Short Theoretical and Practical Considerations regarding the Tax Evasion Offense provided by art. 9 of Law no. 241/2005

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Abstract: *This article intends to reveal and analyse the recent case law of the High Court of Cassation and Justice in order to ensure a consistent judicial practice in the matter of tax evasion, provided by art. 9 of Law no. 241/2005 for the prevention and combating of tax evasion. At the same time, the article aims to draw attention on the case law of the Court of Justice of the European Union in the field of tax fraud and the possible practical application of the principles that emerge from the judgments given by the European court, in criminal cases having as their object tax evasion offenses.*

Keywords: *tax evasion; tax fraud; VAT; offenses provided by special laws; the Court of Justice of the European Union.*
Framing subdomain: Criminal Law

Introduction

In the last years, the High Court of Cassation and Justice has given a series of decisions regarding the tax evasion offense provided by the provisions of art. 9 paragraph (1) of Law no. 241/2005 for the prevention and combating of tax evasion, either in the procedure of the appeal in the interest of the law, or preliminary decisions for the solution of some law matters.

In the following line, we have chosen to present three of these decisions, also highlighting the way in which the principles set by the supreme court in their recitals have been received and developed in the practice of national courts. They concern, on the one hand, the way in which the civil lawsuit in the criminal cases having the object of the tax evasion offense is to be solved, and on the other hand, the existing relation between this offense and other offenses with which it competes or which it absorbs.

The knowledge of the case law of the High Court of Cassation and Justice in order to ensure a consistent judicial practice at national level is important in two aspects.

First of all, the decisions given in the appeal procedure in the interest of law, respectively the preliminary decisions for the solution of some law matters are mandatory for the courts, context in which it is required to know them both by theoreticians and by practitioners.

Secondly, the logical and legal arguments offered by the supreme court in the recitals on which the solutions adopted in these decisions are supported may represent a starting point for solving other legal issues that may arise in the judicial practice.

At the same time, given the rich case law of the Court of Justice of the European Union in the field of tax fraud, and the fact that the principles emanating from it are binding on the courts of the Member States, we wanted to briefly present the most relevant judgments of the Court from Luxembourg in this matter, considering that they are of particular importance especially for the practitioners interested in resolving cases having as their object the tax evasion offense.

We say this because, as we shall show, the principles developed by the European court in its case law, especially with regard to the evidence needed to be administered in order to prove a tax fraud, come, most often, in contradiction with the practice of the criminal investigation authorities in Romania.

Thus, the knowledge of the European case law can successfully contribute to proving the inconsistency of the evidence administered in the prosecution, thus leading to the delivery of acquittal solutions by the criminal courts.

1. The correct way of solving the civil lawsuit in criminal cases having as object the offense of tax evasion

By Decision no. 17/2015 [1], the High Court of Cassation and Justice (RIL Panel of Judges) admitted the appeal in the interest of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and, consequently, in the unitary interpretation and application of the provisions of art. 19 of the Criminal Procedure Code established that: "In the criminal cases having as object the tax evasion offenses provided by Law no. 241/2005, the court, solving the civil lawsuit, orders the obligation of the convicted defendant for committing these offenses to pay the amounts representing the main tax obligation due and to pay the amounts representing the accessory tax obligations due, under the conditions of the Fiscal Procedure Code".

The supreme court has shown in essence that, in the context in which the argument of the criminal liability is a tax evasion offense, the civil lawsuit, which is incidental to the criminal lawsuit, is to be related to the nature of the offense, to the purpose of the tax evasion indictment. Therefore, in the recitals of the aforementioned decision it was shown that in the case of the offense of tax evasion, the taxpayer, as a passive subject of the fiscal procedural legal report, is accused either by a lawsuit or an inaction regarding the obligations incurred in relation to the administration of fees, taxes, contributions or other amounts due to the general consolidated budget, according to the law, and the state, through the fiscal authority, as an active subject of the fiscal procedural legal report, is entitled to obtain the compliance of the obligations of the taxpayers in relation to the administration of fees, taxes and contributions or other amounts due to the general consolidated budget.

At the same time, the High Court of Cassation and Justice emphasized that regarding the relationship between the main tax claims (fees, taxes and other contributions due to the general consolidated budget) and the accessory ones (interests, penalties and, as the case may be, late payment increases), but also the legal nature of the report deduced from the judgment, the criminal courts are to award damages for the damage caused representing exclusively the fiscal accessories of the main tax claim, and not the legal interest characteristic of the private law legal reports. Last but not least, as regards the period of time for which these accessories must be calculated, it has been shown that establishing the birth time of these payment obligations at the end of the judicial procedure (after the final settlement of the conviction decision) is a wrong solution, since it implies only partial coverage of the damage caused to the tax creditor by delaying the payment of the main tax obligations, excluding the period between the date on which they became due and the date of the final settlement of the conviction decision, with the consequence of the partial and unjustified exemption of the debtor from the payment of default damages interests and delay penalties.

In the judicial practice, a distinction was made between prejudice within the meaning of the criminal law and the one related to the civil side, showing that, in the case of the tax evasion offense, what interests the legal classification and the sanction of the offense is the damage caused by the criminal offense at the time of its exhaustion, regardless of the penalties and interests arising from this damage. Thus, it was appreciated that the phrase "full coverage of the damage caused cannot be interpreted as meaning that the notion of damage, within the meaning of the criminal law, also includes interests, penalties, etc., as opposed to the damage notion as defined in the civil law - which also affects the civil side of the criminal lawsuit - which includes all the damages caused by the criminal offense. [2]

In the same sense, in another case, it has been shown that the notion of damage can be used in different legal contexts, which would require a distinct treatment of it, if such an approach is required, in order to reach the specific purpose of each situation pursued by the legislator. Thus, the court highlighted that if the RIL decision no. 17/2015 expressly states on the damage understood as a claim of the civil party, in the civil side of the criminal case, the cause of non-punishment regulated by art. 10 of Law no. 241/2005

provides for an express amount of the damage of the same offense, limit of the application of the non-punishment case, which belongs to the criminal side of the case. Thus, in the first case, the notion of damage concerns the civil side and the sufficiency of the civil party, while in the second case it represents only the nominal limit of the amount of the damage applicable in order not to incur criminal liability and to end the criminal lawsuit. [3]

2. Tax evasion, special variant of the offenses of forgery in deeds by private signature and use of forgery

By Decision no. 21/2017 [4], the High Court of Cassation and Justice (RIL Panel of Judges) admitted the appeal in the interest of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and, consequently, established that: in the unitary interpretation and application of the provisions aiming at the legal classification of the highlighting act, in the accounting documents or other legal documents, of the expenses that are not based on real operations or the highlighting of other fictitious operations, in case of recording tax invoices and payment receipts drawn up falsely on behalf of companies which do not recognize the transactions or who had during the operation period the fiscal behaviour similar to the "ghost" companies, in order to avoid the compliance of the fiscal obligations; the report between the tax evasion offense provided by art. 9 paragraph (1) of Law no. 241/2005 and the offenses of forgery in deeds by private signature/use of forgery provided by art. 322 and art. 323 of the Criminal Code, the fact of highlighting in the accounting documents or other legal documents of the expenses that are not based on real operations or the highlighting of other fictitious operations, by using falsified fiscal invoices and receipts, in order to avoid the compliance of the fiscal obligations, constitutes the tax evasion offense provided by art. 9 paragraph (1) letter c) of Law no. 241/2005 for the prevention and combating of tax evasion.

In the recitals of this decision, the supreme court began by making a delimitation between the offenses of tax evasion, forgery in deeds by private signature, respectively use of forgery, in the light of the material element of these offenses. Thus, it was shown that, regarding the tax evasion offense regulated by art. 9 paragraph (1) letter c) of Law no. 241/2005, the material element can be achieved only by an action of highlighting in the accounting documents or other legal documents, such as justifying documents, invoices and receipts, of expenses that did not have a real existence because they were not determined by real operations or in highlighting in the accounting documents of fictitious operations. Regarding the offense of forgery in deeds by private signature, the supreme court has shown that the material element of this offense is constituted either by the perpetrator's action to falsify a deed by private signature by any of the modalities provided by art. 320 of the Criminal Code, respectively by counterfeiting the writing or the subscription or by altering it in any way, either from the author's action to falsify a deed by certifying facts or circumstances not appropriate to the truth or by the intentional omission to insert certain data or circumstances, according to the provisions of art. 321 of the Criminal Code. Last but not least, in the case of the use of forgery offense, the material element of this offense is represented by the action of using an official deed or by a private signature, false, provided that the perpetrator knows that it is false, in order to produce a legal consequence.

By comparing the material element of the offenses of forgery in deeds by private signature, respectively use of the forgery with the one of the offense of evasion in the form provided by art. 9 paragraph (1) letter c) of Law no. 241/2005, the High Court of Cassation and Justice held that they are similar, in the sense that the activity carried out by the perpetrator aims to falsify the content of some deeds by private signature by certifying facts or circumstances inappropriate to the truth, or the use of such deeds that have been forged in advance by other persons, while in the case of the offense provided for in the special law, the essential requirement is that the deeds on which action is taken to be the accounting documents or other legal documents, invoices or receipts, all these actions having the special purpose provided by the norm of incrimination, respectively theft from complying with the fiscal obligations by reducing the taxable base. The criminal activity can only concern the accounting records, respectively other legal documents, which, if

are based on the accounting records, acquire the quality of a supporting document or can target both categories of documents.

The supreme Court concluded by pointing out that the same action of the perpetrator cannot receive a double legal classification, respectively that it cannot be held in charge of committing both the offense of tax evasion and the offense of forgery in deeds by private signature or of the use of forgery offense, in ideal competition, its unique action being specific to the first mentioned offense, which has the character of a particular form of forgery in deeds by private signature or use of forgery, being in the presence of a special rule that has application priority in the report with the general rule.

3. Tax evasion, unique offense with alternative content?

By the Decision of the High Court of Cassation and Justice no. 25/2017 of October 3rd 2017 pronounced by the Panel competent to solve law issue [5], it was stated that the actions and inactions set out in art. 9 paragraph (1) letter b) and c) of Law no. 241/2005 for the prevention and combating of tax evasion, which refers to the same trading company, represent alternative variants of the commission of the offense, constituting a unique crime of tax evasion provided by art. 9 paragraph (1) letter b) and c) of Law no. 241/2005 for the prevention and combating of tax evasion.

For the ruling of this judgment, the supreme court has, from a theoretical point of view, delimited the offenses with unique content, those with alternative content and those with alternative contents. Thus, it has been shown that offenses with unique content are those offenses whose constituent elements appear in a unique, exclusive, non-susceptible form of several ways (bigamy, murder), while offenses with alternative content are those offenses for which the law provides alternative variants of the material element of the objective side, equivalent variants in terms of their criminal significance. The High Court of Cassation and Justice has pointed out that, unlike offenses with alternative content which, in essence, imply the existence of several ways of committing the offense, in the case of offenses with alternative contents the legislator regroups, under the same name, two or more stand-alone offenses.

At the same time, it has been shown that this delimitation has both theoretical and practical relevance, in terms of the different effects that appear in the case of several commission alternative variants. Thus, in the case of offenses with alternative content, the different modalities, provided for in the rule of incrimination, do not generate a competition of offenses, whereas in the case of offenses with alternative contents, if more of these contents are realized, we shall be in the presence of an offense competition.

Last but not least, the supreme court has shown that the factual ways of committing the tax evasion offense have the same purpose, namely the avoidance of complying with the fiscal obligations, this aspect constituting an additional argument in support of the thesis according to which we are in the presence of a single offense, not being possible to retain the competition between the alternative modalities regulated by art. 9 paragraph (1) of Law no. 241/2005.

In the light of the theoretical recitals presented above, the High Court of Cassation and Justice has ruled that the tax evasion offense is an alternative content one, the alternative variants for committing the offense being equivalent in terms of their criminal significance.

We consider that the reasoning presented by the supreme court is fully justified and perfectly based on the theoretical arguments presented above. Moreover, we believe that, for the identity of reason, it would be necessary to retain an offense of tax evasion and in the event that the defendant is sent to court under the aspect of committing several actions or inactions that are confined to the material element of this offense, whether they are legally classified in art. 9 paragraph (1) letter a), b), c), d), e), f) or g) of Law no. 241/2005.

A further argument in support of this thesis is also the conclusion reached by the supreme court in the aforementioned Decision, in the sense that from the literal interpretation of the text, it results, unequivocally, the legislator's intention to establish several alternative modalities of the material element of the single offense of tax evasion, and not distinct tax evasion offenses.

Therefore, even though the referral of the High Court of Cassation and Justice in order to issue a preliminary ruling for the solution of some law matters exclusively concerns the hypothesis of the actions

and inactions set out in art. 9 paragraph (1) letter b) and c) of Law no. 241/2005, I appreciate that the arguments presented by the supreme court concern all the alternative modalities regulated by art. 9 paragraph (1) of Law no. 241/2005.

Moreover, this point of view was also embraced in the case law [6], in the conditions in which the Bucharest Court ordered the change of the legal classification given to the offenses by the referral notice of the court from two tax evasion offenses provided by art. 9 paragraph (1) letter f) and paragraph (2) of Law no. 241/2005, with the implementation of art. 37 paragraph (1) letter a) Criminal Code (1969), art. 41 paragraph (2) Criminal Code (1969) and art. 5 Criminal Code, respectively by art. 9 paragraph (1) letter b) and paragraph (2) of Law no. 241/2005, with the implementation of art. 37 paragraph (1) letter a) Criminal Code (1969), art. 41 paragraph (2) Criminal Code (1969) and art. 5 Criminal Code, in the tax evasion offense provided by art. 9 paragraph (1) letter b) and f) and paragraph (2) of Law no. 241/2005, with the implementation of art. 37 paragraph (1) letter a) Criminal Code (1969), art. 41 paragraph (2) Criminal Code (1969) and art. 5 Criminal Code. In order to rule so, the court considered the Decision no. 25/2017 given by the High Court of Cassation and Justice, presented previously, noting that, although the aforementioned decision refers to letters b) and c) of art. 9 of Law no. 241/2005, a single legal norm cannot receive truncated and distinct interpretations.

Therefore, the Bucharest Court appreciated that as long as in the recitals of the Decision no. 25/2017 it is noted that tax evasion is a single offense, there are several alternative modalities of the material element of this offense, those solved by the supreme court regarding letter b) and c) are fully applicable also with regard to the other letters of art. 9 of Law no. 241/2005.

However, in the judicial practice there were contrary views [7] the Mehedinți Court rejecting the request to change the legal classification made by the prosecutor, as it was considered that it is unfounded, because art. 9 paragraph (1) letter b) and respectively art. 9 paragraph (1) letter e) of Law no. 241/2005 incriminates different factual situations, the change of the legal classification can be made only if the content of the imputed offense changes.

4. The relevant case law of the Court of Justice of the European Union in the field of tax fraud and its applicability in criminal cases having as object tax evasion offenses.

In the over 65 years of existence, the Court of Justice of the European Union has developed extensive case law on tax fraud, which is mandatory for all Member States.

Although the cases that were analysed by the Luxembourg Court were mainly related to administrative, fiscal law, we consider that the principles set out by the Court are fully applicable and equally binding in criminal cases dealing with tax evasion offense, including domestic law, respectively art. 11 paragraph (11) of the Fiscal Code stipulates in the art. that "in the field of value added tax and excise duty, tax authorities and other national authorities must take into account the case law of the Court of Justice of the European Union".

In the following lines, we shall briefly present the most relevant judgments of the Court of Justice of the European Union in the field of tax fraud, as we consider that a better knowledge of European case law can prove to be extremely useful for the practitioners interested in solving these types of causes.

One of the most important decisions recently given by the Luxembourg Court was the one in the case of Gábor Tóth against Nemzeti Adó- és Vámhivatal Észak-magyarországi Regionális Adó Főigazgatósága [8]. In the recitals of this decision, the Luxembourg Court stated that the right to deduct VAT cannot be denied on the grounds that the beneficiary of some services did not have any checks on the contractual relations existing between his supplier and the employed personnel he claims to have available, in the context where it does not appear as having an employee in the records of the national authorities.

In this regard, the European court has shown that the taxpayer has neither the right nor the obligation to carry out checks on the status of his subcontractor's employees. At the same time, the Court emphasized that the fact that certain tax invoices were paid in cash or that they were issued at a date prior to the

acquisition of an invoice book by the issuer is not sufficient evidence to conclude that the beneficiary of the services participated in a tax fraud.

In the same context Maks Pen EOOD against Direktor na Direktsia „Obzhalvane i danachno-osiguritelna praktika" Sofia [9], in which the European court showed that the circumstance that the service provided to the beneficiary was not effectively provided by the supplying company, which was on the invoices, or by a subcontractor thereof, provided that the latter companies would not have the personnel or the fixed means necessary in this regard, is not sufficient, by itself, to lead to the conclusion that the beneficiary took part in a tax fraud.

This conclusion reached by the European court is of particular importance, given the practice of some criminal prosecution authorities to assess that if a certain trading company did not have any employee to be a declarant and included in the records of the obvious authorities, automatically the service invoiced by this company was fictitious, not being rendered in reality.

The same principle has been pointed out by the Luxembourg Court also in the cases related to Mahagében Kft against Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága and Péter Dávid against Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága [10], in which it was emphasized that the right to deduct the value added tax cannot be denied for the reason that the taxable person did not ensure that its supplier had the goods that were delivered or the logistical means to transport them. Also, the European court has shown that, in order to benefit from the deduction, the taxable person is not obliged to present other supporting documents (waybills, etc.), apart from a tax invoice.

We consider that the solutions mentioned above are correct, given the fact that a taxpayer has limited possibilities to check the fiscal or logistical situation of a business partner, and moreover, undertaking such an approach would incur certain costs, including time, which he cannot be forced to bear. At the same time, the existence of any irregularities or deficiencies identified by the tax authorities or criminal prosecution authorities in the activity of the commercial partner of the person concerned does not automatically prove that the latter knew that he was participating in a tax fraud.

The judgments of the Court of Justice of the European Union are particularly relevant in the case of Bonik EOOD against Direktor na Direktsia „Obzhalvane i upravlenie na izpalnenieto" [11], where it has been shown that the right to deduct value added tax related to a supply of goods cannot be denied for the simple reason that the national authorities are considering frauds or irregularities committed before or after that delivery, which is why it is considered that the subsequent delivery it was not effectively achieved. The Luxembourg Court considered that in this case, the Bulgarian national authorities did not establish, based on objective elements, that the taxable person in question knew or should have known that the operation relied on to benefit from the right of deduction was involved in a fraud on value added tax that intervened upstream or downstream in the supply chain.

In the case of PPUH Stehcemp sp. j. Florian Stefanek, Janina Stefanek, Jarosław Stefanek. against. Dyrektor Izby Skarbowej w Łodzi [12] – for the reason that the tax invoices under which the VAT deduction right was exercised were issued by an operator who was considered by the national authorities to be non-existent under the conditions in which he did not have a VAT code, he had not filed the tax statements provided by law, he had not complied with his fiscal obligations, he had not filed any accounting document, he did not have the necessary authorizations to carry out his activity, the building in which the registered office was declared was in a precarious state and no legal representative of this company could be contacted.

At the same time, we consider extremely relevant the conclusion of the Luxembourg Court in the case of Paper Consult SRL against the Regional Directorate of Public Finance of Cluj-Napoca, the County Public Finance Administration of Bistrița Năsăud [13], where it pointed out that European law opposes the refusal of a national tax authority to recognize the right to deduct VAT from a taxpayer on the grounds that one of its trading partners has been declared tax inactive, even though the information on its tax status was available by accessing the website page of the national tax authority.

Also in this context, the doctrine has shown that the failure to submit tax statements by a trading partner is not, in the European court's view, an element that proves the existence of a tax fraud or the participation in such a mechanism. [14]

We consider that the case law referred to above should draw the attention of the criminal prosecution authorities in the sense that the accusations of tax evasion which are based on factual elements such as those presented above are a flagrant violation of the European law.

Conclusions

Taking into consideration the multitude of criminal cases that have the object of tax evasion offenses that are currently pending before the judicial authorities, I consider that a thorough knowledge of the case law of the High Court of Cassation and Justice as well as of the Court of Justice of the European Union is necessary, all the more as they are mandatory for the judicial authorities in Romania, as this aspect can be a valuable aid for all the practitioners of law, interested in solving with professionalism this type of cases.

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