

## **THESIS**

### **TOPIC: MANAGEMENT OF CONTRACTS TO COMBAT TAX EVASION BY DEDUCTIONS AND ILLEGAL VAT REFUNDS**

#### **INTRODUCTION. THE NECESSITY AND OPPORTUNITY OF THE THEME**

Investigating tax evasion in terms of managing the activities necessary to combat it is presented as a useful and current approach in trying to identify the most effective actions and processes leading to a maximum level of proposed results.

If the specialized literature has constantly provided clarifications regarding the content, scope and applicability of the legal norms in this matter, this paper aims to bring a practical contribution, presenting a perspective on the research of this scourge, by combining the resources available during a criminal investigation: legislation, human capital, financial endowment and time required or recommended.

As specific objectives, the present research aims to analyze, starting both from its own observations on the subject and from the results of other researches, aspects related to:

- the legislative framework
- economic relations and the evasion phenomenon
- cooperation of fiscal, administrative and judicial bodies
- streamlining the actions to combat tax evasion
- proposals for the ferenda law.

The subject matter is one of the broadest in the field of criminal law, as it is necessary to know both the usual rules of substantive or criminal procedural law and legal rules specific to other branches of law, designated generically by the economic field, in fact being the branches of fiscal, banking, customs, accounting, commercial law, etc.

Acquiring information in these areas is useful both for understanding the facts, which helps to more easily qualify the type of incidental legal liability, and for identifying criminal patterns, as essential help in conducting the investigation.

Also, the most effective investigative techniques and tactics can be established by knowing the environment in which the economic offender acts, the levers used by him to achieve the proposed purpose, the legislative or administrative vulnerabilities that are usually exploited in a tax fraud.

## **1. ECONOMIC RELATIONS, ESTABLISHMENT OF THE CONSOLIDATED BUDGET OF THE STATE, LAW FOR THE PREVENTION AND COMBAT OF TAX EVASION**

### **1.1. The relevance of some economic notions in the activities to combat tax evasion**

In order to understand and document the criminal activity in the matter of tax evasion committed by VAT fraud, an initial action is required to know the legislation on activities organized for the production, administration or alienation of goods or services, followed by an action to investigate the market in which the taxable person operates and the business model that he follows.

The data and indications revealed by these research and knowledge objectives may be useful or even decisive as they establish the extent to which the person investigated actually pursued acts of trade or he is, in fact, only a link in an evasionist chain or is even its beneficiary.

Thus, they are appreciated as benchmarks in research and are detailed: financing, business model and market on which the taxable person trades goods or services the main object of activity, how the business is structured and organized, determining measures prior to concluding agreements between parties, movement money and the movement of goods / provision of services, identification of owners of means of transport or providers of transport services, detection of identification numbers of goods and services or lots in which certain goods are grouped and circulate, etc. All this data and information is considered essential in conducting an investigation aimed at tax fraud, facilitating the use and exploiting the maximum capacity to verify the means of proof provided by the Code of Criminal Procedure.

Regarding the means of administering evidence in criminal investigations, there are elements of judicial practice useful for conducting the investigation or which constitute frequent irregularities of the criminal investigation: hearing of the persons against whom the referral was formulated, at an early stage of the investigation, as of witnesses by reference to the provisions of art. 6 of the European Convention on Human Rights; vulnerabilities of the procedural act of home search; accounting expertise and finding; and so on

## **1.2. Establishing the consolidated state budget. Law to prevent and combat tax evasion**

The sum of all public budgets represents the consolidated state budget, which is organized and operates according to the fiscal legislation.

Each component public budget (state social insurance budget, State Treasury budget, budget of administrative-territorial units, budget of autonomous public institutions, etc.) consists of taxes, duties and other amounts that individuals and legal entities owe according to the Constitution , as a general basis and then according to the fiscal norms that regulate the income - producing activity, the accomplishment of a service that presupposes a prepayment, the possession of a good, etc.

Failure to comply with these tax obligations, intentionally, in order to evade the payment of amounts due to the state budget, constitute tax evasion offenses.

The seat of the incrimination of the facts of tax evasion and of some crimes related to them is represented by Law no. 241/2005, which was called “prevention and combating”, although its content has predominantly sanctioning regulations.

Cases of impunity and cases of reduction of penalties are regulated only for the hypothesis of the existence of a criminal investigation initiated or for the trial phase and concern exclusively the coverage of the damage. Or, as provided by most European countries, the preventive character must be manifested prior to the judicial procedure, when the educational, informative role belongs to the administrative-fiscal apparatus.

Therefore, prevention presupposes in this field an attraction, an induction of a concern of the taxpayer in the observance of the fiscal norms and the coverage of a possible damage brought to the state budget on his own initiative, simultaneously with the existence and involvement of a body of administrative-fiscal matters. high professional competencies, whose activity is carried out according to policies, strategies, protocols based on equity, transparency and prognosis.

From this point of view, Law no. 241/2005 supports numerous criticisms: it does not define tax evasion; the calculation of the damage caused by acts of tax evasion was established by court decisions, resulting that it is composed both of the amount of the main tax obligation and of the ancillary tax obligations due; Many provisions needed clarification, for example: the concealment of the taxable property or source, whether the difference between the amount of money recycled and that used to pay compensation can be confiscated, the fact that the actions listed in Article 9, letters b and c of the Law no. 241/2005 represent

alternative variants of the material element of the crime of single tax evasion, etc., in order to mention only some of the problems encountered by the judicial bodies in cases having as object facts of tax evasion.

With reference to the topic of this paper, are presented below the definition of indirect tax called value added tax and other data necessary to understand the rules of criminal law are found in the tax field: the object of taxation; taxable transactions; value added tax rates; and so on.

## **2. CURRENT DIAGNOSIS, SOCIAL AND CRIMINAL DIMENSION OF TAX EVASION**

### **2.1. Current diagnosis, creative accounting and tax optimization**

The right to deduct tax on purchases and therefore the right to a refund if the tax resulting from purchases exceeds the cumulative tax on supplies is fundamental to the functioning of the VAT system and is laid down in Council Directive 2006/112 / EC of 28 November 2006 on the common VAT system, being taken over by all the tax systems belonging to the states of the European Union.

Community regulation in support of traders has, in fact, also led to an expansion of criminal activity through the use of all Community facilities, so that many of the tax evasion involving VAT have become Community fraud, in the unjustified hope that the investigation of a supply chain or of transnational transactions discourages tax or judicial bodies or, this time with a well-founded belief, that Community investigations provide sufficient time for the loss of "traces" linking a phantom firm to the real beneficiary of the fraud mechanism.

According to the national law for preventing and combating tax evasion, the fictitious operation consists in concealing the reality by creating the appearance of the existence of an operation that does not actually exist.

Expenditures that are not based on real operations are a form of fictitious operations, which means that the criminalization of fictitious operations

implicitly also led to the criminalization of expenses that are not based on real operations.

Since, in practice, the most common way of committing the crime of tax evasion, provided by art. 9 lit. c of Law 241/2005, is represented by the registration of expenses that are not based on real operations, the legislator sought to be as explicit as possible and made express reference to this method of committing, but without excluding from the scope of this crime the other fictitious operations.

Thus, it is necessary to specify that fictitious operations can be: fictitious acquisitions of goods or services; fictitious sales of goods; fictitious payments; fictitious recording of goods depreciation, etc.

These entities are the so-called phantom companies, which the Commission of the European Communities, in Regulation (EC) no. 1925/2004, defined them as "traders with potential fraudulent intentions". In judicial practice, it has been established that the indications of the existence of a ghost company involved in the commission of a tax fraud materialize in concrete elements when several of the following conditions or circumstances are met:

- the company does not carry out its activity at the declared headquarters or work points;
- it does not have assets in its patrimony, it does not have employees or the logistics necessary to carry out the activity that represents the field of activity;
- the company does not manage, in fact, goods or commodities;
- the legal administrators of the company are the so-called "straw people";
- the company carries out financial activities of significant values not specific to a newly established company and only during the commission of tax fraud;

- the company does not submit the financial reports to the competent bodies or they are inconsistent with reality;
- cash withdrawals represent the majority of the company's debits;
- the existence of very large cash withdrawals, made on the same day or as soon as the amounts are collected in the account.

In conclusion, the ghost company or the missing trader was not registered to carry out real commercial activities, but to offer to those interested both the issuance of supporting documents for commercial activities that did not exist, as well as to help them get possession of the sums of money. inscribed in those documents in a way that does not appear to be directly related to them.

By involving the phantom companies in the fiscal and financial circuits, the companies, the real beneficiaries of the sums of money coming from evasion, manage to transfer the fiscal obligations incumbent on the phantom companies, with the consequence of their non-payment to the state budget, for the reasons stated above. to which it is necessary to add the fictitious, subsequent assignment of the phantom companies, to a new group of people, who are most often in precarious material situations and thus agree to take over the companies we refer to.

In this way, the phantom company in question disappears without registering, declaring and paying taxes and duties due to the state budget, the companies benefiting from the criminal activity feel protected by law, in the absence of accounting documents that could highlight fraudulent links, and the new administrators and / associates, qualities acquired through assignment, cannot be held criminally liable for their involvement in the evasion circuit, the activities carried out by them, in concrete terms, not meeting the constitutive elements of the tax evasion crime.

With regard to all Community measures aimed at combating tax fraud, taxpayers, natural or legal persons, have agreed to seek and use all the levers necessary to obtain the most favorable tax solutions possible, so that the

applicable legislation generates costs, respectively tax obligations as low as possible.

Unlike established tax frauds, there are also means of reducing taxes and duties that are not against the law and which, even if they had a different result than expected by the rulers at the time of issuing the legal rules, are accepted and common techniques, gathered under the name of tax optimization.

## 2.2. Tax havens and the underground economy

The concern for the reduction or avoidance of taxes and duties due to the form of government has existed since ancient times, with the emergence and development of trade relations, but the notion of tax haven appeared in 1926, referring to the small European state of Liechtenstein, as a result of the adoption of an original law for that period, a normative act by which banking institutions were authorized to attract foreign capital.

According to annual OECD reports, about 70% of the world's money supply is run through tax havens, the most common areas in which offshore companies - the means of action - operate are those for banking, trade intermediation, business management and consulting, insurance, staff recruitment.

Most often, money traded in tax havens is funds from illicit or some lawful activities, but which are tax evaded, in other words they come from what is called the underground economy, which is why their pursuit, determination of source or final beneficiary can be often difficult or even impossible in the absence of international cooperation.

## 2.3. VAT fraud methods

The same approach to understanding the fraud mechanism requires documentation and in order to know the parties involved in the evasion of taxes, the roles of these participants, increasingly sophisticated with the emergence of the European Single Market, online transactions, the spread financial engineers, etc.

By far, the ghost company or the missing trader is the main pawn in committing major tax fraud and is characterized by the fact that it does not pay its obligations due to the state budget, can not be subject to any tax control, and its legal representatives, called in practice and legal literature "Straw people" are either hard to find or do not exist.

The existence of a phantom company is often reduced to a trade registration number, written entry into circulation of goods and withdrawal of cash, while the beneficial owner or person controlling such a company is often unknown to the authorities.

Among the notable features of a missing trader is

- non-submission of tax returns or the existence of discrepancies on the national territory (diagram C-Lynx D394) or community (diagram VIES);
- non-payment of debts to the treasury;
- lack of assets or facilities common to a legal entity;
- the lack of the trader from the declared headquarters and from the known working points, most often the possibility of contact being reduced to a telephone number, a mailbox or the office of a professional mandated to set up the legal person, without being involved in the subsequent activity Hers.

Also among the characteristics of a missing trader is the fact that:

- operates suddenly and for a short period of important values,
- the business in which he is involved is not related to his object of activity or that
- the most important concern at the level of bank turnover is the withdrawal of very large sums of cash, as soon as they have been transferred to the account of the missing trader, with false bank justification.

Although phantom companies may be newly established or may be reactivated latent companies, there has been a preference for tax offenders to use companies that have previously engaged in a lawful activity and are thus not

recorded in the tax records as potential risk of fraud, which means that such companies will be harder to detect by investigators.

All possibilities (fictitious offices, false identities, foreign nationals or companies registered in tax havens, etc.) are commonly used to create and use a phantom company in commercial circuits, in order to hinder the discovery by investigators of those elements of fact that may lead to findings regarding the non-payment of the due VAT or the insurance of the deductible VAT to other persons, in order to obtain a refund or a reduction of the due VAT.

In these circumstances, the subjects of the investigation are presented: the merchant who does not fulfill his payment obligations; the remote trader or remote phantom company, the blocking agent, the broker, the "straw people", as well as the most well-known and effective methods of committing tax evasion: carousel fraud, fraud involving purchases, fraud involving involves deliveries, cross-invoicing, margin fraud, phantom fraud involving services, triangular transactions and imports.

### **3. COOPERATION OF FISCAL AND JUDICIAL BODIES**

#### **3.1. Organization and powers of fiscal and administrative bodie**

Millions of legitimate taxpayers undertake billions of legitimate transactions, during which the tax administrations carry out the activities necessary to identify hundreds, probably thousands of criminals, who carry out fraudulent transactions, in order to evade the payment of VAT and taxes due.

This highlights the need for the cooperation of administrative bodies, both at national and Community level, in order to achieve the purpose for which they were legitimized and the general well-being of the organization whose interests they represent.

At the same time, by realizing that fraudsters will try to circumvent preventive measures, national tax administrations and European or regional bodies have been constantly forced to find new tools to detect and demonstrate

fraud. These activities are very close, as the information, the traces resulting from the detection of fraud are then exploited, extended, detailed to prove fraudulent activity. Thus, for the detection of fraud, there is sufficient knowledge regarding the performance of an economic activity and the finding that the related VAT has not been paid, while for the demonstration of fraud these data represent only sufficient indications for starting the investigation.

In this context, the institutions involved in combating the evasion phenomenon, the competencies and the most effective means of combat used by them are presented:

National administrative and fiscal bodies - National Agency for Fiscal Administration, National Office for Prevention and Combating Money Laundering, National Customs Authority, National Office of the Trade Register, National Agency for Cadastre and Real Estate Advertising, General Inspectorate for Immigration, Labor Inspectorate.

### **3.2. National judicial bodies involved in combating tax fraud**

The General Inspectorate of the Romanian Police through its structures intended to investigate economic crime is the specialized component of the Romanian Police acting through specific means of work to prevent and combat economic and financial crimes and other acts of violation of law affecting economic relations.

The main objective of economic crime investigation structures is to ensure the legal climate in business, by combating tax evasion, smuggling, corruption, counterfeiting of goods, public procurement crimes, and by protecting the financial interests of the European Union.

Public ministry. The role of the Public Ministry and the status of prosecutors is legislated by the Romanian Constitution, in articles 131 and 132, according to which “The Public Ministry represents the general interests of society and defends the rule of law, as well as the rights and freedoms of citizens

..... the attributions through prosecutors constituted in prosecutor's offices, in accordance with the law ”.

At the same time, "the prosecutor's offices operate under the courts, lead and supervise the criminal investigation activity of the judicial police, in accordance with the law .... and prosecutors carry out their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice" .

### **3.3. Institutional cooperation**

Cooperation between tax administrations, customs authorities, police and prosecutors in order to combat tax evasion is essential as a deterrent to crime.

The international nature of phantom fraud is an additional effort for each Member State, which would have no chance of success without the support of the authorities with similar responsibilities in the other states involved in fraud.

The need for pan-European cooperation was emphasized in an EU assessment of the threat posed by serious and organized crime by the Standing Committee on Operational Cooperation on Internal Security (COSI) and the European Commission in 2013. It emphasized the need to bring together multidisciplinary partners. with responsibilities for preventing, reducing and combating crime related to intra-Community fraud with "ghost" companies.

The exchange of information in these ways leads to a faster and better understanding of VAT fraud, the skills of the people involved and the characteristics of their activities. This results in higher levels of VAT fraud prevention, in particular where cross-reporting is carried out between the authorities and organizations involved in combating tax evasion.

Whenever imports and / or exports are part of VAT fraud, it is important to have a good level of cooperation with the customs organization. European practice has shown that this collaboration works best if the tax and customs administrations are integrated into a single organization, which is the case in many Member States, including Romania.

In this context are presented European and international institutions and mechanisms involved in combating tax evasion: Eurofisc, SCAC, Intra-European Organization of Tax Administrations, Mission of the Organization for Economic Cooperation and Development, FISCALIS Program, VIES System, JOINT AUDIT, financial intelligence units Member States, the FIU.NET Network, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures, the Center for International Police Cooperation, the Europol Organization and the MTIC focal point, the Joint Investigation Teams.

## **4. NATIONAL AND EUROPEAN JUDICIAL PRACTICE**

### **4.1. Relevant judicial practice in the field of WATT**

It brings together the most relevant decisions of national and European courts on the following issues: the right to deduct in the national system; tax evasion committed by applying the profit margin regime; hiding the taxable source means hiding it physically and legally; conditioning the exercise of the right to deduct from registration for VAT purposes; the inactive trader and the establishment of an impossible obligation on the taxable person, tax evasion in the field of consulting services; the reality of economic operations; the requirement that the applicant has known or should have known - the so-called "Kittel criteria"; abusive practices - transactions designed exclusively to obtain a tax advantage; the notion of taxpayer; abuse of power by the tax authority in determining the amount of the lawyer's fee.

### **4.2. Delimitation of the contraventional liability from the criminal liability in the case of the evasions phenomenon**

In this subchapter were presented decisions of national courts that revealed a frequent confusion of the judiciary, consisting in the investigation of minor offenses as crimes: violation of the principle of legal certainty; violation of the right to a fair trial; the criminal (can) keep the civilian in place; confiscation of undeclared amounts at the border.

### **4.3 Own activity. Illegal deduction of VAT through the use of phantom companies.**

This subchapter is dedicated exclusively to one's own activity, being presented a case of tax evasion instrumented and finalized by notifying the court with an indictment.

### **4.4 Measures to recover the damages caused to the state budget**

Mostly, the recovery of damages in case of committing tax evasion offenses is done involuntarily, by instituting precautionary measures on movable or immovable property belonging to the suspect, defendant or civilly liable person.

Often in such cases the possibility of applying the extended confiscation measure is discussed, this time, in addition to the suspect's or defendant's assets, being also considered the assets in the possession or property of other natural or legal persons.

The measures for recovering the damages caused to the state budget can be applied to the patrimony of the company managed or controlled by the investigated person or to the patrimony of the natural persons who acted on behalf of the legal person, but in support of the same criminal resolution.

Under national law, Law 241/2005 on preventing and combating tax evasion, as well as the provisions of the Code of Criminal Procedure, regarding the establishment of precautionary measures, were aligned with European norms in this matter, while maintaining particularities related to proving factual situations.

In some EU Member States it is possible to apply precautionary measures which make the amounts in bank accounts unavailable in both administrative and criminal cases. Moreover, if there is an assessment of the damage caused to the state budget by avoiding the payment of VAT, the tax inspector may order the confiscation of the detected money, and in the absence of such an assessment, the administrative authority is required to apply to the court.

In the case of offenses for which the precautionary measure is mandatory, such as the situation of tax evasion, a list of checks that can be performed by criminal prosecution bodies in order to order precautionary measures on assets or values held by the suspect, defendant, civilly responsible party or the person concerned by the extended confiscation measure.

## **5. FINAL CONCLUSIONS AND PROPOSALS**

Compared to the above, the conclusions that are required are that the criminal phenomenon of tax evasion is a complex one and requires the involvement of several factors necessary to ensure success in the fight against tax evasion practices.

By far, the human factor is decisive, which is why we appreciate that:

- it is necessary to continuously train the officials, police officers and magistrates involved in solving such cases,
- it proves extremely useful and it is necessary to maintain and develop the collaboration relations and the exchange of information with the domestic and international institutions, by using the existing means.

Proposals considered useful, given the content of this paper, can be classified into proposals of a social, educational nature and proposals for the introduction or amendment of legal provisions.