

TAX EVASION BETWEEN FISCAL AND PENALTY

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Abstract: Although in present times a big importance is given to combating and preventing tax evasion, as well as to all tax frauds, there are, however, people who are tax evaders from the point of view of the criminal body, who manage to ease of payment of tax liabilities to the state. By imposing more drastic or lighter penalties, it is attempted to determine the taxpayer in order not to escape the payment of taxes and to commit the crime. If for the financial controlling authority a fiscal crime has a direct impact on the budget of a certain area, the fiscal action is a criminal one for the criminal authority.

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1. INTRODUCTION

Romanian and International law tries to define as accurately as possible the act that the tax authorities call evasion, and the tax auditing and punishing bodies call it an offense.

In Romania's legislation, over the years, it has been attempted to develop some normative acts that by their regulation define the deed, define it and punish it. Thus, Law no. 241/2005 on the prevention and combating of tax evasion through which several elements of novelty have been brought in to the provisions of previous laws, such as:

- The terms related to tax evasion have been specifically defined
- New offenses have been instituted
- Commitment and prevention measures have been introduced
- Many facts have been categorized as dangerous offenses.

The law was considered as a real progress. But although it brought novelty elements, it also had a number of gaps, with the fact that "there was no need for certain facts that continue to present the danger of crimes with special implications for the underground economy to be disinclined "[9]

There are two directions to the law: to require taxpayers, Romanian and foreign natural and legal persons, to comply with their tax obligations and to establish the consequences and sanctions to which those who escape from fulfilling these obligations may be exposed by their liability criminal.

Part of the acts considered to be acts of fraud of the legal provisions are provided in art. 9 of the Law 241/2005 on the prevention and combating of tax evasion:

- Hiding the property or taxable or taxable source;
- The omission, in whole or in part, of the disclosure in the accounting or other legal documents of the commercial transactions performed or of the income achieved;

- Accounting, in accounting or other legal documents, of expenses that are not based on actual operations or the recording of other fictitious operations;
- Alteration, destruction or concealment of accounting documents, tax records or electronic fiscal or other data storage means;
- Execution of double accounting records, using documents or other means of data storage;
- Avoidance of financial, tax or customs checks, failure to declare, fictitious declaration or inaccurate declaration of the principal or secondary premises of the persons checked;
- Substitution, degradation or alienation by the debtor or third parties of property seized in accordance with the provisions of the Fiscal Procedure Code and the Code of Criminal Procedure "[12]

The facts provided in art. 9 paragraph 1 of Law 241/2005 on the prevention and combating of tax evasion represents a high degree of danger provided that the damage exceeds EUR 100000 or EUR 500000, as the case may be, calculated in the equivalent of the national currency.

Infections related to the principal offense of tax evasion may consist, for example, in the "act of the taxpayer who does not intentionally or mistakenly rebuild the destroyed accounting records within the timeframe included in the control documents" [12]

In a state governed by the rule of law, the tax authorities affiliate with the taxpayer's good faith in declaring the actual income he / she registers. When the taxpayer feels that the taxes and charges he is payable are too difficult to bear and that they adversely affect his / her personal budget, he / she carries out inappropriate fiscal behavior, which has, besides tax consequences and criminal consequences .

In order to achieve such behavior, taxpayers, being determined by tax interests, resort to various methods of scrutinizing law and increasing their own budget. It is precisely this kind of fact that leads to the emergence of the escapist phenomenon, which results in a negative influence of the state budget.

Tax evasion has been defined as the phenomenon of whipping, in whole or in part, from the imposition of taxable material. This evasion takes place in various ways, such as: interpreting the legal provisions in such a way as to favor the taxpayer, by concealing the taxable object by undercutting its value, or simply by directly and deliberately violating those provisions.

There are authors who claim that there are two kinds of tax evasion: licit and other illicit. Tax evasion is the way the taxpayer understands to take advantage of legislative and tax measures that give him various advantages. Depending on the legislation in force, the taxpayer may benefit from tax benefits. The so-called legal tax evasion is the tolerated form, admitted by the legislator in the sense that, in the absence of express legal norms to criminalize it, it can not be sanctioned [8]

Unlawful tax evasion is grammatically a plea, because the very fact of tax evasion has a negative connotation. By defining unlawful tax evasion, we are talking about the act by which a taxpayer escapes from paying taxes and taxes by means of more or less legal ways, thus pre-judging the budget and implicitly the state budget.

2. DEFINITION OF TAX EVASION:

With the passage of years, taxpayers have developed more and more ingenious methods that they have often managed to escape from paying their contributions.

Considering this, it has been noticed that the number of people who commit tax evasion is increasing. In this way, this kind of tax fraud tends to become a mass phenomenon, which, although trying to be defined as precisely as possible in order to fight as well as it is, is far from being eradicated.

One of the most common definitions of tax evasion is: "the evasion of taxes and duties on taxable income and assets subject to taxing taxation" [2]

"In a global approach, tax evasion is the central vector of the underground economy which, in interaction and interdependence with the other components of economic and financial crime, gives the true amplitude of the informal economy" [7]

The Ministry of Public Finance, in the framework of the working norms it has developed, defined the phenomenon of tax evasion as "total or partial extinction by some taxpayers, individuals or legal entities, in various forms, from the payment of obligations towards the budget".

3. EVASION OR TAX FRAUD

3.1 TAX FRAUD

Considering the two terms of tax fraud and tax evasion as synonymous, the authors considered these terms to have several meanings:

- 1) the notion of tax evasion is included in the fraud
- 2) tax evasion is "the art of avoiding falling into the field of attraction of the tax law"
- 3) all the actions by which a person fails to pay the tax obligations.

Among the most common ways of avoiding tax payments are: the law provides for the facilitation of tax evasion through a fiscal loophole, the taxpayer's refusal to pay its tax obligations properly, and the easy use of fiscal gaps.

It is scandalous that when a taxpayer's income is known / visible, the tax authorities do not make use of this income, but rather do not see what is evidenced. In this way, the taxpayer takes advantage of the same situation, quiet of the fact that no state body is aware of it, nor will it actually declare the revenues. Thus, the crime of tax evasion becomes a continuous one, sometimes taking unimaginable proportions. In this way, there are many people in our country who have made huge fortunes, but if they are cracked they can not justify their income.

The effects of this manifestation have a concrete impact on the economic and social system. All this is possible because of the oscillations both on the political and the fiscal level. The turning to power of the various political forces, which each come with a system of socially-political governance, has led to a disregard for the fiscal and social values, now reaching the momentum laws, not long term .

Tax policy, which can not have a structure in line with the level of taxpayers' income, with the level of state budget expenditures, with a determined state strategy in economic development, can be considered guilty of all these gaps in the tax system .

A system that assists such manifestations only serves to support injustice and help to generate other tax offenses that will negatively affect the state budget system. Moreover, the financial crisis of 2009-2010 has had a great impact on all taxpayers, so their financial strength has increased.

3.2 TAX EVASION

Tax evasion occurs both at the level of the small taxpayer of the economic agent, but also at the macroeconomic level. This occurs when errors or intentional omissions of important income sources that can be subject to taxation under an appropriate tax system are omitted.

Tax evasion directly influences executive factors especially during periods when the budget records imbalances, thus reaching the issue of covering the social needs and the social system whose activity is financed by the state budget.

Tax evasion, though apparent, is difficult to detect and quantify. The fiscal body can quantify at a small level, but at a high level it is difficult.

It is constantly being sought and studied ways of preventing and combating tax evasion both at the level of the tax authorities and at the state-governmental level.

At the state budget level, the impact of tax evasion can be seen through the fiscal results at the end of the fiscal year, through the budget deficit.

It is precisely for this reason that the strengthened gross debt of the public administration of many countries affected by the financial crisis is on the rise. And in the case of Romania this is a visible increase year by year.

Sometimes there is a big difference between how local budgets and the state budget are managed. There are local policies that are well thought out and that spend money at the state budget regularly. Such local budgets, albeit few, actually support the budgetary need of the entire state.

A statement of total tax and social income (including imputed social contributions) after deducting assessed amounts but unlikely to be collected in Romania as well as in nearby countries can be seen below.

Table no. 1 Total income from taxes and social contributions (including imputed social contributions) after deduction of assessed but unlikely amounts collected.

GEO/TIME	2009	2010	2011	2012	2013	2014	2015
Bulgaria	7.102,8	7.053,9	7.324,9	7.960,3	8.326,9	8.361,6	9.130,0
Czech Republic	32.867,3	35.181,7	38.707,6	38.730,0	38.171,9	36.418,3	39.646,9
Croatia	8.967,6	9.109,1	8.749,2	8.849,0	9.032,1	8.730,8	9.351,3
Cyprus	4.341,9	4.486,6	4.597,1	4.529,4	4.226,4	4.281,7	4.233,2
Latvia	2.462,6	2.408,0	2.761,9	3.183,0	3.359,0	3.549,4	3.716,9
Lithuania	4.695,4	4.571,7	4.949,1	5.294,6	5.568,0	5.905,0	6.359,9
Hungary	22.873,6	23.176,7	21.964,8	23.148,0	23.327,7	24.470,4	26.045,9
Poland	53.170,6	62.954,9	66.644,4	65.492,6	64.995,1	67.438,3	70.918,2
Romania	20.123,1	21.864,6	23.947,7	23.507,7	25.205,1	26.651,0	29.997,2
Serbia	7.104,1	7.020,0	7.641,6	7.333,9	7.756,2	7.698,2	8.105,8

Source: Eurostat, GDP and main components (output, expenditure and income)

In order to assess the magnitude of the tax evasion phenomenon, as well as its implications for the national economy and the social side of society, it is necessary to look at the statistical situations and the evolution of the main macroeconomic indicators.

Here are the figures registered at Eurostat, for Romania in the months of October 2016 - March 2017:

Figure 1: Output

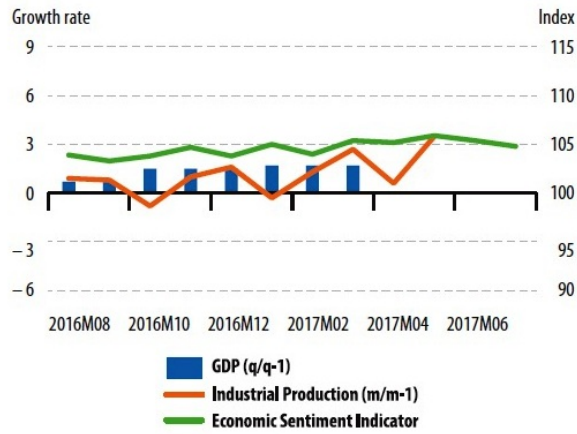


Figure 2: Demand

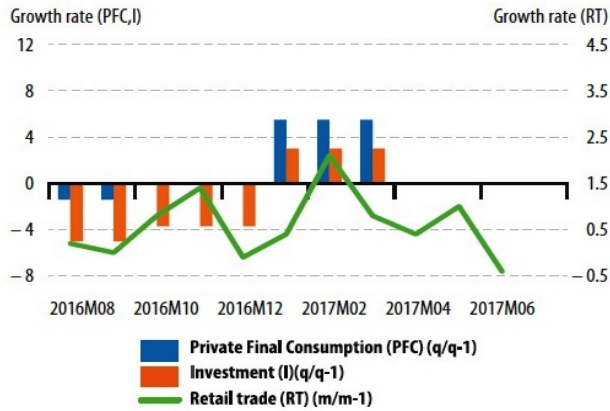


Figure 3: Labour

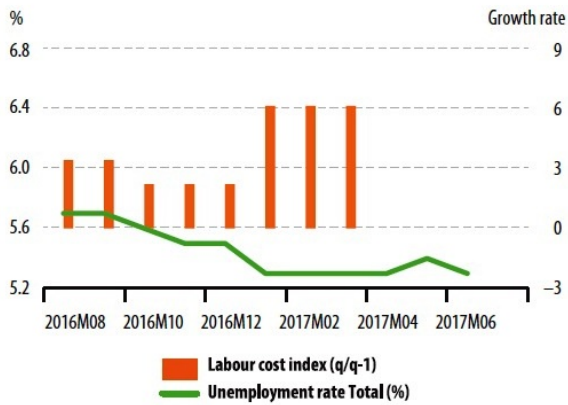


Figure 4: Prices

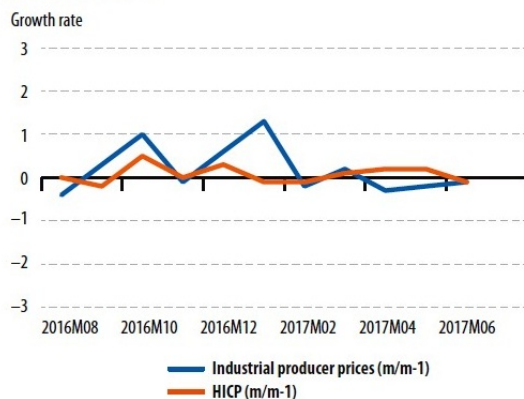


Figure 5: External transactions

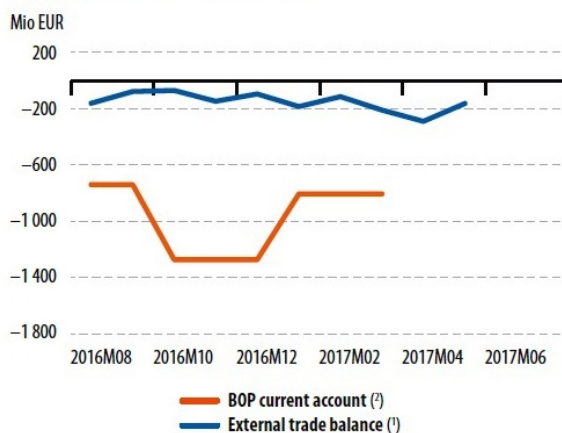
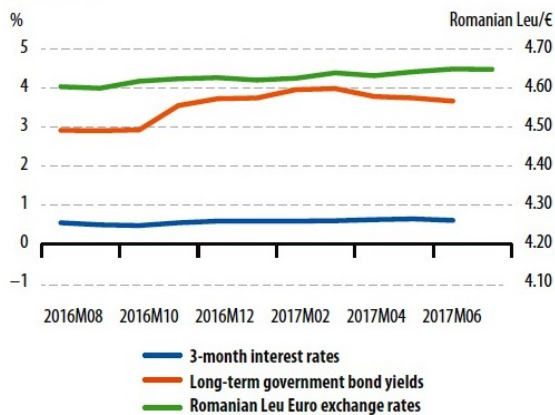


Figure 6: Financial



4. CAUSES THAT FAVOR THE ACT OF TAX EVASION:

In order for the phenomenon of tax fraud to be combated, it must be fully understood. This is why the Romanian and foreign authorities are trying to develop methods that are most effective in order to prevent the defendants from seeking illegal methods to circumvent the law.

For each tax evasive taxpayer, the cause that causes him to commit such an act is another. If some people react negatively to the coercive action imposed by the state, other people consider that the result of the work done is right and considers that there is no one entitled to use the outcome of the work.

"Given that tax fraud is circumscribing the phenomenon of criminality in the economic and business sphere, the determining factors in its genesis are circumscribed to the causality specific to the indicated segment" [10].

4.1 THE EFFECTS OF TAX EVASION ARE

- financial effects
- social effects
- political effects

Financial Effects

It is the main effect of tax evasion. Failure to pay tax offenses directly complies with the budget. If the state budget does not collect the sums foregone to collapse, it is difficult for the state to be able to bear the payment of the necessary financial resources for the functioning of the main basic functions of the state.

Social Effects

At the social level, it is influenced before any taxpayer's behavior. If this observes that other people are violating the law and nothing happens to them, he concludes that he has nothing to happen to. Thus, it makes use of facts that influence to a small or large extent the state budget.

It comes to the situation where the higher the taxpayer's income, the more the damage to the state budget is. Another possibility to influence socially is that the state budget, as a tool for achieving socio-economic objectives through various subsidies and tax incentives, can no longer support such objectives.

These are intended to stimulate the activity of economic agents and all taxpayers or to engage in certain social categories.

Because of the high degree of tax evasion, the Romanian state is even hitting this situation right now. Increased tax evasion leads to a considerably reduced budget, government programs can not be met, and underprivileged social categories can no longer be helped.

Political effects

When a government is in office, it presents a program that covers all levels, from social to economic, from political to state. Even if some of the citizens of the country do not support the program, there is a need to respond as much as possible to the legal provisions for the program to work.

Social inequity brings taxpayers' mistrust into a public system that proves to be inefficient and inevitably draws mistrust in political forces.

4.2 CLASSIFICATION OF TAX EVASION

Tax evasion is classified according to several criteria, as follows:

- Depending on who does the act we meet:
 - tax evasion by taxpayers
 - tax evasion by legal persons
- Depending on the criterion of matter
 - fraud by concealing taxable income
 - fraud by increasing deductible expenses and decreasing taxable income
 - fraud committed by the taxpayer's inaction - prefers not to pay any contribution, perhaps not observed by the tax audit bodies
- Depending on the category of taxable income
 - tax evasion when income is artificially diminished
 - evasion at the time of payment made by fireworks by passing goods that are marketed from a category for which a higher tax is payable to a less taxable category.
- From a quantitative point of view
 - tax avoidance tax evasion by small taxpayers, small businesses
 - industrial tax evasion, which is done by a well-organized group that manages to drain considerable amounts from the state budget
- From the point of view of the aliplicated sanction
 - tax evasion sanctioned administrative / contravention, such as late payments for amounts owed to the budget
 - tax evasion sanctioned for criminal acts that are considered as crimes and are punished according to the Criminal Code.

5. FORMS OF TAX EVASION ACCORDING TO THE MODE OF OPERATION

The use without right of special-purpose documents (tax invoices, consignment notes, receipts):

- sale of alcoholic beverages by the use of illegally or forged bands;
- justifying the provenance of goods during transport with fiscal documents that do not come from real suppliers;
- lowering the tax base or requesting VAT refunds by entering unrealistic expense on the basis of documents issued on behalf of phantom companies;
- production of excisable products outside authorized fiscal warehouses;
- Establishment of trading companies having as associates citizens (in some foreign cases), for the purpose of externalizing to them debts to the state budget, debts that will never be paid;
- transferring the social parts of commercial companies with debts to the state budget, to foreign citizens who, once they take over the society, leave the territory of Romania;
- recording fictitious expenses by creating unrealistic circuits of service-related documents (management, marketing, know-how, consultancy, etc.) which can no longer be quantified or identified because offshore companies or "phantom" firms - nonexistent in terms of commercial activity;
- outsourcing the profits registered by some businesses to micro-enterprise companies that benefit from a fairer tax regime;
- not to declare all transactions made in the community space;
- the interposition of several companies in the transactions, the tax obligations being taken over by a missing trader.

6. FIGHTING TAX EVASION:

Both in Romania and internationally it aims at combating tax fraud in its entirety. This has not been entirely successful. States at national level, but also in collaboration with other states, try to prevent by this means the best way to solve this kind of problem.

Given that Romania is a member of the European Union, which imposed annuity conditions with the intent, it tried to step up the fight against fiscal fraud, both through the fiscal and legal system and the implementation of the European directives.

Strategies envisaged by Romania include:

- Developing a concrete strategy to prevent and combat tax evasion,
- greater use of information used by third parties,
- elaboration and use of tax returns for pre-filled taxpayers,
- ensuring and making concrete efforts by specific bodies to reduce the underground economy.

It also tried to implement the Commission's recommendations on tax havens and aggressive tax planning.

A fiscal legislative measure was that of updating the Fiscal Code and the Fiscal Procedure Code, which came into force on 1 January 2016, introducing new provisions aimed at a better reform of the financial system.

Through its attempt to combat fraudulent fraud and evasion as much as possible, Romania has restored the scheme of organizing the Administrative system by setting up new structures to fight tax evasion.

Among these large new structures are also included: The General Anti-Fraud Directorate is a structure without juridical personality, with tasks of preventing and combating acts and deeds of tax evasion and tax and customs fraud.

Another structure is the Anti-Fraud Department - DLAF is organized as a legal personality structure within the Government's working apparatus, coordinated by the Prime Minister, financed from the state budget through the budget of the General Secretariat of the Government.

DLAF is the contact point of the European Anti-Fraud Office - OLAF within the European Commission and Anti-Fraud Coordinator.

It is precisely from this point of view at the level of the European Union that it is desired to set up common databases from where autochthonous and European authorities can get information on taxpayers' tax activity.

It is possible for taxpayers to check whether they pay their tax obligations or evade, trying to develop businesses in tax havens that facilitate certain financial advantages.

6. THE CRIMINAL SIDE OF TAX EVASION:

The incriminating text of tax evasion crimes "constitute tax evasion offenses and are punished by imprisonment from 2 years to 8 years and the prohibition of certain rights in the following acts committed for the purpose of circumventing tax obligations", regulates a number of 7 ways, which broadly develops the objective side for each of the tax evasion offenses separately, completing these duties, taking into account also the subjective side qualified by the legislator by regulating the special purpose of these offenses, respectively the avoidance of the tax obligations.

Over time, the question arises whether the judge judging the offense can also judge the offense, which directly damages the state budget. The courts had different views on the criminalization of tax facts, both from a criminal and a civil / fiscal point of view.

For this reason, in the Official Gazette no. 875 of 23 November 2015 was published Decision no. 17/2015 of October 5, 2015, pronounced by the High Court of Cassation and Justice, the competent body to judge the appeal in the interest of the law, file no. 14/2015.

In this case the appeal was settled in the interest of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the way of solving the civil side in the case of the conviction of the defendants for the tax evasion offenses stipulated in the Law no. 241/2005 on the prevention and combating of tax evasion, with the subsequent modifications, in the sense of clarifying whether, disengaging the civil action, the court will order the indictment of the convicted person for committing these crimes:

- either pay pursuant to the provisions of the Fiscal Procedure Code the principal obligation and the related penalties
- either pay pursuant to the Civil Code the principal claim due and the legal interest related to this claim

Dissenting on the arguments brought by both the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and the requests of the Courts in the country, the High Court of Cassation and Justice through the Competent Chamber to judge the appeal in the interest of the law has resolved the appeal so:

"Admits the appeal in the interest of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and, as a consequence: In the unitary interpretation and application of the provisions of art. 19 of the Criminal Procedure Code establishes: In criminal cases having as object the tax evasion offenses stipulated in the Law no. 241/2005, the court, resolving the civil action, orders the defendant convicted for committing these offenses to pay the amounts representing the main tax liability due also to the payment of the amounts representing the fiscal tax liabilities due, according to the Code of fiscal procedure." [12]

By imposing greater punishments and by bearing both these criminal and criminal penalties, the authorities want a revival of the tax system.

However, taxpayers resort to increasingly ingenious ways to circumvent the law. Repercussions are indeed fiscal, but in the long run the state budget suffers. Taxpayers become condemned criminals who, through conviction, have to commit an offense, which is often deprived of liberty. Thus, the state budget suffers from two parts, on the one hand, that this bad taxpayer must be offered living conditions in the penitentiary, thus becoming a person maintained from the state budget, and on the other hand this person from the taxpayer becomes a sustained person. A taxpayer sentenced to a custodial sentence can no longer produce, so he can no longer pay tax charges. Instead it becomes a consuming consumer in the state budget, a sustained budget, thus, more difficult for other taxpayers.

Unfortunately, the number of taxpayers who pay their current tax obligations is rising. It is sad that the most conscientious taxpayers are precisely those who have relatively small incomes, but which of these incomes also bear these expenses.

Large taxpayers or taxpayers who have high enough incomes to accommodate all budget needs understand how to use ways to evade. The higher their income increases, the

need grows, so the idea of giving up their own welfare at the expense of the state is not embraced by such taxpayers.

There must be in the consciousness of every citizen that he has both a moral and a financial obligation to the state that rotates it. There should be no different forms of punishing the facts or non-deeds a taxpayer does.

The European directives are trying to halt the evasion phenomena as much as possible. Seen at a higher level, they give rise to certain criminal networks by the birth of organized groups that commit more and more serious crimes and have major repercussions on the state budget.

Romania tries as much as possible, both by its own means, through the elaboration of lawmakers, and by signing some international pacts, to take the lead and to combat the so-called tax evasion phenomenon so present in the national economy.

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