

TAX DODGING. THE OFFENCE STIPULATED BY ARTICLE 9 PARAGRAPH.1 LET. A FROM LAW 24/2005. CONSIDERATIONS.

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Abstract: *The publication of Law no 241/2005 led to achievement of the mostly desired systematization of the deeds that represents offences of tax dodging, the new law proving to be more compelling related to the definition and the approach of the offence than the previous legal frame. This article tackles the concept of tax dodging from the perspective of being one of the most frequent offence as presented by art. 9 paragraph. 1 let.a from Law no 241/2005.*

Key words: *offence, tax dodging, elude, taxable income.*

1. Introduction

Within the law no. 241/2005 the concept of tax dodging is no longer legally defined unlike the previous one which stipulated this domain. Description of the concept is comprised within Chapter II from Law 241/2005, articles 3-9, its legal content being pointed out among article 9.

Within the law no 87/1994 republished, the concept of tax dodging was defined as eluding, by any means, from declaration or payment of taxes, duties, contributions or other amount owed to the state budget, local budgets, social securities' budgets and special funds' budgets by the Romanian or foreign individuals or companies, all called tax payers. In contrast with the old stipulations, the new statements gave up the explanatory note „completely or partially”.

Therefore, the tax dodging consists of an illicit activity through which the tax payer eludes the obligation to pay to the state some taxes, duties, contributions that he

legally owes because his permanent or temporary activities generate taxable incomes. The activity may appear as an action or as a lack of action, still maintaining the specific illicit character and the specific effects (the trial and even the success to harm the state budget).

As a consequence of the modifications brought by the law 161/2003 the concept of tax dodging additionally comprised, in comparison with the old law, the activities of eluding from taxes declaration in the stage when they do not become exigible yet. The new stipulations from law 161/2003 show the compliance between the definition of tax dodging and the offences of tax dodging regarding both the activities of „eluding from taxes' declaration” and of „eluding from taxes' payment”. In these circumstances the tax dodging is considered to be an offence of menace or an offence of effect, by case.

These legal definitions no longer belong to the content of law 241/2005, but they

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can be determined based on the analysis of the offences presented within this law and of their immediate effects.

2. Tax dodging Types

In relation to the means of execution and if there are infringed certain norms through the method of fiscal obligations' avoidance two types of tax dodging can be emphasized: legal or tolerated tax dodging and illicit or fraudulent tax dodging.

2.1. Legal Tax Dodging

The doctrine's opinion is shared between its experts regarding the notion of legal tax dodging. Some authors^[1] consider this type of tax dodging as being the action of the tax payer through which he avoids the law applying an unforeseen combination of legal stipulations, therefore being „tolerated by losing sight”. Other authors^[2] mention that through this type of tax dodging the elusion of some parts of the taxable source is allowed without considering this conduct to bring harm to any law and to be penalized as an offence or as a contravention.

In my opinion, in this case it only can be considered the existence of some inadvertencies or gaps of the law and this type of tax dodging has a high probability of occurrence when new forms of enterprises or new categories of taxes are established (major changes in legislation without correlation with internal existing law, in fact a serious mistake of legal conception).

After all, the tax payers find some deficiencies of the law, use them and legally elude the payment which they were obliged to made because of the legislative shortages. Acting in such a manner, the tax payers remain within the strict limit of their rights. The state can only defend itself through a well structured, clear, precise, scientific legislation. On these terms, the one who carries the guilt for this negative phenomenon is only the state.

In conclusion, even if the state will suffer any prejudice, the means which led to this situation does not entail any penalty from the specific authorities.

Some authors^[3] even offer examples of legal tax dodging based on legislation's insufficiency or favorable interpretation of the law:

- usage within certain limits of legal stipulations regarding philanthropic donations, no matter if they took place or did not;
- deduction from taxable income of protocol and advertising expenses with a higher level than the one that results from applying legal rates;
- favorable interpretation of legal stipulation regarding important facilities for contribution to support social activities;
- making up depreciation or reserves' funds in a higher ratio than the ones justified from the economic point of view, in this way decreasing the taxable income.

2.2. Illicit Tax Dodging

This type of tax dodging consists of all the tax payers' actions which break a legal stipulation with the purpose of not paying the related taxes. This is based on fraud and dishonesty of the tax payer.

Illicit tax dodging is incriminated and punished by the law through contraventions and offences. This is the role of the law 241/2005 regarding prevention and control of tax dodging which, in comparison with the old law 87/1994, republished and modified by the law 16/2003, does not mention dangerous deeds socially punished through contravention, but only through offences.

3. Offence Stipulated by Article 9 Paragraph.1 letter a

A. Legal Content:

The offence consists in „concealing the taxable good or source” with the object of

eluding from fulfillment of fiscal obligations as presented in paragraph.1 of article 9 from Law 241/2005.

B. Constitutive Elements:

I. The special legal object and also the **passive subject** are common with the ones of other offences and refer to social relations regarding the development of economic and financial activities whose achievement assumes honest fulfillment of fiscal obligations by the tax payers, the passive subject being represented by the state or administrative units.

II. Material object. Some authors^[4] consider that the material object of this offence has a high degree of complexity: on one hand, mainly, the taxation statement counterfeited by the tax payer and on the other hand, subordinately, the amount of money obtained by the tax payer.

The material object of the offence is made up of the taxable incomes, object or source.

III. Active subject. Active subject is qualified, he/she being a tax payer liable to fiscal obligation. In absence of this quality the deed does not represent an offence. The attribute of tax payer is conditioned by the existence of a fiscal juridical report enforced by the law.

IV. Objective side: The material element of this offence lies in eluding the fulfillment of fiscal obligations through concealment of the taxable object or source.

Concealment of the taxable object or source means the action of taking away from the fiscal authorities' sight either the object that generates payment of some amounts to the state budget (for example when passing over the state frontier some goods for which custom duties must be paid are hidden in the boot of the vehicle) or the entity which represents the computation ground for taxes or duties (carrying out services like taxicab services,

seasonal work, consultancy, real estate securities, inheritance right).

In the experts' references[5], the deed of an usurer that declares in front of the notary, while authenticating a loan contract, that he grants the loan without charging interest, a statement which proves to be unreal afterwards, performs the method of concealing the taxable source (interest).

Similarly[6], it can be considered the deed of the person that declares a lower price than the real one, while authenticating a loan contract in front of the notary.

Another example can be mentioned: the administrator of a private enterprise who did not register significant amounts of money obtained from selling goods which results in eluding from profit tax payment.[7]

The administrator who frequently and according to the same resolution resold important quantities of merchandise to another private company at a lower price than the acquisition price or disguised manual labor, based on an agreement contract, committed a fiscal offence by recording the price difference on costs' side (without real ground) that leads to purloining from the payment of profit tax and value added tax (VAT). [8]

Also the culprit deed that, as a tax payer, had the obligation to declare to the Financial Authority the incomes achieved from renting his office building to another company (monthly rent is cash-in), but he avoided the payment of fiscal obligation, was qualified as an offence by the Supreme Court.^[9]

Immediate consequence is represented by giving rise to a menacing frame of mind regarding incomplete collection, from all tax payers who own taxable goods or sources, of the amounts owed to the state budget as taxes or duties. In this respect, the above-mentioned offence is a formal

one because the law does not demand that the aim should be achieved by the tax payer, but be pursued by him.

Causality report, that must be determined between the deed and its effect, is presumed by the law without being necessary to establish it and to prove it by the judicial authorities.

V. Subjective side: The offence is committed exclusively with direct intention, meaning that intention is qualified by the purpose. The person who commits the deed knows that he/she achieves taxable incomes or owns taxable goods, but does not declare them to competent authorities with the determined end in view to elude from fiscal obligation fulfillment.

C. Forms. Methods. Sanctions.

I. Forms. The offence can be considered to be committed when the time limit for any taxable income's declaration expired as stipulated within the Fiscal Code or within the law that states the tax or duty and followed by no declaration from the tax payer regarding the taxable source or good, through concealing them. If this concealment lasts, after the offence was committed there will be a continuous offence, whose ending will take place at the moment of legal and complete declaration of the deed.

II. Methods: The offence presents one single normative method consisting in concealment of the taxable good or source with the object stipulated by the law. Various factual methods comply with this normative method; for example, when the possession of the good is subject to taxation on customs, when vehicle possession is implied, etc.

III. Sanctions: The penalty stipulated by the law for this offence described within **paragraph 1** of article 9 from the law, is represented by the imprisonment from 2 to 8 years and forbiddance of some rights.

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