

THE ACTIVE SUBJECT IN CASES OF TAX EVASION OFFENSE

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Abstract: *Whether we analyze the offense of tax evasion or those related to tax evasion offenses under Law no.241/2005 depending on the material element, we will reach the conclusion that if in some cases the lawmaker qualifies the active subject, in other cases it can be any criminally liable natural or legal person. However, taking into account the changes in Law no.241/2005 through Law no.50/2013, changes consisting in the abolition of the enactment of fines, the lawmaker implicitly excludes from the active taxpayers - legal entities, even though most tax evasion crimes are committed in the name and on behalf of corporate taxpayers.*

Key words: *tax evasion, taxpayer, natural person, legal person, the generally consolidated budget.*

1. Introduction

Although in the originally adopted form in 2005, unlike the old regulation - Law no.87/1994 on combatting tax evasion, Law no.241/2005 expanded the scope of the active subjects of offenses by including the legal person in the definition of the taxpayer, and in relation to the amendments to Article 19 of the Criminal Code Law through no.278/2006, we now observe that the lawmaker excluded by adopting Law nr.50/2013, the express provision of the penalty fine - the most common punishment of the active subjects legal person - for tax evasion crimes.

Given the definition of the taxpayer contained in Article 2 point b Law no.241/2005, under which *any natural or legal person or any other entity without legal personality who owes taxes, contributions and other amounts to the general consolidated budget is considered*

taxpayer, in conjunction with Article 19 of the Romanian Criminal Code, according to which legal entities (...) are criminally liable for the offenses committed in achieving the object of activity or in the interest or on behalf of the legal person, if the offense was committed under the form of guilt provided by the Criminal Law, penalizing with a fine the legal entities in relation to whose activity, or on behalf of whom tax evasion was committed, was expressly provided in the form of Law no.241/2005 previous to its amendment brought in March 2013 by Law No. 50/ 2013.

And sanctioning the legal entity, active subject of the tax evasion crime, was and is still possible combined with the punishment of the natural person within the legal person who had committed the offense, for as article 19¹, paragraph 2 Criminal Code states, *the criminal liability of legal entities does not exclude the criminal liability of the natural person who*

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has contributed in any way to the same offense being committed.

In the sense of the amendments brought to the Criminal Code in 2006 were also the preceding provisions of Articles 3-7 of Law no.241/2005 where together with imprisonment, the fine was present as an alternative in such a way that sanctions could be imposed both to individuals and legal entities for the same offense of tax evasion.

Given the legislative changes brought to Law no.241/2005 through Law no.50/2013, in which penalties for offenses covered in Articles 3-6 of the Law no.241/2005 were modified by increasing the maximum limits of the prison sentences and giving up on the exclusion of fines, compared to the previous text of Articles 3-6 of the Law no.241/2005, at first glance, there is a tendency to believe that the lawmaker considers sanctioning only the individual offender, who is liable to imprisonment.

But we must apply the provisions of Article 71 Criminal Code, also introduced through Law no.278/2006, *according to which the fine is the amount of money that the legal person is sentenced to pay. Paragraph 2 of article 71 Criminal Code stipulates that when the law provides for the offense committed by the individual a prison sentence of maximum 10 years or a fine, the special minimum fine for the legal person is 5,000 lei and the maximum fine is 600,000 lei*, and paragraph 3 of article 71 Criminal Code stipulates that *when the law provides for the offense committed by the individual life imprisonment or imprisonment of more than 10 years, the special minimum fine for the legal person is 10,000 lei and the maximum of the fine is 900,000 lei.*

Thus, using article 71 in the Criminal Code and relating to the imprisonment limits established expressly by Law no.241/2005, we will identify the limits of

fines, penalty imposed cumulatively to the legal entity who is an active subject of the tax evasion offense, together with imprisonment applicable to the individual offender.

Before analyzing the active subject for each offense of tax evasion, it must be noted that in relation to the actual conditions in which the deed can be blamed on the legal person, analyses have been made in the reference books[1], the conclusions being unanimous towards the fact that in order for the legal entities to be criminally liable, the offense must have been committed in its name or in the performance of its activity, to be committed by an individual who has the ability to engage the criminal liability of the legal person and to be committed with the form of guilt required by law [2].

All these elements lead to the conclusion that the Romanian law establishes criminal liability as a liability of the legal entities as an offense of their own, unlike the French theory of the author's moral responsibility according to which the legal person, anthropomorphic fiction, is held liable for offenses committed by its organs or representatives.

2. The active subject of the crimes related to the tax evasion crime

According to Article 3 of the Law no.241/2005, **it represents a crime punishable by imprisonment from 6 months to 5 years the deed of the taxpayer who intentionally or with guilt does not restore the destroyed accounting documents, within the time entered in the records of control.**

Regarding the active subject of the crime, there are two conditions that must be met: first of all, the active subject must be a taxpayer, as the term is defined in Article 2 letter b of Law no.241/2005, and secondly, the person concerned must have been

intimated through the documents regarding the obligation to restore destroyed accounting documents. Given these express specifications to establish the offender, we can say that we are in the presence of a qualified active subject.

Concerning the quality of taxpayer of the active subject, we make it clear that Article 2 letter b of Law no.241/2005 defined as taxpayer both the individual as well as the legal person, so in relation to the change in Law no.241/2005 made through Law no.50/2013 in drafting Article 3, by replacing the penalty fine from the previous text with imprisonment, we must apply the provisions in Article 71 paragraph 2 of the Criminal Code related to Paragraph 3 of the Law.

Considering the second condition to identify the perpetrator of the offense under article 3 of the law, discussions are divided if the control body is obliged through the document control to state the person from a legal entity (a company, for example) who is responsible with restoring the documents found missing, or is it enough to intimate to the taxpayer - legal person of this obligation of restoring accounting documents, as the individuals in the society who have the obligation to restore the accounting documents are established by law.

In article 4 of Law no.241/2005, it is incriminated by the law and punishable with imprisonment from one year to six years **the unjustified refusal of a person to submit the legal documents and property assets to the competent bodies in maximum 15 days from notice in order to prevent financial, tax or customs controls.**

In case of this crime, the active subject of the offense may be any natural or legal person, for the legal text makes no reference to the taxpayer, but uses the generic term "person", still we should consider that the current Criminal Code

regulates both the individual's criminal liability, as well as that of the legal one.

However, in relation to the objective side, a specification about the author is necessary: he/she must be in possession of the legal documents or goods that are required for verification, or at least have the legal obligation as a representative of the legal person to submit the documents and assets to control.

Preventing in any way the competent bodies from entering, in the conditions provided by law, in establishments, premises or on lands in order to carry out financial, fiscal or customs inspections represents an offense under article 5 of Law no.241/2005.

Based on article 57, paragraph 2 of the Fiscal Procedure Code, **the active subject** of the offense charged in Article 5 of the law can be any person who fulfills the general conditions of criminal liability, thus the deed may be committed by a taxpayer, individual or representative or employee of the taxpayer - legal person, and even a third party, for it is not required that the taxpayer subject to financial, tax or customs inspections and the perpetrator be in any connection or agreement regarding the commission of the crime. The participation is possible in this case, in all forms - co-authorship, instigation or complicity.

According to article 6 of Law no.241/2005, **the retention and not transferring, intentionally, within 30 days from the due date, of the amounts representing taxes or withholding represents an offense.** A novelty brought by Law no.241/2005 regarding these deeds of intentionally not transferring and not retaining the tax obligations pertaining to the wages owed by the employees is represented by the broadening of the active subject's domain.

The active subject of the offense is either the taxpayer - individual or the

representative of a taxpayer - legal person: administrator, executive director, authorizing officer, legal representative or any other person who is mandated by the decision of the management of the legal entity to withhold and pay contributions and taxes for salaries or other withholding taxes.

In this respect, article 26 paragraph 1 of the Fiscal Procedure Code defines the taxpayer of tax liabilities as debtor or the person who, in the name of the debtor, by law, is liable to pay or withhold and pay, according to the case, taxes, contributions and other amounts owed to the general consolidated budget. Participation is possible in all forms, even co-authorship, a circumstance which applies to the directors of a company who decided unanimously on the Board of Directors not to pay the amounts withheld from the employees' wages.

Owning or movement, without being entitled, of stamps, bands and standard forms with special regime, used in the tax area, represents an offense according to Article 7, paragraph 1 of Law no.241/2005.

In the case of this crime, we observe that the lawmaker did not impose any qualification for **the active subject**, who can be any natural or legal person who is criminally liable.

Although not regulated by Law no.87/1994, according to the provisions of Law no.241/2005 article 7 paragraph 2, **intentional printing, possession or movement of fake stamps, bands or printed forms with special regime, used in the tax area** is punishable as crime.

Unlike the previous paragraph, the legislator introduces one more way of committing the offense, namely printing, and replaces the phrase "without right" with the word "knowingly" considering that the stamps, bands, and order forms are "fake".

The active subject of the offense may be any individual who meets the conditions of criminal liability, given that the applicable sanction is imprisonment. No specific qualifications are required, only that the offender is aware that he/she prints, holds or puts into circulation counterfeit marks or printed forms. The criminal participation is possible in all forms, except that in the case of incitement to print bookmarks or forged documents, after committing the crime, the instigator puts them into circulation, he/she will be held responsible only as the author of the offense provided by article 7 paragraph 2 of the Law, being in the presence of an alternative way of committing the offense [4].

Also, if a person prints the markings or the forms and another person puts them into circulation, both people will be incriminated as authors for different ways of committing the same crime under Article 7, paragraph 2 of Law No. 241/2005.

Concerning the regularity of the declarative procedures, article 8, paragraph 1 of Law no.241/2005 incriminates **establishing in bad faith by the taxpayer of taxes or contributions, resulting in obtaining, without right, sums of money as reimbursements or refunds from the general government consolidated budget or compensations due to the general government consolidated budget**, and article 8 paragraph 2 of Law no.241/2005 incriminates **the association with a view to commit the offense referred to in paragraph 1.**

The active subject of the offense is the taxpayer - individual or legal entity that is a subject qualified by reference to Article 2 letter b of Law no.241/2005. For corporate taxpayers, we consider that in their case, they will be held criminally responsible for the damage created to the general government consolidated budget,

consolidated through the amounts collected by the legal person, the administrator / legal representative or the employee with financial and accounting responsibilities who has drawn up the tax statements in bad faith in order to obtain tax returns, reimbursements, refunds or illegal compensations, but also a person acting on behalf of the taxpayer - legal entity that is aware and administrates the filling of false statements.

In respect to the stake, in case of incitement and complicity, the authors are unanimous that these forms are possible, in case of co-authorship, we must emphasize that this is only possible if the decision on reimbursement, restitution or unlawful compensation belongs to a collective body or by reference to the provisions of paragraph 2 of Article 8 of the law, the co-authorship is possible in case the offense is committed by several people who are compelled to pay certain taxes jointly, or contributions to the general government consolidated budget.

3. The active subject of tax evasion offenses referred to in article 9 of the Law no.241/2005

In general, in case of tax evasion offenses covered by Article 9 paragraph 1 letters a) to g) of Law no.241/2005, the active subject is unqualified, possibly being the taxpayer - legal or natural person - his/her legal representative as well as the person authorized with financial and accounting attributions, in order for the lawmaker to classify in certain situations the active subject depending on the material element of the actus reus of the offense.

The active subject for the offense under article 9 paragraph 1 letter a in the law is not determined and can be any person or entity, and it is irrelevant if the taxpayer benefits from concealing any taxable matter.

In case of article 9 paragraph 1 letters b) and c) of the law, the active subject is qualified in the sense that it can only be the manager or the natural or legal person who has the legal or contractual obligation to organize and manage the taxpayer's accounts.

According to article 19¹ Criminal Code, also regarding this offense, if the active subject is a legal person, we will always have an active subject natural person, the one actually carrying out the criminalizing conduct prohibited by rule [5].

In case of offenses under article 9, paragraph 1, letter d, letter e and letter g of the Law, the active subject is unqualified and he/she can be any natural or legal person criminally liable for his/her act.

Related to the material element of the actus reus of the offense under article 9, paragraph 1 of the law, the subject can only be the taxpayer or the person authorized by the taxpayer to declare the primary or secondary head offices of some legal entities. In this case, it does not matter if the person who commits the offense has any benefit or not from circumventing from the financial, tax or customs check by not declaring, fictitious or inaccurate declaration regarding primary or secondary offices of the taxpayer-legal person.

4. Conclusions

In principle, we believe that active subject to offenses under Law no.241/2005 can be any natural or legal person acting on behalf or in the interest of the taxpayer, as defined by Article 2 point b in law or in achieving its object of activity, taking into account the obligations imposed by law or by contract between the parties.

Also, in general, in tax evasion offenses and those related, criminal participation is possible in all three forms – co-authorship, instigation and complicity - except for the

offense under article 4 of the Law, respectively article 8 of the Law, in the latter case not being possible for the offense to be committed because it is a plurality offense constituted by the authors.

With respect to the offense under article 4 of the Law, given the theory of criminal law according to which the offenses committed on his/her own, the action that constitutes the material element of *actus reus* can only be committed by a single person, and not by more people at the same time [6], **the criminal participation** is only possible under the form of intellectual complicity and instigation, although some authors [7] support the existence of co-authorship, opinions we however disagree with, given the previously stated theory.

Thus, besides the administrator (in fact or law) of the company, another person in the company may be the active subject of tax evasion offenses and the related ones, such as the accountant, the manager, the vendor, and so on, as well as a third party not connected to the company, in so far as through their intended actions or inactions aim that the company evade tax obligations and accept the consequence of their actions.

References

1. Mărgărit, Gh.: *The concept of criminal liability of the legal entities in the New Criminal Code*. Law Magazine No.2/2005.
2. Moldovan, M.: *The criminal liability of the legal entity*. Bucharest. Moroşan Publishing House, 2010.
3. Ferreira, M.: *The criminal liability of legal entities*, fragment from Work and Safety, 1999.
4. Voicu, C., Boro, A., Molnar, I., Gorunescu, M., Corlăţeanu, S.: *Business Criminal Law*, 4th edition. Bucharest. C.H. Beck Publishing House, 2008.
5. Vîrjan, B.: *Crimes of tax evasion*. Bucharest, C.H. Beck Publishing House, 2011.
6. Mitrache, Ctin., Mitrache, C.: *Romanian Criminal Law. General Part*. Bucharest. Universul Juridic Publishing House, 2007.
7. Hotca, M.A., Dobrinioiu, M.: *Offenses under special laws: comments and explanations*. Bucharest. C.H. Beck Publishing House, 2010.