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THE INVESTIGATION METHODOLOGY IN TAX EVASION OFFENSES. AMENDMENTS BROUGHT BY THE NEW CODE OF CRIMINAL PROCEDURE

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Abstract: *The issue of tax evasion is now a constant concern of all countries in the world, being regulated differently in relation to the financial and economic implications, the way in which they were committed, the principles underlying the fiscal policy of the authorities or of the investigative methodology. In terms of investigating crimes of evasion, it must be said that the method is specific to the investigation of financial and economic crimes in general, with some specific issues related to the elements of the tax evasion offense. Changing the criminal procedural law in February 2014 also brought changes in the running of the criminal investigation, in the prosecution, namely in the trial phase, changes which were felt in the case of tax evasion offenses.*

Key words: *tax evasion, prosecution, expertise, undercover investigators.*

1. Introduction

Given the fact that the offenses of tax evasion are placed in the field of criminal business activities, in conjunction with the quality of passive subject of the state and with the fact that the damage created by illegal avoidance of paying tax obligations is reflected in the general consolidated budget, the criminal investigation of tax evasion must be made taking into account certain peculiarities in the process of prosecution and trial.

In order to discover and prove the elements of the tax evasion offense, in the **three procedural steps:** *identifying the offense,* most often in the fiscal control procedures, *prosecution* by the criminal investigators and *the criminal proceedings* by the court of law, most often backed by the civil case for the recovery of the damage, the most appropriate tools must be identified in order to overset the maneuvers used by the offender and determine the extent of the damage caused to the state budget, for avoidance actions are often at the boundary between licit and illicit, against a background of uncertainties and ambiguities in the legislative.

Tax evasion offenses are generally crimes of danger, as noted above, and in light of the financial consequences, they fall into the category of crimes against property through the damage they bring to the general consolidated

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budget and to the local ones, and thus the damage to the business environment.

Being intentional criminal acts, in most cases the intention being classified according to purpose - avoiding the payment of tax liabilities - each tax scam is unique in its own way, for the perpetrator usually tries to place his/her actions in pseudo-legality in order to inspire confidence and thus evade the inquiry of the financial control bodies.

Thus, not infrequently, it is found that tax evasion offenders are well acquainted to the financial and tax law, have knowledge of the organization of the accounts of a legal person, or know the mechanisms employed in order to achieve certain deductions or tax incentives, all this knowledge being used with the purpose of avoiding the payment of tax to the state budget.

2. The first procedural step: identifying the offense

Regarding the first step in the procedure of investigating tax evasion, namely the stage of identifying tax offenses, it must be said that it usually overlaps fiscal control operations, operations being in the competence of tax authorities.

Thus, through the records of tax or customs control established by the competent tax authority, the acts of evasion are identified, together with factual circumstances in which they were committed, the criminal investigation body also being apprised when the deed involves criminal elements, under art .108 Romanian Fiscal Procedure Code.

According to Article 108 in the Romanian Fiscal Procedure Code, (1) *the tax authorities will notify the prosecution in relation to the findings of the tax audit that could meet the elements of an offense, under the conditions stipulated by the criminal law.*

(2) In the cases referred to in paragraph (1), the inspection bodies are required to draw up a report signed by the inspecting body and by the taxpayer being inspected, with or without explanations or objections from the taxpayer. If the one subjected to control refuses to sign the control report, the tax auditor shall record this in the report. In all cases, the report will be communicated to the taxpayer.

By virtue of the control attributions, the tax authorities will identify deeds committed by the taxpayer in the drawn-up report and if there are elements actually claiming the existence of a crime, the report must state the rules of criminal law and the need for referral to courts to continue investigations into the offense in terms of verifying the evasion.

Along with the notification of the criminal investigation bodies, tax authorities communicate the control report to the taxpayer so that he/she is aware of the facts found and of the notification of the criminal investigation bodies of the facts alleged.

Considering the Romanian criminal procedural system, the notification of the prosecution can be achieved either through external ways - the report drawn up by the competent tax authority, or by internal means - ex officio referral [4], in the absence of an express stipulation. With regard to the offenses regulated by Law no.241/2005, the referral can come in either of the two ways.

Unlike the French law, the exercise of criminal action in tax evasion is conditioned by a complaint of the fiscal administration, i.e. a tax administrative body *(Commission des infractions fiscales* is the tax

administration authority that notifies the criminal investigation bodies in the French legal system), which appreciates on the advisability of prosecution and decides on the referral of the public prosecutor, after following a prior mandatory procedure [2].

The usefulness of starting prosecution only upon the complaint of the tax administration is objectionable in terms of limiting the modality of notification of the judicial bodies, but the advantage of this system is given by the specific tax law in relation to criminal law and criminal procedure in identifying the tax irregularities with a criminal character.

3. The second procedural step: prosecution

The second phase, prosecution, initiated either by the relevant fiscal or customs control body or by ex officio referral involves solving the case by the prosecutor and thus gathering evidence in support of the resolution given by the prosecutor.

Regarding the evidence gathered in the prosecution stage, irrespective of the findings of the fiscal or customs control bodies, the prosecution is independent in managing its own specific criminal evidence, characteristic of criminal proceedings, but without totally excluding the information and the findings of the tax administration.

The authority in prosecution and trial of the facts strictly related to tax evasion is given by the legislature to the prosecutors in the Department of the public prosecutor attached to courts, respectively to the criminal division of the court in case of judgment in the first instance, by derogation from the rule regarding the authority of judges and prosecutors' offices attached to courts, according to Law no.202/2010 [10], which was amended and supplemented by Article 27 of the Criminal Procedure Code of 1968 by introducing letter e [1)] expressly referring to the offenses under Article 9 of Law no. 241/2005 and the money laundering offenses, this offense being omitted from the regulation of the previous Article 27 of the Criminal Procedure Code until 2010, so that all the evasion-related offenses and the connected ones fell on the competence of courts and public prosecutors' departments attached to courts.

Consequently, the general rule of jurisdiction of courts and the prosecutor's offices attached to courts as courts of first instance applies under the old Code of Criminal Procedure of 1968, regarding related offenses of tax evasion provided for by Articles 3-8 in Law no.241/2005, this rule becoming a generalized one now to all tax evasion offenses covered by Law no.241/2005 under the provisions of Article 35 and Article 36 of the New Code of Criminal Procedure [11].

If by June 2013, the National Anticorruption Directorate had jurisdiction in the prosecution of the offenses under Law no.241/2005 if a material damage of more than the equivalent in RON of EUR 1,000,000 was caused, according to article 13 paragraph 1 ^ 2 of Ordinance no.43/2002 [8], currently, by the modification of art.I in GEO no. 63/2013 [9], justified by reducing the duration of investigations by relieving the National Anticorruption Directorate as it was found that there is a direct link between tax evasion or fraud and high-level corruption, such as to justify the competence of National Anticorruption Directorate to investigate the crimes listed, the criminal jurisdiction belongs to the department of the public prosecutor attached to the county courts (as regulation

of the proper jurisdiction under the old Code of Criminal Procedure) and, respectively, attached to the courts, according to the New Criminal Procedure Code, regardless of the amount of damage caused by the evasion offenses provided for by Articles 3, 8 and 9 of Law no.241/2005.

The complexity of tax evasion cases, the perpetrators' ability to interpret and apply the provisions of tax law which are subject to interpretation in order to give the appearance of legality to certain escapist transactions, but also the particularities of tax legislation and of accounting operations often require the use of specialized judicial expertise both in accounting and in the technical domain, which are aimed at objectively establishing the mechanisms used to defraud the state budget, the extent of damage produced to the consolidated state budget, the degree of involvement of individuals specialized in financial and accounting operations, the technical possibility to recover the damage.

Thus, the accounting expertise aims at establishing, by tax experts and accountants, the objective truth regarding the financial situation of taxpayers, the legality of primary documents and the accounts, the real situation regarding the expenses recorded and of the revenue declared with the ones actually achieved, establishing the legal amount of taxes owed by the taxpayer and the amount actually paid to establish the pecuniary damage caused, determining the accountability of people in the elaboration and management of accounting records for corporate taxpayers.

Prosecutors rule the administration of technical and scientific expertise or handwriting expertise in order to identify the authors of the documents - documents of primary evidence, statements regarding the headquarters of the economic agent or their change - in case of incomplete or improper documents of the kind mentioned are discovered in the possession of the investigated taxpayer either by tax inspectors or by the criminal prosecution bodies.

In case of investigations on tax evasion offenses provided for in Article 9, paragraph 1, letter d in Law no.241/2005, scientific and technical expertise may be carried out during prosecution by order of the prosecutor on the case in order to establish methods used to alter the memory of the taximeters or electronic cash registers or any other means of data storage and to identify the way in which these alterations have affected the accurate accounting records, in which case these expert findings corroborate those of the accounting expertise in order to determine the damage caused by the circumvention - total or partial - from tax obligations to the state budget.

Regarding the crime investigation techniques in tax evasion, in the prosecution phase it should be noted that due to the nature of these crimes and the economic links between tax evasion and corruption and money laundering, in case there are serious and concrete indications that crimes of tax evasion have been committed or are being committed causing important prejudice or in an organized criminal group, with the authorization of the prosecutor on the case, undercover investigators or investigators with real identity can be used in order to discover the facts, identify the perpetrators and obtain evidence [3].

The undercover investigator or the collaborator is any person who on behalf of or with the consent of

the legitimate authority is involved in some form of participation in a criminal offense, so that the guilt of the other participants can be proven and they can be held liable.

The institution of the undercover investigator was first introduced in the Romanian legislation and the criminal procedures in Article 21 of Law no.143/2000 on preventing and combating trafficking and illicit drug use, being subsequently included in the text of Law No. 78/2000 on preventing, discovering and sanctioning corruption and in the text of Law no.39/2003 on preventing and combating organized crime.

By Law no.281/2003 amending and supplementing the Criminal Procedure Code and certain special laws, namely Law no.356/2006, the Criminal Procedure Code was modified, art. 224^1 and 224^4 being introduced and then modified, regulating the institution of the undercover investigator and the specific procedure thereof. The settlement of the New Code of Criminal Procedure, the special method of surveillance and investigation using undercover investigators is regulated by art.138 paragraph 1 and paragraph 10, articles 148-150 of the New Code of Criminal Procedure from 02/01/2014.

In order to obtain new information and evidence, and to verify and prove existing information held by tax inspectors on the illegal activities of the people suspected, the stakeout technique is also used, which aims at establishing by direct observation, photography, filming or other technical means the concerns and actions of certain people, places of meeting, reception or transmission of goods or values, contacts with influential public officials, interested in or with certain powers or in conducting the respective business or fiscal accounting procedures as well as in the cases where, based on the existing information, conditions are created for catching in the act criminals involved in operations of tax evasion, with significant damage to national economy [3].

And in case of tax evasion offenses, in order to identify the perpetrators and objectively establish the truth concerning the financial situation of the suspected taxpayers, tape conversations and videos can be successfully used as means of investigation by the judicial police in order to prove the circumstances which preceded, accompanied or followed the perpetration of the criminal offense, the participants, the degree of participation, the goods that were subject to criminal activity and the means used [1].

The interception and recording of conversations or communications, a form of mutual legal assistance in criminal matters among the Member States of the European Union shall be authorized under article 140, paragraph 1 of the New Criminal Procedure Code, *at the request of the prosecutor, by the judge of rights and freedoms from the corresponding court responsible to hear the case in the first instance or the one equivalent in degree to this, in whose jurisdiction are the headquarters of the prosecutor who made the request,* for a limited period of 30 days, with the possibility of extension under article 140 alin.8 of the New Criminal Procedure Code. Prior to 01/02/2014, the authorization for using the intercepts and records of conversations and communications between offenders was given by the prosecutor under former Article 91 ^ 1, Criminal Procedure Code of 1968.

According to art. 91 ^ 1, paragraph 1 of the Criminal Procedure *Code of 1968,*

tape recordings of conversations with the motivated authorization of the prosecutor appointed by the chief prosecutor of the Department of the Public Prosecutor attached to the Court of Appeal in the cases and under the conditions provided by law, if there are solid data or clues regarding the preparation or commission of a criminal offense for which the prosecution is done ex officio, and tapping is useful in order to find the truth, can serve as evidence if the contents of the recorded conversations indicate facts or circumstances likely to contribute to finding out the truth, while starting from 01.02.2014, according to the procedural rules on technical supervision (article 139 paragraph 2 and article 140 of the New Criminal Procedure Code) paragraph 1: *Technical supervision may be ordered during the criminal prosecution, for a period of no more than 30 days at the request of the prosecutor, by the judge of rights and freedoms from the court responsible for hearing the case in the first instance or the one equivalent in degree to this, in whose jurisdiction are the headquarters of the prosecutor who made the request* and alin.8: *A new petition for approval of the same action can only be filed if new facts or circumstances occurred or were discovered, unknown at the time of settlement of the previous petition by the judge of rights and freedoms.*

The completion of the prosecution may consist either in referring the case to the competent criminal court trial, the third stage, or its closing when from the rules of evidence adduced, the prosecutor identifies grounds for the dismissal of the case, removing prosecution or terminating prosecution under Article 17 in relation to Article 16 of the New Code of Criminal Procedure.

4. The third procedural step: criminal proceedings

The third procedural step - judgment - is governed by the principle of independence of evidence, the burden of proof falling on the prosecution, with the participation of the tax administration institution in the criminal proceedings as a civil party, either alone or together with other natural or legal entities who were prejudiced by the actions of the perpetrator.

Even if tax evasion offenses are mostly crimes of danger and not of result, given the main goal pursued by the perpetrator, i.e. avoiding the payment of taxes, duties and contributions to the state budget, in case of identification by expertise of some damage to the state budget, the financial administration bodies, including the National Agency for Fiscal Administration are compelled to constitute themselves as a civil part (under the conditions and limits laid down by Article 19 para 2 in conjunction with Article 20 of the New Criminal Procedure Code by the aggrieved party by committing the offense) in order to recover the damage.

Thus, the settlement of the civil side of the case is done together with adducing evidence in the criminal proceedings (Article 25 of the Criminal Procedure Code on solving new civil action in criminal proceedings), determining the amount of damage caused to the state budget, representing a circumstance in individualizing the criminal punishment in conjunction with the defendant's attitude during the process.

Separating a civil action from criminal proceedings in case of tax evasion offenses, even if justified under Article 26 in the New Criminal Procedure Code, encroaches on the criminal trial as the civil side contributes to determining

the seriousness of the offense of evasion, and therefore, as I said previously, contributes to the individualization of the sentence, the court considering the extent of the damage actually incurred. On these grounds, in the court of first instance, if the cause of the civil action is separated from the criminal proceedings, the courts of appeal will invalidate the substantive decisions and send the cases back to the first trial court for retrial, also ruling the obligation of trial of the civil action in the criminal court (See Criminal Court Order no.347/23.05.2007 [7] of Alba Iulia Court of Appeal, decision rendered under the old Code of Criminal Procedure of 1968).

Given the present case mentioned above, where tax authorities do not bring the civil action in the criminal proceedings until the reading of the act of apprehension before the court, regardless of the causes, the damage being caused to the state budget, the courts must apply the provisions of art.348 Criminal Procedure Code of 1968 (art. into force on the date of delivery of the decision) and to decide ex officio on the necessary measures to repair the damage caused and determined by the evidence on record.

Thus, given the active role of the criminal court and the principle of availability of the civil action, even in case of its exercise in the trial, if the evidence adduced quantify the damage caused to the state budget by the tax evasion offense, even if the competent tax authorities do not make an entry of appearance as civil party regarding the damage caused to the state budget, the criminal court was required, under the old Code of Criminal Procedure of 1968, in this case to apply the provisions of art.348 Criminal Procedure Code of 1968 and to rule ex officio regarding the recovery of the damage caused, by ruling, if necessary, special measures, such as the special seizure of the money taken by the prosecutors from the defendant. [Penal sentencing no.651/2011 Criminal Court of Appeal, Bucharest].

Applying the provisions of art.348 of the Criminal Procedure Code of 1968 which was in force considering that the Constitutional Court, under Decision no.80/20.05.1999 declared the provisions of article 17, paragraph 1 and paragraph 2 of the Criminal Procedure Code in 1968 unconstitutional.

Currently, regarding the exercise of civil action in criminal proceedings, the provisions of Article 20, paragraph 6, in conjunction with Article 21 paragraph 2 of the New Criminal Procedure Code are incident, according to which, only in some cases the civil action shall be initiated to the notification of the prosecutors, but the current regulation did not retain the notification *ex officio* of the court regarding the civil action in case the aggrieved party is a unit of the ones mentioned in article 145 of the old Penal Code (1968), respectively a public unit.

In the current regulation of the Code of Criminal Procedure, the prosecutor, under the aforementioned texts, exercises the civil action in order to hold somebody liable only if the aggrieved party lacks legal capacity or has limited legal capacity, which can not be the case when committing tax evasion offenses, thus becoming liable through a civil action initiated by the prosecutor ex officio being out of the question, as the institution of the civil action was regulated in the criminal proceedings under the old Code of Criminal Procedure of 1968 (Articles 17 and art.348).

It should be mentioned that in case of the admission of the civil action, the claim individualized by the court in

charge of the defendant, being a claim owed to the state budget will follow the specific legal regime of tax claims, by holding material liability on the damage caused by the crime of tax evasion.

Concerning the actual carrying out of a tax evasion trial, it must be mentioned that it runs its course like any other criminal trial, evidence is given, there are debates, exceptions are invoked, including constitutional challenges of art, and after closing the proceedings, the court rules, establishing criminal penalties and measures in order to recover the damage caused and determined.

Referring to the submission of evidence in criminal proceedings, according to Article 99 paragraph 2 in relation to article 103 in the New Criminal Procedure Code, the evidence does not have a predetermined value, appreciation of each evidence being made by the court according to the opinion acquired after examining all the evidence, the burden of proof is on prosecution-prosecutor, for according to Article 99 paragraph 2 of the New Criminal Procedure Code, the *suspect or the accused benefits from the presumption of innocence, not being compelled to prove his/her innocence, and has the right not to contribute to his/her own prosecution.*

The idea regarding the presumption of innocence is absolute and must be interpreted in the sense that the accused or defendant never has the obligation to prove his/her innocence, even when the evidence of guilt was brought by the prosecutor [5].

Likewise, the defendant is not compelled during the criminal proceedings to require the production of evidence, with the possibility that the criminal proceedings take place only based on evidence presented by the prosecutor, if the defendant believes that the evidence is unreliable or contradictory, as well as the rules of evidence proposed to the prosecutor by the aggrieved party or parties (article 99, paragraph 3 New Criminal Procedure Code), respectively, during the trial, *the court presents evidence at the request of the prosecutor, of the aggrieved party or parties and, subsidiary , ex officio, when they consider it necessary in order to form a conviction* (Article 100 para 2 New Criminal Procedure Code).

Consequently, in case the prosecution or the prosecutor does not prove with certainty the defendant's guilt and the existence of all elements of the crime of tax evasion in the evidence given in court, the solution that is required for the criminal court is the acquittal of the defendant.

Regarding the appeal against the sentence given by the court of first instance, we assert that also in cases of tax evasion offenses, these remedies of law may be exercised by the parties in the trial including the criminal and civil side, under article 409 (call), art. 410 (appeal) and art.426 (appeal for annulment).

The new Criminal Procedure Code, in this respect, we mention the Constitutional Court Decision no. 482/2004 [6], in relation to which the civil part and the civilly responsible party can appeal also regarding the criminal side, because in case of a solution of acquittal, challenging the criminal side of the sentence is relevant in terms of the existence of damage produced by evasion and challenged by the defendant.

In case the taxpayer is wrongly convicted for tax evasion, under art.538 New Criminal Procedure Code, he/she is entitled to compensation from the

state for the damage suffered, both in terms of material damage found as well as in moral prejudice assessed by applying the principle of equity [Art.504 regarding the right to compensation in cases of mistrial in the old Code of Criminal Procedure in force at the date of Order no.40/13.01.1999 Bucharest Court of Appeal; Order No.359/01.04.2011, Bucharest Court of Appeal .

5. Conclusions

The legal nature of the crime of tax evasion, the state's involvement as a passive subject in the offense as a civil party in the procedural framework determined and continues to determine, under the new Criminal Procedure Code, certain peculiarities in the procedure of prosecution and trial of the offenses of tax evasion.

Using the method of criminal investigation with undercover investigators or the method of interception by technical surveillance of people suspected of committing tax evasion are useful and necessary to gather the evidence, given that tax evasion is generally a crime of danger, not likely to be discovered in the act, for which the provisions of article 293 shall not apply and neither those of article 298 New Code of Criminal Procedure.

Sometimes these special investigative procedures may be used to establish the extent of the damage, providing clues that could escape the vigilance of fiscal or criminal controls or could produce subsequent effects.

The current regulation on the initiation of civil action ex officio by the prosecutor, in terms of Articles 19-20 New Code of Criminal Procedure is in accordance with the provisions of the Constitution and of the Constitutional Court, as belonging to the sphere of "public domain" of tax administrative authorities or the local or central administrative-territorial budget holders but does not justify, under the Constitution and the principles of non-discrimination, the start-up of the proceedings ex officio, at the request of the prosecutor or the court, if the aggrieved party, the state authorities, did not make the necessary efforts to recover the damage caused to the state budget.

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7.*** *Constitutional Court Decision no. 482/2004 on the constitutionality of the provisions of Article 362 paragraph 1 letter d of the Criminal Procedure Code*, published in the Official Gazette nr. 1200/15.12.2004.

8.*** *Government Emergency Ordinance no. 63/2013, amending <LLNK 12002 43180 302 13 69> art. 13 paragraph (1 ^ 2) of the Government Emergency Ordinance no. 43/2002 on the National Anticorruption Directorate*, published in the Official Gazette of 06.26.2013 nr.377.

9.*** *Government Emergency Ordinance no.43/2002 on the National AntiCorruption Directorate* published in Official Gazette No. 244 of 11.04.2002.

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11. *** *The New Criminal Procedure Code Romania - Law no.135 / 01.07.2010* published in Official Gazette no.486/15.07.2010 entered into force on 02.01.2014, under Law no.235/19.07.2013.