited from the provisions of paragraph (1). (1) or (1^1)."

Law no. 241/2005 introduces four new elements from the very first article, establishing measures for the prevention of tax evasion, establishing new offences called offences in connection with the offence of tax evasion, criminalising several acts as offences of danger and defining several terms used by the law for greater precision, in contrast to the previous regulation.

2. The actual tax evasion offences (Anitei. Lazar (2013):32-43)

2.1. General characteristics of tax evasion offences proper (Aniţei, Lazăr Roxana Elena (2013: 44-53).

In Romania, Article 9 of Law 241/2005 regulates seven criminal offences of tax evasion.

The actual tax evasion offences present specific elements of the offences which will be presented below.

1. Definition. The criminal offence of tax evasion consists in the evasion, by any means, of the taxpayer's payment of taxes and/or duties due to the state budget, local budgets, the state social security budget and special extra-budgetary funds.

2. Legal object. The legal object is represented by the social relations relating to the establishment of the state budget, local budgets, the state

social security budget and special extra-budgetary funds. Business relations imply trust between partners. In the case of tax evasion, one of the partners is the state, whose trust is betrayed by non-payment of taxes.

3. Material object. The material object is the money owed to the state budget, local budgets, the state social security budget and special extra-budgetary funds.

4. Active subject. The active subject is the taxpayer, natural or legal person, Romanian or foreign, who obtains income or other such amounts generating taxes and/or duties. In various circumstances, the active subject of the criminal offence of tax evasion is the person who:

a) does not pay taxes and duties at all, although he/she obtains taxable or taxable income;

b) pays taxes and duties that are lower than those actually due;

c) pays taxes to institutions other than those competent to collect taxes;

d) pays taxes and duties after the legal deadlines.

From a psychological point of view, the potential explanations of people who commit such acts can be exemplified as follows: "I'll pay taxes later"; "I'm just doing what everyone else is doing", etc. (S. Picket, J. Picket, (2002):. 12).

In accordance with Article 12 of Law 241/2005, persons convicted of tax evasion offences will in future no longer be able to act as founders, administrators, directors or legal representatives of companies, and persons who already have such status will be deprived of such rights. Once a court decision convicting a person of one or more of the offences provided for by Law No 241/2005 has become final, this decision will be communicated to the National Trade Register Office for the necessary entries to be made.

At the same time, these offences are likely to be committed in different forms of criminal participation.

5. Passive subject. The passive subject is the State, as holder of the social values concerning the constitution of the state budget, local budgets, state social security budget, special extra-budgetary funds.

6. Material element. The material element takes the form of actions, in a few cases the offence of tax evasion is committed by omission. The offence of tax evasion is never static, it does not have a well-defined pattern, but changes in tax legislation and social conditions bring about different forms of action which form the objective side of this criminal offence. The various forms of tax evasion are specific to the material element, as described below.

7. The subjective side. The subjective aspect consists in committing the criminal act with the form of guilt of direct intent, because there is always an aim - to evade tax obligations. The evasion of tax liability may be total or partial, and the form of evasion is irrelevant to the offence. The legislator does not penalise guilt in committing such acts. The perpetrator of such offences often plans his actions in advance.

Intent to defraud concerns bad faith, the taxpayer's desire to defraud the tax authorities with full knowledge of the facts. In other situations, a transaction, which at first glance appears to be a deliberate tax fraud, if examined carefully shows that the violation of the tax law is made on the basis of an honest attitude, through misdirection of the taxpayer by other incompetent or bad faith persons such as certain accountants, or through an honest (made in good faith) but wrong interpretation of the tax laws in force.

Non-payment can also originate from the taxpayer's intentional, voluntary behaviour, but non-compliance can also result from ignorance (not knowing the law), error (miscalculation) or negligence (e.g. lack of care in making and keeping accounting records).

8. Attempt. Attempt, although possible, is not penalised.

9. Prompt prosecution. Being dangerous offences, the immediate consequence is the state of danger for social relations concerning the constitution of the state budget, local budgets, state social security budget, special extra-budgetary funds. The state of danger created is all the more serious as this type of economic and financial crime is characterised by the possibility of remaining hidden indefinitely.

10. Punishment. The penalty prescribed by law is imprisonment, from 2 years to 8 years, together with the prohibition of certain rights, alternatively with a fine, after the last amendment of Law 241/2005.

2.2. Forms of tax evasion offences proper

The actual tax evasion offences consist of (Article 9 of Law 241/2005):

1. concealment of the taxable or taxable source;

2. the omission, in whole or in part, to record, in accounting or other legal documents, the commercial transactions carried out or the income generated;

3. the entry in the accounts or other legal documents of expenditure not based on actual transactions or the entry of other fictitious transactions;

4. alteration, destruction or concealment of accounting records, memories of electronic invoicing or tax registers or other means of data storage;

5. making double accounting entries, using book entries or other means of data storage;

6. evading financial, tax or customs controls by non-declaration, fictitious declaration or inaccurate declaration of the main or secondary establishments of the persons being controlled;

7. substitution, degradation or alienation by the debtor or by third parties of assets seized in accordance with the provisions of the Fiscal Procedure Code and the Criminal Procedure Code.

1. Concealment of the taxable or taxable source

The characteristics of this type of offence, provided for and sanctioned by Article 9(a) of Law 241/2005, are:

- the material object is represented by false tax returns, completed;
- the active subject can be any person;
- in terms of the objective side, there is an action of "concealment", which can be both physical and legal. The action must be carried out against the taxable or taxable property or source. Taxable or chargeable property or source means any income or any property subject to tax or duty;
- the subjective side implies direct intent, given the intended purpose - to evade tax liability;
- the immediate consequence is the state of danger to the social relations protected by the criminal law.

In judicial practice, in relation to the applicability of this text of the law, it has been ruled that in the case of those incomes for which there is a double obligation - both to record and to declare, if the incomes have been recorded in the accounts or in other legal documents, but have not been declared to the competent tax authority, it follows that the constituent elements of the offence provided for in Article 9 para. (1)(a) of Law No 241/2005, since there has been no concealment of taxable or taxable income, given that the competent tax authorities may become aware of the income realised simply by checking the taxpayer's accounting documents, and, at the same time, neither are the constituent elements of the offence provided for in Article 9(1)(a) of Law No 241/2005. (1) (b) of the Law241/2005, since the income realised was highlighted.

As regards the income for which there is only the obligation to declare, if it has not been declared to the competent tax authority, then the

constituent elements of the offence of tax **evasion** provided for in Article 9(1)(b) of Law No 241/2005 are met. (1) letter a) of Law no. 241/2005.[4]

In practice, the offence provided for and punished by Article 9(9) of the Framework Decision is not a criminal offence. 1 lit.a of Law no. 214/2005 consisted of:

- handing over ferrous and non-ferrous materials to a trading company on the basis of a false declaration that they came from one's own household (even though they had been acquired in one's own name), without paying the taxes due to the State (i.e. carrying out commercial acts and deeds without holding a licence for this activity);[5]

- management of a number of four slot-machine games of chance, without taking steps to obtain an operating licence for each game and without taking steps to obtain a gambling organiser's licence, concealing the taxable source by concealing the activity of organising games of chance.[6]

2. Failure, in whole or in part, to record in the accounts or other legal documents the commercial transactions carried out or the income realised

The characteristics of this type of offence, according to Art. 9 letter b of Law 241/2005, are:

- the material object is represented by the accounting records or any other legal documents which record the commercial operations carried out or the income received;

- the active subject is a special, qualified subject, given his capacity as a manager (in fact) or as a natural or legal person who is responsible for organising and managing the accounts;

- the objective aspect consists of inaction. Naturally, failure to record commercial transactions carried out usually entails failure to record income. Inaction must be proven in the sense that there are no records at all of the commercial transactions carried out. If the record is made, but late, this does not make the person concerned criminally liable;

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[4]ÎCCJ, Secţia penală, decizia nr. 3907 din 28 noiembrie 2012, disponibil la http://www.scj.ro/SP%20rezumate%202012/SP%20dec%20r%203907%2028%2011%202012.htm (accesat la 04.09.2013).

[5]Decision no. 9/2015 - Tribunal Covasna, http://portal.just.ro/119/Lists/Jurisprudenta/DispForm.aspx?ID=99 (accesat la 08.09.2020).

[6]Decision no. 262/S/2015 -Tribunal Brasov, http://portal.just.ro/62/Lists/Jurisprudenta/DispForm.aspx?ID=692 (accesat la 19.09.2020).

- the subjective aspect implies direct intent, given the intended purpose - to evade tax liability;

- the immediate consequence is the non-payment of all or part of the tax liability to the State.

In practice, the offence provided for and punished by Article 9(9)(a) is a criminal offence. 1 letter b of Law no. 214/2005 consisted of:

- issuing invoices for the supply of materials necessary for the company's activity, not recorded in the accounting records, as well as failure to submit tax returns and non-payment of income tax;[7]

- failure to make an inventory of stocks of raw materials, finished products and goods by failing to record shortages in the management of the company on the date of their discovery by failing to record income from the sale of finished products and goods;[8]

- the reduction of the total amount of VAT owed by a commercial company to the state budget, by failing to record and declare the shortfall in management, assimilated to the supply of goods.[9]

3. The entry in the accounts or other legal documents of expenditure which is not based on real transactions or the entry of other fictitious transactions

The characteristics of this type of offence provided for and penalised by Article 9 lit. c) of Law no. 241/2005 - is characterised by:

- the material object consists of accounting acts or any other legal documents which are either not based on real transactions or show fictitious transactions;

- it can only have a qualified active subject: the natural or legal person who is responsible for recording in legal documents the commercial transactions or the income generated: the accountant, the economic director, the administrator, the taxpayer. A common example is the conclusion of fictitious commercial transactions through the intermediary of a shell company, which issues tax documents that do not correspond to reality;

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[7]Decision no.85/2018 ,Tribunal Vaslui, http://portal.just.ro/89/Lists/Jurisprudenta/DispForm.aspx?ID=532 (accesat la 08.09.2020).

[8]Decision no.218/2011,TribunalVaslui, http://portal.just.ro/89/Lists/Jurisprudenta/DispForm.aspx?ID=346 (accesat la 08.09.2020).

[9]Decision no. 37/2014 Tribunal Arad, http://portal.just.ro/108/Lists/Jurisprudenta/DispForm.aspx?ID=429 (accesat la 19.09.2020).

- the immediate consequence is a reduction in tax liabilities to the State.

In relation to this offence, we recall decision no. 2008 of 2004 of the Criminal Division of the High Court of Cassation and Justice, which ruled that where the expenses entered in the accounting records of a company were subsequently corrected, following the cancellation of a commercial contract, and the annual balance sheet reflected the reality of commercial operations, the existence of the offence of tax evasion cannot be held to exist.

With regard to Article 9 letter c of Law no. 241/2005, the High Court of Cassation (M.St. Minea, C.F. Costas, D.M. Ionescu, (2006): 133.) and Justice admitted the appeal in the interest of the law formulated by the Prosecutor General of the Public Prosecutor's Office of the High Court of Cassation and Justice, establishing the necessary delimitation between the offence of tax evasion, forgery of private documents and use of forgery, as follows: "In the interpretation and uniform application of the provisions concerning the legal classification of the offence of recording, in accounting or other legal documents, expenses which are not based on real operations or the recording of other fictitious operations, in the hypothesis of recording tax invoices and payment receipts drawn up falsely in the name of commercial companies which do not recognise the transactions or which, during the period of operation, have had fiscal behaviour similar to that of 'ghost' companies, with the aim of evading tax obligations; the relationship between the offence of tax evasion provided for in Article 9(9) and the offence of tax avoidance provided for in Article 9(9)(a) of the Directive. (1) of Law No 241/2005 and the offences of forgery of private documents/forgery of documents provided for in Articles 322 and 323 of the Criminal Code establishes that: the offence of recording in accounting records or other legal documents expenses not based on real transactions or the recording of other fictitious transactions, by using forged invoices and tax receipts, with the aim of evading tax obligations, constitutes the offence of tax evasion provided for in Article 9 (1) of Law No 241/2005. (1) lit. (c) of Law No 241/2005 on preventing and combating tax evasion".[10]

In practice, the offence provided for and punished by Article 9(9) of the Framework Decision is not a criminal offence. 1 lit. c of Law No 214/2005 may consist of:

[10]Decision no. 21/2017 a I.C.C.J (Completul RIL), https://static.anaf.ro/static/10/Anaf/legislatie/DICCJ_21_2017.pdf (accesat la 19.09.2020).

- issuing tax invoices certifying non-existent supplies of goods and services with a view to evading tax obligations to the state budget and defrauding creditors' rights;[11]

-receiving negative VAT refunds in the absence of any justification, by recording in the accounts purchases from "ghost" companies;[12]

- recording in the company's accounts fiscal invoices attesting values higher than the value of the products purchased, with the aim of evading the payment of tax and VAT.[13]

4. Alteration, destruction or concealment of accounting documents, memories of tax invoicing or electronic tax registers or other data storage media

The characteristics of this form of tax evasion - art. 9 letter d) of Law no. 241/2005, are:

- the specific material object consists of the accounting records, the memories of electronic tax invoicing or marking machines and any other means of data storage;

- the objective aspect involves an act of alteration (a change), destruction (consisting in damaging the substance of the property so that it ceases to exist in its materiality) or concealment (we might add, physical) of the accounting records, the memories of the electronic tax invoicing or marking machines and any other means of data storage. The action, in whatever form, may be total or partial, and the means of alteration, destruction or modification may be any.

- The immediate consequence is the alteration, destruction or concealment of accounting documents, memories of tax invoicing or electronic tax registers and any other means of data storage, which leads to the reduction or even complete evasion of tax obligations.

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[11] Decision no. 213/2016 Tribunal Vaslui, http://portal.just.ro/89/Lists/Jurisprudenta/DispForm.aspx?ID=515 (accesat la 07.09.2020).

[12]Decision no. 88/2012 Tribunal Vaslui, http://portal.just.ro/89/Lists/Jurisprudenta/DispForm.aspx?ID=350 (accesat la 07.09.2020).

[13]Decision no. 438/2017 Tribunal Dolj, http://portal.just.ro/63/Lists/Jurisprudenta/DispForm.aspx?ID=730 (accesat la 19.09.2020).

5. Keeping double accounting records using entries or other means of data storage

The following characteristics are defining for this form of the offence provided for and punished by Article 9(e) of Law 241/2005:

- the particular material object of this criminal offence under consideration, which consists of double accounting records, i.e. the entries or other means of data storage. The concept of "double bookkeeping" is not to be confused with that of "double-entry bookkeeping". Double-entry bookkeeping involves keeping parallel accounting records;

- the active subject of the offence can only be qualified - the person responsible for organising and managing the accounts;

- the subjective aspect involves the keeping of double accounting records, as a result of the use of written records or other means of storing data;

- the immediate consequence is the keeping of a parallel set of accounts to the official set.

6. Evading financial, tax or customs controls by non-declaration, fictitious declaration or inaccurate declaration of the main or secondary establishments of the persons checked

The characteristics of this form of tax evasion - Article 9(f) of Law 241/2005 - are as follows:

- the material object consists of documents proving untruthful, fictitious main or secondary offices;

- the active subjects of the offence are qualified. Since the statements which are the material object of the offence of tax evasion in this form are the responsibility of the administrators, they are also the active subjects of the offence. These statements belong to the category of statements to be made to the tax authorities;

- the objective aspect involves an act of evasion of financial, tax or customs checks by non-declaration, fictitious declaration or inaccurate declaration of the main or secondary offices of the persons checked;

The literature states that "this offence is a variant of the offence of false declarations provided for in the Criminal Code, which is why, if the constituent elements of the offence in both texts are met, there will not be a concurrence of offences, but a concurrence of texts, applying the provisions of the special law in accordance with the provisions of the Criminal Code". (D. Florescu Dumitru, D. Bucur , T., Mrejeru , M., Pantea, A., Martinescu, V. ,Manea, (2013): 44.

In practice, it is stressed that in order to retain the offence provided for and punished by Art. 9 para. 1 lit. f it is imperative that the actions or inactions that constitute the material element of the objective side of these facts be committed with the aim of evading tax obligations. The fact that a lease contract - which proves the existence of the registered office of a company, being registered as such with the Trade Register - has expired, does not amount to a fictitious declaration of the registered office, because the contract had a period of validity, the registered office was real and declared.

7. The substitution, degradation or disposal by the debtor or by third parties of property seized in accordance with the provisions of the Code of Tax Procedure and the Code of Criminal Procedure

The specificity of tax evasion in the form provided for in Article 9(g) of Law No 241/2005 is ensured by the following:

- the material object is represented by the goods on which the procedural measure of seizure has been instituted;

- the active subject may be any person who meets the conditions of criminal liability;

- in terms of the objective aspect, the material element may consist of one or more of the actions provided for by the legislator in an alternative manner: substitution (replacement), degradation (alteration) or alienation of the property subject to seizure. The seizure shall be established by the competent tax authority by drawing up a report, which shall comply exactly with the provisions of Article 152 of the Code of Tax Procedure, respectively, when the commission of a crime is in question, of Article 253 of the Code of Criminal Procedure, which will be communicated to the land registry office which will proceed with the entry in the land register;

- the immediate follow-up implies the production of a certain result.

4.3.1.3. Aggravated forms of tax evasion offences proper

There are two aggravated forms of tax evasion offences:

- if the damage caused exceeds EUR 100 000 in national currency equivalent, when the penalty limits are increased by five years;

- if the damage caused exceeds €500,000 in national currency equivalent, when the penalty limits are increased by seven years.

Conclusions

Law no. 241/2005 on preventing and combating tax evasion regulates tax evasion offences (Art. 9) and related offences (Art. 3-8). Even if, from the point of view of the organisation of the law, we note that related offences are initially regulated, and then the actual tax evasion offences are regulated, which is not beyond criticism, we consider that the economy of the law is not accidental. It is easier to detect one of the related offences, which is sufficient reason for the subsequent investigation of the main offence of tax evasion.

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