

TAX EVASION – A MORE AND MORE CONTROVERSIAL CONCEPT

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1. General considerations

Tax evasion is a mass phenomenon, a "scourge" of the economy that, although it was carefully studied and analyzed by theorists and practitioners, is still vaguely defined, dominated by conflicting views.

Use of the term, "tax avoidance" seems currently very common, both in everyday language and in the vocabulary reserved for specialists in tax matters. Furthermore we find it used both in our country and in most foreign countries where you can find an equivalent translation.

Definition of tax evasion and especially its delimitation into legal tax avoidance and tax evasion were the subject of studies conducted by specialists, justified by the need for understanding the dimensions and implications of this phenomenon at international and national level and, on this basis, to establish the most effective actions and measures to prevent and combat it.

2. Difficulties in addressing the concept of tax evasion

Most commonly, tax evasion is defined as avoiding the payment of taxes on income and property acquired that must go under taxation.

According to the Oxford dictionary tax evasion is, " minimize tax obligations legally and by means of full disclosure to tax authorities; financial

business arrangement to reduce obligations under the law"¹.

Carmen Cordunescu, in "The tax system in finance science" states that " tax evasion means taxpayers' avoiding to pay their respective tax obligations, either partially or completely, using legal loopholes or using clever maneuvers, in order to hide taxable material "².

The difficulty of addressing the concept of tax avoidance is amplified by the diversity of words used to describe the same phenomenon: the taxpayers evading payment of their budget obligations to the state.

Thus according to Nicholas Hoanță, "if indeed speaking of fraud, they speak at the same time of legal or legitimate fraud, illegal fraud, international tax evasion, tax fraud, illegal tax evasion, tax havens or refuges, by abuse of the right to run the tax, the freedom to choose the least impressive track or underestimating tax, law fraud or fraud economy "³.

Jean-Claude Martinez, a reputed French specialist highlighted in the work "La fraude fiscale" that the term 'tax avoidance' is included in the 'avoidance' and thus tax evasion would be "the art of avoid falling into the attraction field of tax law "⁴.

¹ I. Cristea, Tax Evasion. Assessments and interpretations, Journal of Public Finance and Accountancy, no. 4 / 2008, p.10

² C. Cordunescu, Tax system in finances' science, Codecs Publishing, Bucharest, 1998, p.117

³ N. Hoanță, Tax evasion, Tribune Publishing, Bucharest, 1997, p. 214

⁴ JCMartinez, La fraude fiscale, Ed Dalloz, Paris, 1985 - cited by DAP Florescu, P. Coman, G.

Similarly, M. Duverger considers that tax evasion designates “all manifestations of tax escape”⁵.

Unclearness of vocabulary is, moreover, aggravated by comparisons between countries, because the names used differ. Thus, in Anglo Saxon countries the term “Tax Evasion” is used to define tax avoidance and “Tax Avoidance” is used to define tax evasion.

3. “Legal” tax evasion vs. tax fraud

One of the most delicate issues regarding definition of tax evasion refers to its delimitation into legal tax avoidance (lawful) and illegal tax avoidance (illegal, tax fraud).

In many cases, it is considered that tax fraud is a crime against law and is different from tax evasion, which would be a clever use of the opportunities offered by law.

It is significant in this design the opinion of authors C.V. Brown and P.M. Jackson, that tax evasion (tax avoidance) is a “legal reorganization of a business so as to minimize tax liability”, and tax fraud (Tax Evasion) is “an illegal business arrangement for the same purpose”⁶.

In this view, tax evasion would mean to minimize taxation through knowledge and consideration of all real possibilities offered by the law, and tax fraud would be determined by the concern of the taxpayer to abandon, ignore, circumvent, and disregard the provisions of tax legislation.

Unclear definition of tax fraud comes from the distinction that is sometimes made between the so-called

legal fraud and illegal fraud. Legal fraud, which is a metaphorical and ambiguous phrase, is commonly used in francophone countries (France, Switzerland, and Belgium).

It has a dual meaning. Sometimes this means underestimating taxable material through certain courtesy tax regimes. Most often, however, legal fraud appoints legal processes that allow the escape of taxation without breaching the law.

Some authors⁷ assessed that there are no great differences between legal tax evasion and legal tax avoidance, since both concern the taxpayer action to avoid the law, use unexpected combinations of laws and are so, “tolerated” by oversight.

Ambiguity and diversity of meanings regarding tax evasion has gone so far that in the specialized literature legal tax evasion and illegal tax evasion were defined separately.

Thus, the specialized literature of Romania established, based on legality, compliance with tax laws or not, two words to describe forms of tax evasion: lawful tax avoidance (legal) and illegal tax evasion (tax fraud).

In this respect, it is stated that if circumvention from accomplishing tax obligations would be done by interpreting tax laws in favor of the taxpayer, then we are in the state of legal avoidance, and if evasion results from infringement of tax law this would be illegal evasion.

Typical activities of tax evasion (fraudulent) imply for the taxpayer decision making under uncertainty, while tax avoidance (lawful) implies safety for the taxpayer when he makes certain tax related decisions, although this too may involve some frustration generated by the intention of finding a low taxation.

In practice, however, is very difficult to distinguish lawful from the fraudulent tax evasion, so that between

Balasa, Taxation in Romania, All Beck Publishing House, Bucharest, 2005, p. 118

⁵ M. Duverger, “Finances publiques”, Press Universitaires de France, Paris, 1965 - quoted by N. Hoanță, “Tax evasion, Tribune Publishing, Bucharest, 1997, p. 218

⁶ C.V. Brown, P.M. Jackson, Public Sector Economics, Eclition, Basil Blackwell, Oxford, 1982, p.227

⁷ I. Cristea, Tax Evasion. Assessments and interpretations, Journal of Public Finance and Accountancy, no. 4 / 2008, p.10

legal and illegal is not a rupture but rather a continuity, successive attempts to exploit loopholes in the law leading the taxpayer from legal to illegal.

Under this sense, it can be argued that in the economic space, there are three categories of taxpayers, "one, those totally honest (white); another one of those totally dishonest (black) and a gray one, of those which escape either legitimate by skill or illegal by acrobatics or law abuse.

According to the diagram below (Figure No. 1) one can identify three areas in which taxpayers can act in order not to fulfill the tax burden. as taxpayers drag the error, the use of tax options, from simple abstinence, the skillful use of texts law or abuse of tax laws, qualified fraud. Thus, taxpayers slide from error to the use of tax options, from simple abstinence to the skillful use of law texts or from abuse of tax laws to qualified fraud.

Given the degrees of illegality, the only form of tax evasion that, according to gravity, is considered contravention or crime, being punishable as such, is the one situated in the illegal area that is fraudulent tax evasion or tax avoidance. Gray area is located between legal and illegal, its delimitation being practically not easy to trace.

As concrete ways to avoid tax that involve, undoubtedly, will and intention of the taxpayer, are tax evasion, based on fiscal ability by using the tax system loopholes and tax laws'

imperfection, and tax evasion by abuse of law.

This form of tax evasion means the conclusion of legal arrangements between various business partners in order to reduce the tax burden.

In Anglo-Saxon countries such arrangements are tested for "reasonable business purpose" (reasonable commercial interest), after which the objective of the arrangement is established. If it is found that it was a purely fiscal arrangement, the unenforceability of that legal act is declared.

Other ways to avoid or reduce the tax, falling in the lawful area, are the taxpayers' failure to perform or carry out certain activities. This is frequent in case of excessive taxation and in case of usage of courtesy tax systems in which even the tax law provides evasion, as in the case of evaluation of taxable lump of matter.

Tax evasion may occur as a result of errors caused by ignorance or misinterpretation of laws. In practice, however, it is difficult to distinguish unintentional error from a conscious decision made in order to reduce tax.

Furthermore, the multiform notion of tax evasion has a content whose variable geometry prevents drawing precisely a net distinction between acts in accordance with the law and acts contrary to law. Therefore, the limit between "legitimate" and "illegitimate" forms of tax avoidance may only be drawn from case to case.

Figure no. 1. Fraud and tax avoidance: the degree of illegality

ILLEGAL AREA	<ul style="list-style-type: none"> ▪ FRAUD
GREY AREA	<ul style="list-style-type: none"> ▪ ABUSE OF RIGHTS ▪ TAX SKILLS
LEGAL AREA	<ul style="list-style-type: none"> ▪ ABSTINENCE ▪ ENFORCEMENT OF COURTESY TAX REGIMES ▪ ERROR ▪ LAW ENFORCEMENT

Source: JC Martinez, "The tax evasion, Dalloz Publishing, Paris, 1985, p.11

Most national laws refer to illegal tax evasion and punish it. Thus, in France the Book of tax procedures represses tax abuse. Germany's tax code provides that tax cannot be avoided by the taxpayer and that it cannot be reduced by abuse. Similar provisions are found in Belgian, Dutch or Swiss tax law, to prevent abnormal procedures used in order to clearly reduce the tax burden.

According to the authors D.A.P. Florescu, P. Coman and G. Balas, "the synthesis of the term tax evasion can be achieved from two complementary legal principles: the principle of legality of the tax and the principle of fiscal management freedom.

Principle of legality allows us to delimitate the avoidance from fraud. Thus, Tax Evasion is a distinct concept, and requires the analysis of two situations: On the one hand, the fiscal option or what the Anglo-Saxons called tax planning and, secondly tax evasion itself known in the Anglo-Saxon terminology as tax avoidance.

The latter is a situation outside the law that means it is neither tax permitted by tax law, nor directly encouraged, such as tax options. Tax evasion is not expressly prohibited by law, such as fraud, and so it lays both in the authorized area and prohibited area ".

4. Conclusions

In our view, attempts to define the concept of tax evasion, and especially its dissociation into lawful and unlawful tax avoidance (tax evasion) are necessary and useful, at least in theory, for estimating the phenomenon on both forms of expression.

This dissociation helps to raise various policy makers and those administrative in seeking appropriate means to limit and control this phenomenon.

Although such a distinction seems superfluous, because once it is criminalized, any tax evasion means the brake of law, so it is unlawful, in terms of

theory it can be argued such a distinction.

Thus, legal tax avoidance would be considered tax evasion that manages to avoid payment of budgetary obligations (in whole or in part) by exploiting some "loopholes" in law.

We believe that the arrangement legal possible combinations is rather a manifestation of the tax consultant, individual understanding based on knowledge and interpretation of tax laws or tax reference. We could say that this is a matter of tax engineering, in its positive meaning, of technology of processing statutory tax information in order to maximize the taxpayer's tax advantage.

Legal tax evasion is a tax evasion targeting not the effectiveness of damage the financial interests of the state but rather concerns the potentiality of such harm. Indeed, if tax evasion is made without the law infringement, it follows logically, that the timing of budget revenues has not taken into account budgetary revenues that could not be collected because of tax law provisions.

This being so, the financial interests of the state were not actually harmed. In this situation, we believe the concept of legal tax evasion is a concept that is denoted, so it is an artificial semantic construction that should be abandoned. On illegal tax evasion (fraud), we appreciate that this is the only tax evasion form, as it is done by defeat of the tax law.

In this sense, the term "illegal tax evasion" is a redundancy, because tax evasion is illegal by definition.

We appreciate that although the distinction between legal tax avoidance and tax evasion is widely accepted, in theory it was shown that drawing a border between the two forms of tax evasion is a relative and arbitrary approach, because there is continuity between them and the line of distinction is extremely fragile, very often being artificially drawn.

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