

THE LAW MISUSE IN CONNECTION WITH THE TAX FRAUD

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Abstract: In the following, we want to reveal the importance of knowledge of forms of "abuse of law" in the field of taxation and especially about his side aimed at avoiding the payment of taxes (tax evasion) and also to highlight the bridge provided by legal norm in this context that the legislature can pass through to framing various legitimate forms of specific cases in the category of willful evasion. In this context, both doctrinal and practical, it foreshadowed the need to understand and control this new concept and "abuse of individual rights" and also finding optimal ways of intervention to address this reality.

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1. INTRODUCTION

Apart from the tax payer's material, conscious interest, the human nature itself develops a reticence, an impulse to elude from paying the tax obligations, regardless of their volume or specificity. Bellow, we will make inroads on the ways in which the tax payer decides to choose the legal forms that, in his opinion, meet the most the purpose of his business.

The effects of tax evasion on state's incomes accumulation are multiple if we look beyond the immediate and obvious consequence (the reduction of the state's incomes), from the point of view of the impact that these (state's incomes) have on the way in which each democratic state fulfils its functions.

2. METHODOLOGY

The phenomenon of tax evasion leads directly and compulsorily to the diminishing of state's incomes. This diminishing automatically determines a lower budgeted for that state which can no longer cover the request for financial funds necessary for the state's basic functions.

As a result of the absence, sometimes acute, of financial funds, the state can only take one efficient and immediate measure: to raise the tax rate on existing taxes and even to come with new types of taxes.

This raise of tax rates leads to an increasing of the tax pressure and, as practice often shows, a tax pressure implies, besides many other effects, an increase of the tax resistance and thus an increase of the phenomenon of tax evasion. A high percentage tax evasion phenomenon determines a diminishing even more accentuated of the state's incomes and the described cycle can re-start on a higher level this time.

A vicious circle is produced from which the only escape is represented by the significant reduction of the tax evasion phenomenon and, implicitly, by a substantial reduction of the incomes eluded from the state budget.

The mechanism that can put an end to this undesirable economic events and phenomena is based on the substantial reduction of the tax evasion phenomenon that can produce the opposite reaction to the above described events.

Tax evasion negatively influences state's incomes, through two mechanisms:

- a direct one, through which the tax evasion/ tax fraud directly deprive the state budget from a part of its incomes deserved according to the valid laws, by not paying the tax obligations;
- an indirect one, through determining the public central administration to increase tax rates and, implicitly, to increase tax pressure, tax resistance and dimensions of the tax evasion phenomenon within the process of state incomes formation, from which a lower volume of state's incomes.

Also, not collecting and not running on time (during the period established by the law) of the amounts that are intended for the state's budget, negatively affect the budgetary execution. Because of the system through which the amount of the budgetary incomes is established together with the necessary expenses for fulfilling state's functions, it is very important that the level of budget incomes, in a financial year, to be established as correctly as possible.

These unbalances that are amplified and, sometimes, even generated by this phenomenon of tax evasion raising dimensions, determines, compulsorily, an incorrect fulfillment of state's functions. In a market economy, still in transition and without solid economical fundamentals, the lack of correct and complete fulfillment of its functions by the states determined extremely serious negative effects at an economical, social and even political level.

To reduce the effects generated by this phenomenon, a introspection is necessary: on one side, on the taxpayers approach on his quality of tax paying citizen, and on the other side, on the tax practice that is contrary to state's interests, the one that represent the source of tax evasion actions, manifested in its two forms, licit and illicit (fraud) evasion, as a result of action or inaction of the taxpayer in rapport to the law regulation, in an instituted tax law rapport.

According to the general principle, accepted by most states, the freedom to act, awarded by the private law to its beneficiary, also creates a buckler that offers protection against the actions coming from interested thirds, such as public authorities or even law courts, knowing that an interest (or reason), even a minimal one, justifies the exercise of the right.

In this context, both opinionatedly and practically, the necessity emerged to understand and control this new concept, „the abuse of individual rights” and therewith to find the optimal intervention ways to solve this reality.

In essence, the exercise of a right is considered abusive when that right is not used as it was meant to be used but whit the intention to harm a person, authority or against goodwill.

The excessive character of right's exercise, necessary to train responsibility, implies the situation of its development by the owner in an exacerbate way, causing to thirds a prejudice more burdensome than the one that could be, objectively, created through the natural exercise of that right, in accordance with the aim for which it was recognized by the authorities and inside its boundaries. The excessive character of

right's exercise commands, *per a contrario*, the need for a proportionality balance between an owner exercising his right and the prejudice of that action eventually caused to thirds.

This approach has found an echo also in economic situations, forming into a response to the contestations appeared especially in the area of economic legislation, but also in socialist opinionated developments, as a response to the „power exaction” theory as a defense for the individual rights, concerning the relations between individuals and public authorities.

In consequence, the concept of *law misuse* developed especially in countries where the civil law is predominant. According to this concept, *no one can exercise his right in conflict with the position for which that right was accredited*. This principle represents a constitutive element for the law systems of most European jurisdictions.

It is equally true that the countries with predominant civil law are characterized by their own tax laws which, through its broad and explicit nature, imposes the analyze and qualification of rights, reason that must regularize expressly the fact that one can not abuse the right given in absolute terms because the interests of the three state powers could not be defended anymore.

Remarkable is the fact that, in time, the conception of *law misuse* developed, aligning the concept of *tax law*, most of the states recognizing the tax payer's right to run his business in such manner that his tax duty to remain minimal and thus to choose the legal forms which are, in his opinion, the most suitable for the purpose of his business.

In this context, a similitude can be observed between the law misuse and licit tax evasion or, to put it this way, a *completative* relation between the two phenomena, but one that does not lead to their identification as notions. Thus, from a fiscal point of view, the taxpayer either has a decision freedom concerning the most favorable tax situation, especially when the law is lacunary permissive, his actions being fundamented on a tax freedom principle, either, without breaking the legal specific norms and based a face lift of reality of the conducted operations by inducing some appearances as fiscally correct, benefits from tax advantages or even eluds from tax obligations, in this case the principle of fiscal legality being the one imposed.

We highlight that, no matter the forms developed by the evasion phenomenon, licit or illicit (fraud), the state loses and, as consequence, the society in general loses, while the taxpayer is responsible only for his actions.

Applying the two principles named above does not implies from the law maker a giving up to his fiscal prerogatives and the fact that the taxpayer's decisions are unlimited or unsupervised by the competent institutions. Just now we can consider ourselves situated in an area of action for the law misuse or normal gestion. These two notions have a series of common elements even thought the law misuse is exclusively founded on the fiscal interest and the normal gestion act is based on the importance of distortion between the act the company's interest. According to the definition, the law misuse represents a right being applied against its economic and social function, thus bringing a prejudice to other persons. In our law system, the rights of the natural persons are recognized in order to satisfy personal, material or cultural interests, consonant with the communitarian interest, according to the law and to social cohabitation and the rights of the corporate bodies are recognized in order to insure the continuous growth of material and spiritual wellbeing of the population, by developing the economical power of that specific country. As consequence, in case of illicit tax

evasion, the law misuse can become an overrun of the limits permitted by the law and equity principles, and, so, it is placed with the illicit actions. Such approach comes into prominence, all the more so as it was concluded that establishing norms to limit the fiscal speculations and interpretations remains an impossible desirable, a target way to far whose access road is full with obstacles derived from political, group interests or sometimes from misunderstanding of phenomenon generated by imposing improper solutions.

The theory of the *law misuse* entered the tax systems in states such as Portugal, Germany, Argentina, Nederland, France. Finding a similitude or clearly comparing the various approaches of this problem, it becomes noticeable that these can be hazardous since every measure taken reflects a background, a particular legal base. Either way, certain distinctive elements can lead to a better understanding of the most important ratios or approaches stated as principles.

Thus, in Germany and France, the reason (the intention to avoid paying for taxes) must ne accompanied by the artificiality (the abnormality) of the legal forms chosen in order to obtain economical results. According to the German approach, this last element is seen as the basis for behavior deviation from the normal course followed by a business man.

In Nederland, the concept of *fraus legis*- which, in relation to the German and French approach, does not posses a statutory expression- is used by law courts to *transform* the tax-free operations in taxable operations, when the exclusive aim of the abstraction from tax payment is combined with the real equivalent situation from an economical point of view with one for which the authorities intended to impose fiscal burden.

3. CONCLUSIONS

However, if the only reason or the predominant reason of certain operation was to avoid tax payment, the form of this operation must be cast away, since the taxpayer abused his right to use that form of the operation. Certainly, in this case, an essential distinction must be made: while in the private law, the reason of the law misuse is to protect other individual rights, in fiscal law this theory is used to protect the state's interest in the context of the taxpayer's freedom to use the legal forms of his choice for the operations that are includes in the profit maker activities.

REFERENCES

1. P. Rotaru, S. Matters of law and tax procedures, Didactic and pedagogical Seliseanu Publishing, Bucharest, 2007
2. R. Bufan si Treated as tax-party general, Ed.Luminalex, Bucharest, 2005
colecivul
3. D. D. Saguna Financial and tax law, Ed All Beck, Bucharest, 2003
4. P. Rotaru Tax law-university course, Craiova, 2008