

CAUSES OF IMPUNITY AND CAUSES FOR THE REDUCTION OF PENALTIES IN CASE OF COMMITTING THE CRIME OF TAX EVASION

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Abstract : *The offenses of tax evasion are associated with a high degree of social danger due to the immediate economic consequences but also to the long-term consequences on local or national budget, reason for which the legislature has chosen high limits for prison sentences in Law no. 241/2005. Nevertheless, several causes of impunity respectively causes for the reduction of sentences are settled in case of offenses of tax evasion. Starting from the closely resembling criminal institutions the provisions of article 10, article 11 and article 12 of law No. 241/2005 do not represent true causes of impunity or reduction of sentences. The provisions contained in Chapter III of the Law no.241/2005 are new compared to the previous settlements of Law no.87/1994, but such a new regulation is useful and appropriate, since on the one hand, it liaises with other laws concerning the commercial area where we can find evasion, and on the other hand, the legislator settles over punishments in case of offering total compensation for the damage caused by all evasion.*

Keywords: *tax evasion, punishment, causes reduction sentences, causes of impunity, criminal record*

1. Introduction

Regarding the structure of Chapter III of Law no.241/2005 on prevention and combating tax evasion (article 10, article 11 and article 12), criticisms and comments of the authors as well as the jurisprudence of the Constitutional Court are numerous and constant with regard to interpretation.

Thus, starting from the heading of Chapter III of the law, "Causes of impunity and causes for reduction of punishment", the criticism of the authors^[1] is constant in

the sense that the three articles contained in this chapter (with the exception of some regulations of article 10) have no relation to establishing some of the extenuating circumstances within the meaning of the regulations of the penal code^[2]. Furthermore, we can observe in the text of article 11 of the law that the issue refers to taking precautionary measures, thus, the legislator lays down certain incompatibilities regarding the persons having been convicted for crimes of tax evasion, as settled by article 12.

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Returning to the criticism brought to the title of Chapter III of the law, it should be observed that neither precautionary measures nor incompatibilities are extenuating circumstances, nor shall they give rise to the impunity of the persons convicted for the offenses of tax evasion.

With regard to article 10 of Law no. 241/2005, the criticisms of the doctrine are uniform in the sense that only the first sentence of paragraph 1 of the regulation is a reduction of punishment, while the second sentence provides a case for replacing the prison punishment, under certain conditions, with the penalty of a fine, and the final sentence regulates a case of replacing the punishment with an administrative penalty^[3].

In this latter case, the assessments differ in doctrine, some authors^[4] considering that there is the case to replace the penal responsibility under special conditions derogating from the regime established by the Criminal Code, other authors^[5] consider that the final sentence of paragraph 1 of article 10 of the law falls within "causes that determine ceasing the exercise of criminal action", while other authors^[6], assimilating the provisions of article 172 of the criminal code to the final sentence of paragraph 1 of article 10 related the title of Chapter III and the cause of impunity under this special law.

In the case of precautionary measures, provided for in article 11 of Law no. 241/2005, they are regulated by the legislator as being required in the case when a tax evasion offense is committed. So, the precautionary measures are procedural measures to ensure the enforcement of the payment penalty, and they consist in blocking through the seizure of movable and immovable property of the perpetrators of the tax evasion offenses regulated by article 3 of Law no. 241/2005, respectively in case of replacement of the jail punishment with the fine penalty.

In the case of article 12 of the law, without doubt, we are in the presence of settlement of a legal incapacity, by which the persons convicted for crimes of tax evasion cannot hold office and cannot be founders of a commercial company; this regulation completes the legal incapacity governed by art. 6 paragraph 2 of the company law no. 31/1990.

Before a separate analysis of the three articles of Chapter III of the law, we must point out that the implementation of articles 10 and 11 of Law No. 241/2005 to the individualization of punishment is mandatory, and it has personal and special character, namely it concerns only the perpetrator, and not the rest of the participants.

2. Legal analysis of the institutions regulated by article 10 of Law no.241/2005

Article 10 of Law no.241/2005 provides that the reduction of punishment and the impunity cases were mandatory for the Court at the time of the individualization of penalty and the article applies only to the offenses of tax evasion under the Law no. 241/2005, namely in the case of the crimes provided by article 9 of the law. Therefore, article 10 shall not apply in the case of offenses committed under the conditions mentioned in articles 3 to 8 of Law no. 241/2005.

Article 10 paragraph 1 sentence 1 of Law no. 241/2005 provides that in the case of tax evasion offenses laid down by law, if in the course of criminal prosecution or in the course of judgment, until the first term, the accused or the convicted person covers all damage, the limits for the punishment provided by law for the committed offense shall be reduced to half.

Considering the nature of the danger for offenses assimilated to the offenses of tax evasion, which are stipulated in articles 3 to 8 of the Act, some authors^[7] have

interpreted that the legislator excludes the criminal offenses similar to those of tax evasion for the benefit provided for in article 10.

The argument would be that the immediate result, in the case of offenses assimilated to the offenses of tax evasion, is not materialized into effective injury, but is manifested in the form of endangerment of certain social values, protected by penal law. In these circumstances, given that the damage is not always quantified in the case of offenses assimilated to the offenses of tax evasion, the author cannot fully recover the damage since he cannot benefit from the reduction of punishment given for his behavior after the crime was committed.

Starting from the institution of reducing penalties and from causes of impunity which are substantive for the criminal law institutions, other authors^[8] consider that the provisions of article 10 apply strictly to the offenses of tax evasion under article 9 of the law, as the legislator regulates restrictively these cases using the words "*In case of committing an offense of tax evasion under this Law*".

We find that the case-law of the Romanian courts is not consistent in interpreting Article 10 of the Law. Thus, the High Court of Cassation and Justice through Decision No. 8 of January 21 from 2008 decides that if there are acts of tax evasion committed under the rule of law no.87/1994 and their judgment is subsequent to the moment of the entry into force of Law 241/2005, the benefit of reducing penalties or for the cause of impunity referred to in article 10 of law No. 241/2005 applies only to those detained for committing offenses of tax evasion laid down in article 9 of law No. 241/2005, pursuant to article 13, paragraph 1, of the penal code^[9].

On the one hand, the Supreme Court argument was based upon the grammatical

interpretation of the thesis I paragraph 1 of article 10 through which the legislator clearly states that the provisions are applicable only "*In case of committing an offense of tax evasion under this Law*", on the other hand, it was shown that the narrow formulation of Article 10 paragraph 1 is consistent with the provisions of Article 13 paragraph 1 of the Criminal Code. Thus, the Supreme Court maintained that the implementation of the principle that "*if from the commitment of the felony until the final judgment there have been adopted one or more criminal laws, the most favorable laws shall be applicable*" is made by reference to the law more favorable as a whole, not only by reference to certain provisions which are more favorable through the effect of combined successive laws.

If this kind of interpretation for Article 10 paragraph 1 of Law no.241/2005 were not allowed it would mean that if the acts were committed under the rule of Law no.87/1994 but were judged by the coming into force of the Law no.241/2005, by applying the principle of the more favorable criminal law, it would be an offense committed under law No. 87/1994 and which would benefit the causes of impunity or the reduction of the penalty according to the new law.

Although some courts had learned from the motivation adopted by the Supreme Court, we should mention that there are some courts which consider that the provisions stipulated in article 10 paragraph 1 shall apply to all categories provided for in Chapter II of the Law no.241/2005, chapter entitled "Offenses"^[10].

The conditions to be met for application of the provisions of article 10 of law are that the damage has to be completely recovered, containing the due amounts as well as any penalties for delay, as these are state revenues and if these are not paid in

time they will generate penalties and increases for the delay. It is also essential for the recovery of the damage to take place during the criminal trial until the first hearing, because it follows the author's behavior after the crime of tax evasion is committed.

Paragraph 2 of article 10 of the Act provides that a person cannot invoke the provisions of Article 10, paragraph 1 of law successively within less than five years starting from the commitment of the first offense for which he received the benefit of reduction of the punishment, respectively the cause of impunity.

Consequently, if within five years from the offenses of tax evasion for which the author has received the reduction of punishment, the person commits a new offense of tax evasion, he shall not lose the first granted benefit but, even if he recovers the damage fully during the criminal proceedings, he shall not benefit again from the provisions of Article 10, paragraph 1 of the law.

Article 10 paragraph 1 second sentence of the Law. 241/2005 provides that if the damage is up to 100,000 Euro, the national currency equivalent, damage caused and recovered in the same conditions as those stipulated in the first sentence, then the punishment can be a fine. Thus, within the limit of 100,000 Euro there is voluntary established a cause regarding the replacement of imprisonment with the fine, depending on other elements for individualization of punishment.

From the grammatical analysis of article 10 paragraph 1 of the Law, we see that if for the reduction of penalties and application of administrative sanctions, the provisions of Article 10 paragraph 1 first thesis, respectively of Article 10 paragraph 1 third thesis are imperative, concerning the second sentence paragraph 1 of Article 10 the legislator regulates an optional measure. Also, starting with the

imperative character of application of the rule under Article 10 paragraph 1 sentence III of Law, we believe that the possibility covered in article 10 paragraph 1 second sentence refers to a total amount of damage between 50,001 Euros and 100,000 Euros. Thus, if, according to article 9 paragraph 2 of the Law, the damages caused by offenses, provided in Article 9 paragraph 1 of the law, are greater than 100,000 Euro, but are fully recovered during the prosecution trial or until the first term of judgment, bringing together article 9 paragraph 2 to article 10 paragraph 1 first thesis of the Law, for the individualization of punishment the court will proceed first to increase by two years the special limits of punishment, and then will reduce to half the new limits obtained by taking into account the aggravating circumstances. Following the same algorithm, the same will be done in case of proving a damage higher than 500,000 Euro, as an aggravating circumstances provided by Article 9 paragraph 3 of the law.

Starting from the definition of Professor Constantin Mitrache^[11] for causes that remove - criminal responsibility, we can include the - text paragraph 1 of Article 10 third sentence of Law no.241/2005 as being part of the special cases that remove criminal liability, being stipulated into a special law. *If the prejudice caused and recovered in the same conditions is up to 50.000 euro equivalent in national currency, an administrative penalty, which is mentioned in the criminal record is applied.* So we are in the presence of a cause of impunity, because, even if the deed retains the characters of an offense, the behavior of the offender, subsequent to the commitment of the offense, through which the prejudice caused by the wrong deed is covered, by reference to the amount of damage provided by law, shall not bind the criminal liability of the author, this having been removed.

3. Precautionary measures

According to article 11 of Law no. 241/2005, if an offense was committed under this Law, taking of precautionary measures is compulsory.

Continuing the grammatical interpretation of legal texts, we find out that the legislature ordered the obligation of taking precautionary measures in case of committing the offenses mentioned in Chapter II of Law nr.241/2005, therefore not only in case of tax evasion offenses punishable by Article 9 of the Act, as it is provided in Article 10 of Law. Also in the case of precautionary measures, through the imperative character of the text from the law, we must say that it derogates itself from the general scheme of precautionary measures as it is ruled by the Code of Criminal Procedure (Article 163, paragraph 6, point b), because the rule is that precautionary measures are voluntary, and they only become compulsory if the victim is a person without capacity or with limited capacity of decision.

4. Disabilities

According to article 12 of Law no. 241/2005, persons who have been convicted for offenses under the Law no.241/2005 cannot be founders, administrators, directors or legal representatives of the company, and if they were chosen, are revoked. Article 12 of the Law regulates the incapacities related to the corporate regime, because most offenses of tax evasion are committed through companies. Not being incident, the dispositions of articles 64-66 of the Criminal Code concerning complementary punishments, incapacities regulated in Art. 12 from the law are similar to those in article 6, paragraph 2 from Law 31/1990.

Starting from the text in Article 5 of the Code of Criminal Procedure, according to which "*Everyone is presumably innocent*

until proven guilty by a final criminal sentence", it follows that the incapacity appears only starting with the date when the criminal sentence remains final. Also, according to the text of Article 133 paragraph 1 of the Criminal Code regarding the cessation of incapacities and withdrawals of rights at the time of rehabilitation, it must be stated that the incapacities act until the date when the rehabilitation sentence is pronounced.

Even if article 13 is structured in Chapter IV of Law no.241/2005, its settlement has incidence on the application of Article 12 of the Law, because by communicating the judicial sentence of conviction to the National Trade Register Office by the court for offenses stipulated in Law no.241/2005 at a date when they remain final, guarantee the possibility of real-time verification of incapacities covered by Article 12 of the Law is ensured.

5. Conclusions

Although the social risk of the tax evasion crime is high, evidenced by the maximum penalties of imprisonment and by lack of alternative between imprisonment and criminal fine, the legislator has intervened into Law no. 241/2005 for mitigation of the punishment under the condition that the damage caused to state or local budgets should be fully recovered by the author until the first hearing.

It should be noted that the High Court of Cassation and Justice ruled through the Decision of the Criminal Section no.2342/2007 that the benefit of punishment reduction causes, respectively the causes of impunity, operates only when the defendant does not deny the damage found by the criminal research bodies, appropriates it and acts in respect of paying that damage^[12].

Also, given that the advantage of causes for reduction of punishment, respectively the causes of impunity, is conditioned

according to the procedure of criminal liability, namely that the legislator gives the possibility to recover damages until the first hearing, we consider that the recovery of the damage can be achieved if the possibility of damage recovery is enlarged during the criminal case, including the period of time necessary for deciding the appeal. Thus, the modification of Article 10, paragraph 1 of the law in the sense that "*In case of committing an offense of tax evasion under this law, if during the prosecution or trial, until the last hearing on appeal, the accused or defendant fully covers the damage ...*" besides guarantee in the right to defense for the defendant, improves the likelihood of coverage of the damages caused through increasing the period of liquidation of the payment.

Regarding the amount established by the legislature for damage caused by tax evasion offenses, we believe that they should be calculated in national currency, partly, because the contributions to state budgets which are obviated through fraud are established in national currency partly because tax legislation provides penalties and late payment penalties in case of exceeding the date of maturity for payment due to state budgets, thus being guaranteed the recovery of the unrealized gains through the impossibility of using embezzled funds from the state budget through fraud.

Furthermore, the expression in Euro of the amount of damage thresholds in article 9 and 10 of the Law, considering that in Romania payments are made in national currency, leads to different solutions regarding the establishment of the amount of damage in equivalent ROL in view of verifying the condition of payment of the damage. Hereby, the question is what exchange rate ROL/EURO is used to determine the amount of damage: the exchange rate ROL/EURO on the date of delivering a sentence, after the date of

assessing the damage by the tax authorities, after the date of the expert advice for establishing the amount of damage or the exchange rate on the date of the actual payment of damage. The expression of value thresholds for damage in the national currency eliminates any interpretation.

Notes

1. M.Şt. Minea, C.F. Costaş, D.M. Ionescu,; *Law evasion. Comments and explanations*, Bucharest. Publishing C.H.Beck, 2006, pg.147 and next.; M.A. Hotca, M. Dobrinouiu: *Criminal elements of business*, Bucharest, Publishing C.H.Beck, 2009, p.90 and next; B. Virjan: *Offenses of tax evasion*. Bucharest. Publishing C.H.Beck, 2011, p.254.
2. Article 73 and Article 74 of the Criminal Code in relation to Article 76 of the Criminal Code that are regulated mitigating circumstances and their effects in the process of individualized sentencing.
3. Article 90-91 Criminal Code covers the administrative penalties.
4. M.A. Hotca, M. Dobrinouiu: *Offenses under special laws. Comments and explanations*, Vol.I, Publishing C.H.Beck, 2008, p.280.
5. M.Şt. Minea, C.F. Costaş, D.M. Ionescu, *op.cit.*, p.150.
6. C.V. Neagoe, *Question of impunity. Tax evasion*. In: Journal of Criminal Law no.2/2006, p.82.
7. Gliga, C.I.: *Tax evasion. Regulation. Doctrine. Jurisprudence*: Bucharest. CH Beck Publishing, 2007, p.116.
8. B. Virjan, *op.cit.*, p.268.
9. Decision No. 8 of January 21 from 2008 of the Unit Departments of the High Court of Cassation and Justice was published in the Official Gazette no.866 of 22 December 2008.
10. R. Schmutzer, I. Hobijă Spataru: *Tax evasion. Jurisprudence*. Bucharest. Publishing Morosan, 2010.
11. Constantin Mitrache, Cristian Mitrache: *Romanian criminal law. The general part*. Bucharest. Publishing Universul Juridic, 2007, p.345.
12. M.V. Tudoran, *Tax evasion in relation to ECHR*. In: Journal of Law no.2/2010.