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Tax Evasion – between Civil and Criminal Law

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Abstract: Establishing the boundaries between the behaviors that constitute tax evasion and those that are outside the criminal law is a subject of maximum interest both for the people called to apply the law, and especially for the litigants. In this article, the authors propose to analyze the relationship between tax evasion and payment due. Over time, a non-unitary practice at the level of judicial bodies has formed around it, capable of generating confusion. The authors believe that some problems are placed in the litigious-fiscal area, coming out of the authority of the criminal law. In support of this opinion, arguments regarding the requirement of the typicality of the deed both on the subjective and objective side, as well as on the need to apply the criminal law as an ultima ratio, are presented at length.

Keywords: practice; payment due; criminal law; civil law; confusion

1. Introduction

As the word was in the beginning, we will make a short foray into the definition and meaning of the notion of evasion, but also the extent to which different classifications, such as licit or illicit, become - or not - slightly anachronistic. The noun evasion comes from the Latin *evasio* denoting, at the base, the idea of "to escape"; "to exit". We could say, relatively improperly, but suggestively, a evasion of fiscal obligations from the authorities. We don't want to dwell too much on the philosophical complications of those who claim that, by nature, man looks for ways to escape, the discussion is in the sphere of the crime of escape, but a little

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extrapolation can be reviewed, extrapolation related to doctrinal classifications in the matter of tax evasion.

Francisco Suárez, a man from Granada who lived between the 16th and 17th centuries and who was also known by the nickname of Doctor Eximius due to his vast knowledge (he was a theologian, philosopher and jurist), being one of the best representatives of the Salamanca School, held that a prisoner had every right to escape if the sentence he received was very harsh and the prison in which he was confined was unhealthy (Florescu, 2005). Suarez based this view on Natural Law, arguing that it is above the laws of man and that *ius fugiendi* justified the protection of life in the first place. He was only establishing a principle of proportionality, according to the usual rigors of the penal system of his time, resuming the scholastic tradition in this regard, according to which justice must be commutative (not to exceed the limits of punishment), distributive (to be equitable) and legal (applied by the public administration).

Continuing Durkheim's line of thought, Edwin Sutherland integrated the study of criminal behavior into the sociological study of any type of behavior.

Through the association he made between the criminal culture and the culture of the global society, he was able to identify forms of crime that escaped the criminal law, such as “white collar” crime (white color crime). Although at first, the term had a restricted meaning, it has evolved into professional crime, a concept that refers to all illicit profit-oriented activities carried out through or in connection with the perpetrator's profession (Adhikari, 2020).

2. Body of Paper

From the individual's point of view, white-collar crime could be explained by differential association theory, and from the social point of view, it could be explained by anomie theory and cultural conflict theories.

Sutherland brought to attention several cases that demonstrate that “white collar” crime was initiated in a process of association with participants who considered such behavior to be favorable to them. White-collar crime arose at a time when the business community was favorable to breaking the law, and the political community, which opposed it, was much stronger.

From the perspective of classical theories, "white-collar" criminals are treated as rational criminals who, before carrying out their criminal activity, carefully weigh the cons and benefits they can obtain from this activity (Hettich et co., 1999).

I think, however, that a pattern can be seen, a behavioral template of the individual, more specifically the subterfuges that people resort to when taxes are too high or when bureaucratic procedures are very complicated. Although it might seem cupid, in the current evolution of society, financial stability is, to some extent, a form of freedom, an aspect that is hard to deny, even if the statement may seem, in the eyes of some, mercantile.

Evasion, without the individualization by the fiscal adjective, does not tell us very much, although, usually, it is heard at the level of laymen. Thus, the phrase tax evasion has become a very broad way to include, here again, at the level of non-professionals, many conducts, or putative facts, more rigorously said.

We want, on this terminological occasion, to inform the reader that the short considerations, theses, or questions that we will present in the analysis are addressed to professionals, but, in particular, to non-professionals, people who want to understand how to comply with criminal law (the so-called criminal-compliance). Under this emphasis, we will address the relationship between tax evasion and transfer pricing; when and how there can be criminal connotations in different situations of reduction of the taxable base, elements that belong to the subjective side, which, unfortunately, are rarely treated with sufficient meticulousness in the considerations of court decisions or the referral act of the court, whether we are talking about indictment, whether we're talking about the plea agreement, or, why not, the pretrial judge's conclusion.

I made this brief mention to the subjective side because, in our opinion, in most situations, the accusation of evasion can be placed outside the strictures imposed by Article 6 paragraph (3) letter (a) of the European Convention on Human Rights, an aspect that I do not have noted to be sufficiently fruitful of defense, in general.

Already, traditionally, as a link between criminal and tax litigation, we work with the notions of tax optimization, abuse of law, and tax evasion. The above-mentioned taxonomies are quasi-known by most lawyers and very well known by lawyers dealing with crimes provided for in law 241/2005 or with tax law, in general. Professionals involved in cases with such an object, tilt the balance either to the private interest or to the public interest. Moreover, in the framing of conduct, *lato sensu* facts, people without adequate legal instruction about the complexity of the

situation also take part. In these cases, a good collaboration and coordination of resources is required to clarify the legal significance of the facts, in the most unequivocal manner. The better the equivocal situations, located at imperceptible borders, are brought to light, the better the system will work. Legislative inflation, especially extra-criminal, can, we admit, make this desired difficult, but not impossible. Due to their specificity, the rules that criminalize the crimes of Law 241/2005 on the prevention and combating of tax evasion, perhaps more than any other rules, are inextricably linked to extra-penal legal provisions. And here we refer, first, to the Fiscal Procedure Code, the Fiscal Code, Law 82/1991 on accounting, as well as, in certain cases, the Customs Code and Law 31/1990 (Pantea et co., 2011). Although extensive and arid in their technicality, they can be traversed and understood by litigants and professionals alike.

"Without" or "only with" nemo *consentur legem* ignorance, a society and a state of law cannot be conceived. The problem would not only be with the few ordinary laws, which are inherently an integral part of the objective side of the offenses provided for in Law 241/2005 but also with many other legal provisions for amending or implementing them, which can have a dynamic and a stretch hard to follow. For example, upon a quick check, we find 106 secondary normative acts - orders, decisions, and the like, as well as 71 main normative acts, all of these only in the period 2020-2022. Obviously, before being accused of an emphasis on the subject, we mention, as clearly as possible, that not all of them are inextricably linked to the objective side of the crimes that are the subject of this analysis, but they can have an influence on the activity of keeping accounting and, therefore, suspicious behavior may emerge in the view of criminal investigation bodies. Not wanting to deprive the thesis of a corollary, we will say that all these legislative events can and should generate, where appropriate, a serious doubt regarding the constitutive elements of the crime, considering the standards of guilt in the matter of evasion - direct intent qualified by purpose (Bisa et comp., 2005).

About criminal compliance, we want to bring to the attention of readers, of any kind, another perspective on advocacy to highlight that we are not necessarily interested in one solution or another, but rather our attention falls on clarity proposed solutions, as well as their unitary character. By drawing as well determined boundaries as possible, between different behaviors, we can in turn provide a clear presentation to the litigant, avoiding answers of the type "it is possible to". Uncertainty and approximate solutions must not find a place in the sphere of criminal law. Advocacy is no longer based on obstinately clinging to settlement/termination/classification

solutions or so-called damage avoidance (Clausing, 2016). The services of law firms aim to proactively direct clients to the legal ground before any other unpleasant incidents for a particular company. All these steps are done, ante factum, by advising clients in the sense of avoiding conduct that could appear to be of a criminal nature from the perspective of the criminal investigation bodies. However, to carry out such an approach, the constitutive content of the crimes must be clarified, as it evolves in the dynamics of the incident legal norms, jurisprudence, as well as the doctrine, where appropriate.

The clearer things become with the support of professionals from the entire legal-fiscal spectrum, the more ways of criminal compliance can be presented to litigants. Thus, people who seek tax optimization can be delimited from those who had only a purely evasive purpose. Along with these benefits, indisputable, there is also the increase of confidence in the judiciary, but also in lawyers, a desirable which, I think, must let's all answer it.

Concretizing, it is desirable to define and highlight, as best as possible, the boundaries between the abuse of law, tax optimization and tax evasion. The first may attract contraventions or remain without any sanction, the second should not attract any repercussions, and the last must attract criminal liability and recovery of damage, where other institutions are not involved.

Tax optimization consists in the use of all legal methods of efficiency and reduction of the tax burden, in good faith and with the purpose of the tax rules (Alm, 2014).

The abuse of fiscal law also represents the use of legal levers to reduce taxes, but with the diversion of the intrinsic purpose of the rule, more precisely, the use of the rules in an unreasonable manner and contrary to good faith, but without their formal violation.

Tax evasion represents the paroxysm of ways to reduce the tax burden, through which the active subject violates both intrinsically and extrinsically the rules of fiscal and criminal law, alike.

Among the three ways of reducing the tax burden, the most problematic can be the abuse of law. Likewise, it can prove to be the most dangerous, as the apparent meeting of the constitutive elements of the crimes provided for in law 241/2005 comes close enough. It is precisely this proximity that makes it problematic (Balaban, 2003).

What interests us, among the operations that can be qualified as fiscal optimization or abuse of law, depending on the viewer, is the manipulation of transfer prices. Transfer prices represent, in the tax sense, the prices at which transactions with goods or services take place between affiliated parties within the same group of companies, under common control. These prices must respect the market value principle which states that the prices applied in intra-group transactions must not differ from those applied in transactions that take place between other companies that are not part of the same group, if similar economic and commercial conditions are observed. In other words, this standard requires that companies that are part of the same group of companies carry out transactions as if they were taking place between unrelated parties, in the open market. In practice, depending on the nature of the transactions, various methods can be applied to assess whether transfer prices are at market value, some of these methods being of great complexity (Robinson, 2012).

In such cases, the tax authority could (and must) under article 11 tax code reclassify the operations and impose taxation as such. We will see, throughout the article, why we cannot put the sign of equality between the fictitiousness of the operation and differences in values. We summarize to say now that, in most situations, accounting-fiscal inadvertences invariably have an influence on the taxable base, by way of consequence it would mean to displace any behavior prohibited by the tax code into criminal affairs. It is obvious that the principle of minimum intervention does not allow such a criminal policy.

We will review a short and simplistic example that could be placed between these classifications. We will imagine a tax triangle in which company 1 sells to company 2 a good, at a lower than market value, and company 2 sells to company 3 at market value. It is obvious that in this example the best placed from a tax point of view is company 2. In other words, the higher profit is strategically placed in the place with the most advantageous tax, if we were malicious, we would say, in the place that knows how to attract investors. It would be good to remember that the goal is not always exclusively to reduce the taxable base, but it can also be one that is more related to bureaucracy or many other business reasons. For example, such a chain of companies may have a more efficient and, consequently, less expensive accounting-tax department in a particular state, preferring to transfer most of its assets to that jurisdiction. We could say, even without being too imprecise, that in the current cosmopolitan constitution of Europe, the choice of the place where the affiliated companies store their assets, represents a genuine fiscal forum shopping, which is remedied, when appropriate, by litigious-fiscal remedies and not through criminal

repression, the criminal being the ultima ratio, as was specified over time in the jurisprudence of the Romanian Constitutional Court.

In any case, the extra-criminal remedies for non-compliance with such transfers between affiliated companies are the provisions of article 11, paragraph 4 C. tax which provide criteria for determining the market value of goods, in an enumeration. Thus, the tax authorities have enough suitable extra-penal remedies to resolve disputes because, in essence, the problem is often one of assessing the value of goods or services their traded between affiliated companies.

In concrete terms, the majority (and here we emphasize the majority, because we do not exclude the possibility of committing tax evasion in the form of letter (c) by disguising transfers between affiliated companies, but which are purely fictitious) of the disputes bear on the market value of the goods or services, value that will always affect the taxable base. The fiscal code deals, in line with the guidelines given by the OECD, with the terminology and remedies related to transfer prices, defining in article 7 the notions of: affiliated companies, market price, the principle of market price value (Cârlescu, 2015).

We will continue to present relevant considerations of the courts that may be related to transfer prices and the classification or non-classification of tax evasion, to follow the judicial syllogism in the matter, but also to express our opinions regarding the various issues related to the content constitutive of the crime that is the subject of this analysis.

One of the causes from which we will extract considerations, traveled a rather interesting route. In the first instance, the Prahova Court sentenced the defendants to 3 years in prison, respectively a 200,000 lei criminal fine. The Court of Appeal of Ploiești sent for a retrial, noting, among other things, that: "it follows from the considerations of the sentence that the judge of the merits resumed the indictment in its entirety, less the chapter in which the prosecutor detailed the evidence administered during the criminal investigation and carried out the analysis them, there being identity between pages 1-17, 26-30 of the notification document and pages 2-16 of the considerations of the sentence, while the reasoning of the adopted solution (pages 17-20) is limited to simple considerations, including assessments of a subjective nature, without a concrete analysis of the evidence administered during the entire process and in the absence of a factual situation regarding the crimes for which the conviction was ordered, of any verification regarding the meeting of their typical conditions and the conditions aimed at holding the person criminally liable

legal, aspects likely to lead to the conclusion that proceeding in the manner shown, the judge pri my courts did not resolve the merits of the case."

In the retrial, the same Prahova Court found that the fact did not exist, decision from which we will extract certain considerations, worthy of highlighting in the matter of tax evasion, the variant from letter c): the highlighting, in accounting documents or other legal documents, of expenses that are not based on real operations or the highlighting of other fictitious operations.

"According to the provisions of art. 9 para. (1) letter c) from Law no. 241/2005, the cumulative incrimination conditions regarding the material element of the objective side, which fall into this alternative constitutive content of the crime of tax evasion, are: (i) the existence of the action of highlighting the active subject; (ii) the highlighting action materializes in a legal document; (iii) the action of the active subject always aims at a fictitious operation; (iv) the fictitious operation is capable of prejudicing the right of claim of the passive subject correlative to the fiscal obligation to calculate and record the taxes, fees, contributions and other amounts due to the general consolidated budget, within the accounting and fiscal records (Benta et comp., 2018).

Such a problem is circumscribed to the matter of fiscal law, and not to the criminal offense, which considers fictitious and implicitly susceptible to outline the objective side of tax evasion, only the operation that does not exist in fact, not the operation that exists in fact, but whose legal effects are against the tax law.

For the respective non-deductibility to enter the scope of the criminal offense, it is necessary that it be generated by the registration of factually (not legally) non-existent operations.

Also, regarding the crime of tax evasion held against the defendants, in the form of expense records that are not based on real operations, arising from the management contract concluded between B and C - limited liability companies, considering the evidence administered during the investigation judicially, we appreciate that the constitutive elements of the crime of tax evasion are not met, the actual existence of the services being proven beyond any doubt."

Although the considerations regarding the fictitiousness of the operations are precise, a small mention can be made regarding "proven beyond any reasonable doubt" which is probably due to the stereotypical expressions of a decision. That being the case, we will specify that the defense does not have the task of proving beyond any reasonable doubt a specific situation, in this case the legal reality of the operations,

but only to generate a reasonable doubt, which will be interpreted in favor of the defendant. Moreover, in the doctrine it was appreciated that "(...) the requirement of proof through evidence, beyond the no doubt, the non-existence of a case of extinguishment of the action refers to all the impediments provided for in art. 16 Romanian Criminal procedure code not only to those concerning the commission of the crime by another person" by way of consequence, including the doubt that a certain deed constitutes a crime should attract the solution from art. 16 paragraph (1) letter b). We wanted to punctuate this aspect to highlight how solid the prosecution's evidentiary body must be to turn this imbalance between the defense and the prosecution (Pantea et comp, 2011).

The distinction between legal non-existence and material non-existence that the Prahova Court makes, in the retrial, is extremely useful. Moreover, it can also be nuanced in the opposite direction given that an operation can exist legally, being fully valid, but it may not yet materially exist, either because one of the parties does not comply with the contractual obligations (does not fulfill the obligation to do or to give as the case may be), or for other reasons related to the execution of contracts. But this aspect relates to the contractual execution and contractual remedies, not to the untimely incidence of the penalty. Moreover, the Court of Justice of the European Union, by Decision C-463/14 established that, in the case of legal, commercial, or financial consultancy contracts, there is no obligation to prove the actual provision of services, this being carried out by the very fact that the provider is available to the beneficiary, regardless of the volume and nature of the services provided (Florescu, 2005).

Next, the Prahova Court made an analysis regarding the issue of non-deductible expenses - tax evasion, a problem that should no longer be brought before the criminal investigation bodies, in our opinion. The Prahova Court notes, at the stage of the retrial in the first instance, after the sentencing solutions had initially been ordered by the same Prahova Court, that:

"Some expenses recorded in the accounting are deductible or not, through the prism of the provisions of the tax legislation, it is a circumstance of a fiscal nature, which does not wear the cloak of criminal wrongdoing, a circumstance otherwise resolved by the judicial expertise in the taxation specialty" (Bisa et comp, 2005).

Without denying the importance of the findings of the experts appointed by the court, the defense justifiably considered that the crime of tax evasion in this way cannot be retained, even in the hypothesis of the non-deductibility of the respective expenses

registered by S.C. X S.R.L., as a distinction must be made between criminal offenses and fiscal irregularities. To find ourselves in the presence of the crime of tax evasion provided by art. 9 para. (1) letter c) from Law no. 241 of 2005, it is necessary for its active subject to highlight in the accounting expenses that are not based on real operations or the highlighting of other fictitious operations. Therefore, specific to tax evasion is the existence of a fictitious, unreal contract, or of some operations that did not exist in objective reality, because of which expenses were recorded in the accounting records, while the deductible nature or not of some expenses is a fact that exceeds the criminal framework of tax evasion.

"There is no benefit that could have been obtained from the artificial invoicing of strategic management services, given that the legislation in Belgium provides for a higher tax than in Romania" (Cârlescu, 2015).

"Otherwise, it's hard to believe that there was an interest, for S.C. X S.R.L. and for AB to commit the alleged crime of tax evasion, since by "transferring" the sums of money to the companies in Belgium, the group paid much higher taxes, an aspect confirmed by the documentary evidence, considering that in Belgium the tax rate it is 33.99%, and in Romania it was 16%."

We note together with this aspect highlighted by the court that in not a few situations and in the matter of transfer pricing, the asset is displaced to a jurisdiction with a higher tax. And here we must stop to ask ourselves: how can the purpose qualified by the law be indirectly proven - "society evaded paying lower taxes to pay higher taxes, in some cases the percentages being 33%!". I believe that in these situations, the non-compliance with the market price does not meet the rigors of objective typicality and, even more so, the subjective ones. The subjective side is proven by researching the objective side. Magistrates, with the support of lawyers, as indispensable partners of justice, must establish without any doubt the direct intention qualified by the purpose of tax evasion.

The Ploiești Court of Appeal notes, regarding the fictitious operation:" For the existence of the crime of tax evasion provided by art. 9 paragraph 1. letter c, it is necessary that, from the objective point of view, the highlighting of some unreal expenses or other fictitious operations should be proven. To highlight fictitious transactions means to record certain transactions that did not exist in the legal documents, such as, for example, expenses that are not based on real transactions (Balaban, 2003).

In this context, the investigative approach that establishes the real or fictitious nature of an economic operation must be related, with priority, to the analysis of the substantive aspects of the transaction, to the detriment of the formal conditions.

"Thus, the desired definition of fictitiousness and its detection can only be achieved by analyzing the four essential elements that characterize any economic operation, namely the supplier or provider, the buyer or beneficiary, the goods or services traded, and the price or consideration" (Batchelder et comp, 2019).

In this sense, for an economic operation to be real, all four elements must be real simultaneously.

Also, the fictitious character of any of the four essential elements is likely to compromise the real character of the entire operation, since the factual situation will no longer correspond to the way it is recorded in the financial accounting and fiscal records."

The detection of the notion of fictitious/unreal represents the hot core of the transfer pricing issue because, to put it succinctly, what is criticized by the judicial or fiscal bodies is the existence of an under or over-dimensioned price. The considerations above try to clearly state some criteria for defining the fictitious operation, but we will add some aspects, starting from the insufficient explanation given by law 241/2005 and going through fiscal law and civil law.

The law on the prevention and combating of tax evasion defines the fictitious operation as disguising the reality by creating the appearance of the existence of an operation that does not exist. An under or over-dimensioned price does not transform a materially and legally existing operation into a non-existent one, without just and maybe. Such an interpretation would add to the text of the law, interfering with the strict interpretation and application of the criminal rules, except for the related one. An operation that does not have an economic purpose, as defined by the tax code in Article 11, cannot be classified as fictitious.

On the other hand, at the opposite pole, we have identified in the jurisprudence also opinions that give an amplitude inconsistent with the requirement of restrictive interpretation of criminal law norms.

"The High Court of Cassation and Justice decided that by the provisions of art. 2 letter f) from Law no. 241/2005 regarding the prevention and combating of tax evasion, fictitious operations consist in disguising the reality by creating the appearance of the existence of an operation that does not exist. In this sense, the

fictitious operation can consist, among others, of expenses that did not exist or that are higher than the real ones or expenses for which there are no supporting documents, but which are recorded in the legal documents. (Decision no. 272 of January 28, 2013, issued in appeal by the Criminal Section of the High Court of Cassation and Justice, having as its object tax evasion)" (Cârlescu, 2015).

In the situation where the fictitiousness concerns the economic component, the operation can be qualified as fictitious from the perspective of art. 2 letter f) from Law no. 241/2005, it being necessary to establish whether the fiscal regime applicable to the written operation is more advantageous for the taxpayer than the one applicable to the factual operation, and the aim pursued was to evade the fulfillment of fiscal obligations.

If things are like this, and the equal sign can be put, arbitrarily, we say, between fictitious and "higher prices", it would mean that the free market will be dictated by surveyors, judicial experts, agents of tax bodies, criminal investigation bodies, and courts. Thus, every time you provide a service or transfer an asset, you will have to know that if the value is higher or lower, your dispute is not fiscal, but of a criminal nature. We don't want to take it out of context and dramatize too much, but a good validation or invalidation can sometimes also be reductio ad absurdum.

We cannot even accept the idea that a ridiculous price, as described by the Civil Code in article 1.665, can transform a legally fictitious operation into a materially fictitious one. Criminal law generally protects states of fact, not states of law, and through the systematic interpretation of law 241/2005, it can be easily observed that the description of the fictitious operation is intimately linked to the material non-existence ("non-existent in fact"), moreover, we cannot accept that a higher price or smaller means a fictitious operation within the meaning of art. 2 letter f) from Law no. 241/2005. Strictly from the perspective of the framing from letter (c) and through the interpretation of the provisions provided in law 241/2005, the value dimension and the economic substance of the transaction are aspects related to civil law, tax law, the eventual civil and tax legal relationship will be devoid of the effects own legal rights, using the relative nullity for derisory price, respectively by not taking into account the price declared by the tax authorities, two necessary and sufficient ways to restore legality (Florescu, 2015).

In other words, most simplistically, if ownership of a Rolls Royce Cullinan is transferred for a price of 1 leu, in the sense of the criminal law and from a material point of view, it is not fictitious ("in fact"), but in in the sense of the provisions of

civil law, it is hit by relative nullity for derisory price, and in the fiscal sense, the fiscal authorities may not take note of the value of the transaction by recalibrating and taxing as such, being another type of lack of legal effects contrary to the law. In this example, the situation is the same as if the price had been oversized. That being the case, putting the sign of equality between an operation that does not exist in fact (the meaning given to the fictitious operation by law 241/2005) and a voidable/lacking economic substance/legally fictitious operation means flagrantly violating the principle of legality, *nullum crime sine lege*, enshrined in the Criminal Code in art. 1 Criminal Code, of the Convention in article 7 and of the Charter article 49.

(1) The following acts committed for the purpose of evading the fulfillment of fiscal obligations constitute tax evasion crimes and are punishable by imprisonment from 2 to 8 years and the prohibition of certain rights or a fine.

c) the highlighting, in accounting documents or other legal documents, of expenses that are not based on real operations or the highlighting of other fictitious operations.

f) fictitious operation - concealment of reality by creating the appearance of the existence of an operation that in fact does not exist.

The terms and expressions provided for in the Criminal Code and in other legal provisions of a criminal nature may have a different meaning compared to the colloquial expression. Thus, considering that law 241/2005 defines in article (2) letter f) the notion of fictitious operation, the meaning will be that and only that, in a strict interpretation. In support of this thesis, we consider the provisions of Article 172 of the Criminal Code: Whenever the criminal law uses a term or an expression from those shown in this title, its meaning is that provided in the following articles, except when the criminal law provides otherwise; Art. 173. – Criminal law means any provision of a criminal nature contained in organic laws, emergency ordinances, or other normative acts which at the time of their adoption had the force of law (Benta et comp, 2018).

The ECHR (https://www.echr.coe.int/Pages/home.aspx?p=home) has noted in multiple cases problems related to this aspect of extensive interpretations in criminal matters:

"91. The notion of "law" contained in Article 7 refers to the same concept that appears in other articles of the Convention, a concept that includes legal provisions as well as judicial practice and implies qualitative requirements, especially those

regarding accessibility and predictability. These qualitative requirements must be met in terms of both the definition of a crime and the punishment it entails.

93. The decision-making role conferred on the courts aims precisely to dispel doubts that persist when interpreting the rules (ibid.). The progressive development of criminal law through jurisprudence as a source of law is a necessary and well-rooted component of the legal tradition of the Member States (see Kurstin v. France, 24 April 1990, § 29, Series A no. 176 A). Article 7 cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability through judicial interpretation from one case to another, provided that the result is consistent with the substance of the offense and is reasonably foreseeable (see S.W. and C.R. v. of the United Kingdom of Great Britain and Northern Ireland, cited above, § 36 and § 34 respectively; Strelitz, Kessler and Krenz, cited above, § 50; K.-H.W. v. Germany [MC], No. 37201/ 97, § 85, ECHR 2001-II (extracts); Korbely v. Germany [GC], No. 9174/02, § 71, ECHR 2008; and Kononov v. Latvia [GC], No. 36376/04, § 185, ECHR 2010). The absence of an accessible and reasonably foreseeable jurisprudential interpretation may even lead to the finding of the existence of a violation of the rights guaranteed by Article 7 about the accused person (see, regarding the constitutive elements of the crime, Pessino v. Franț them, no. 40403/02, §§ 35-36, October 10, 2006, and Dragotoniu and Militaru-Pidhorni v. Romania, no. 77193/01 and 77196/01, §§ 43-44, 24 May 2007; on punishment, see Alimuçaj v. Albania, no. 20134/05, §§ 154-162, February 7, 2012). If things were, otherwise, the object and purpose of this provision - according to which no person should be subjected to arbitrary prosecution, conviction, and sanction - would be violated."

Yes, maybe some of the considerations we brought up are old, but we find it useful to debate them. Moreover, we ask ourselves: will there still be litigious tax disputes, since the "prophylactic" remedy is given by law 241/2005, in most tax violations? Conversely, when a higher taxable base is generated through a higher selling price, is the transaction fictitious?

The disregard of transfer prices will have to be qualified, in our opinion, as being a fiscal optimization or, at most, an abuse of law. In support of this opinion, we will emphasize, on the one hand, the subjective side, and on the other hand, the notion of fictitiousness, as an essential condition attached to the material element. First, non-compliance with transfer prices does not constitute tax evasion because there is no direct intention qualified by the purpose provided by the law, namely: evading the fulfillment of tax obligations. There is no such statutory purpose since the group of

related companies will pay taxes and duties, just in another jurisdiction. At the same time, there is the possibility that through the requalification and estimation of the value by the tax office, the company will bear an even greater tax burden. Multinationals call on specialized auditors to draw up the transfer pricing file, people who have a purely evasive purpose do not call on the services of consultants, or lawyers. Unlike true acts of tax evasion that involve the clandestine nature of operations, transfer operations are visible and can be subject to state control without additional efforts to identify evasive partners. All this only raises sufficient doubt about the guilt.

As for the notion of unreal or fictitious, (between which we consider that there is no difference as we will present below and considering that the legislator was concerned in Article 2 only with the notion of fictitious operation, an aspect that could attract possible unconstitutionality of the phrase) we consider that the non-compliance with the price margin does not represent a fictitious operation, there being no concealment of reality by creating the appearance of the existence of an operation that did not exist. Above or below the value measurement, it is a matter that is eminently related to the economic purpose of the operations, an aspect that could be seen as a tax violation or, in certain cases, as using the company's credit in bad faith, fraudulent management or embezzlement, but, in no case, tax evasion.

"Returning to the method by which the material element of the objective side can be achieved, this consists in the highlighting in the accounting documents or other legal documents and which are represented by the documents expressly provided for in the accounting law - the mandatory accounting registers, the recapitulative financial accounting statements and the declarations mandatory fiscal, of expenses that are not based on real operations or the highlighting of other fictitious operations, the notion of "fictitious operations" including the notion of "unreal expenses". In other words, expenses that are not based on real operations represent a form of fictitious operations" (Adhikari et comp, 2020).

We do not exclude, out of hand, other legal frameworks, but we find it important to highlight that the special maximum provided by law for the crimes provided for in Article 9 can reach up to 15 years, unlike other legal frameworks where the special maximum is more reasonable. Misclassification in non-compliance with transfer pricing can attract strange, disproportionate penalties, given that most cross-border transactions can easily exceed the harm provided by special aggravating circumstances.

As a short foray into comparative law, we will highlight how the Italian legislator removed the issue of transfer prices from questionable situations. The amended legislation that reformed the criminal tax system, led to the amendment of the article regulating the crime of discrepant tax declaration. Due to this change, transfer pricing adjustments arising from tax assessments regarding relationships between affiliated companies are considered irrelevant from a criminal point of view. The legislator also provided an additional "safeguard measure" under paragraph (2) of Article 7 of Legislative Decree no. 74/2000, which excludes any penalty for "value estimates c have, when considered individually, vary less than 10% from the exact ones. What follows is that incorrect estimates of value, even if they are not supplemented by explanations in the financial statements of the adopted criteria, cannot in any case become relevant from a criminal point of view if the "discrepancy" is limited to the 10% margin of up. The purpose was to create a kind of "exemption" by which any difficulties connected with estimates remaining within certain percentage limits could be removed. Thus, by the ferenda law, if one wants to clearly determine the notion of fictitious, certain margins in which the operation becomes fictitious should be drawn much more clearly, meaning that the price is under/oversized by a certain percentage compared to the real market price (Bisa et comp, 2005).

In conclusion, three arguments plead in favor of placing the exposed situation in the litigious-fiscal sphere, which we present in the following.

The most visible argument opposing the attempt to classify some facts under letter c) of article 9 of Law 241/2005 is, by far, the principle of strict interpretation of the criminal law, which does not allow the rule to be extended by analogy to situations that are not described in the hypothesis of the text of the law.

Thus, we note that the law itself defines in art. 2, letter c) the notion of fictitious operation as "the concealment of reality by creating the appearance of the existence of an operation that does not exist". So, it doesn't allow us to equate the fictitious with a price higher or lower than the transfer pricing file. An interpretation according to which an undersized or oversized price transforms a materially and legally existing operation into a non-existent one is illegal, contradicting two of the guiding principles of criminal law, namely the principle of legality and predictability of criminal law (Pantea et comp, 2011).

Also, tax evasion is one of the few crimes for which the legislator provided the direct intention qualified by purpose, the evasion from fulfilling tax obligations. Upon a

careful analysis of the situations encountered in practice, we noticed that, in most of them, the transfer of the asset is pursued, which inevitably also leads to the reduction of the taxable base. However, the purpose pursued is not a fraudulent one, taxation in the destination state will be carried out anyway. Therefore, in these situations, the rigors imposed by the law regarding the subjective side of the crime of tax evasion are not respected either.

Finally, the principle of the subsidiarity of the criminal law, which must be applied as an ultima ratio, is also in favor of placing such commercial practices outside the criminal law, considering that in the current legal system, there are enough extra-criminal levers that can be exploited for legal reinstatement.

3. Conclusions

Besides creating moral harm to honest consumers, tax evasion is a central node in the economic analysis of any state, because it creates financial harm. Non-recovery of funds by the state, to be used in public expenditures, can lead to the creation of public debt. In order to recover the public debt, the state, if it cannot, as is often the case, fully recover the funds from the evasion, is consequently obliged to reduce public expenditure with cuts to the financing of the public administration and, consequently, the possible decrease in the quality to the public services offered and/or to the increase in taxation and the tax on taxpayers (for example, the increase in excise duties) with the effect of increasing the tax burden. In the long run, in addition to possible public services, higher taxation may lead to a decrease in consumer incomes, with a decrease in consumption and therefore a further decrease in economic growth. Another important effect of the tightening of taxation, or the tax burden on taxpayers to try to recover evaded funds, is the disadvantage of the activity of entrepreneurs, as well as the limitation of the normal consumption activity of consumers: all this can create a vicious circle, generating a situation for some that is unsustainable, which pushes more and more taxpayers to evasion, making the situation even worse.

The recovery of evasion could have the potential to solve two fundamental problems, that of public debt and that of economic growth, in a much bigger, faster and more efficient way the closer it gets to the total amount of the embezzled funds. Tax evasion itself, together with the phenomenon of money laundering, represents an international challenge to the institutions engaged in combating the underground

economy, and the prevention and sanctioning of the phenomenon is the great challenge addressed to these institutions at the beginning of the 21st century.

Regardless of the level of material costs involved in making the fight against tax evasion more efficient, they must be analyzed and measured from the perspective of the balance of adverse effects that can be obtained. At the opposite pole, the lack of eloquent evidence produces the opposite effect of exculpation, the demarcation line between criminal and civil being very fine, almost unnoticeable at first superficial analysis.

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