

TAX EVASION FROM LEGALITY TO OFFENCE

Sebastian GUT

University of Agronomic Sciences and Veterinary Medicine Bucharest, 59 Marasti Boulevard,
District 1, 011464, Bucharest, Romania, Phone: +40213182564, Fax:+40213182888, Mobile:
+40770460571, Email:gutsebi@yahoo.com

Corresponding author: gutsebi@yahoo.com

Abstract

Tax evasion is the most widespread national and international economic crime and occurs by avoiding, in bad faith, the payment of taxes or by changing the information to be reported to the authorities, all of these with the purpose of diminishing the revenues and profits or of artificially increasing the expenses. By tax evasion, the natural or legal person has a direct intention to commit the offence, because he/she plans it and pursues to obtain a profit from this activity. The fight against tax fraud is becoming a priority in Romania, because tax evasion has an impact on the public services, it fraudulently appropriates public funds and delays the economic growth. This paper tries to indicate the causes of this type of offence, and also methods, statistics and prevention measures.

Key words: tax evasion, offence, fight against, public funds

INTRODUCTION

The idea of tax fraud or tax evasion has been a constant concern of the specialists as regards the diminishing of this phenomenon, by successively amending the laws and by developing an investigation methodology in order to promptly react to discover, investigate and fight against the phenomenon. The economic and financial crime is an ongoing phenomenon, continuously evolving, because the offenders discover sophisticated methods to use in order to avoid the law and to cover their criminal tracks, giving a legal appearance to their businesses and acquiring illegal financial resources. The most important law on the prevention and fight against tax evasion is Law 241/2005, as amended and supplemented, with the addition of the Fiscal Code, the Fiscal Procedure Code, and the Customs Code, with the related implementing acts.

Tax evasion is based on several factors: faulty laws, lack of clarity in levying taxes and duties by the financial authorities, taxpayers' behavior and corruption of public servants [3, 4].

As regards the law, tax evasion has two meanings, a strict meaning and a wide meaning [11].

„*Lato sensu*, tax evasion represents the avoidance by taxpayers of paying taxes or tax liabilities to the general government balance, including the payment of customs duties;

Stricto sensu, tax evasion represents the avoidance by taxpayers of paying taxes or tax liabilities to the general government balance, excluding the payment of customs duties”[4];

Some experts differentiate between two categories of tax evasion, according to its features:

-Legal (licit) evasion;

-Illegal (illicit) evasion.

Others do not agree with the name „legal evasion”, suggesting that it should be named „tax optimization”, because they do not consider that suspicion of evasion exists, because these facilities are allowed by the law and are not made in bad faith; they are rather an avoidance of paying the general tax liabilities. This type may be associated with the creative accounting the procedures of which it uses and which are based on the accounting regulations, but uses the faults of accounting standards and the mechanisms that are made available to the specialists in order to change the information they present in the financial statements [9].

The illegal tax evasion is more widely spread than the licit evasion, some estimate that it exceeds with 15% the GDP of the country.

As regards the territory, some may classify tax evasion as follows:

- National tax evasion;
- International tax evasion.

In turn, this type of offenders may be classified in several typologies or categories. Some use complex financial methods, while others act primitively or in a rudimentary manner.

Specific for tax optimization is that the natural or legal person does not hide the source or the tax liability, but, in compliance with the law, he/she/it manages to avoid the payment of some taxes, contributions or duties or to diminish these liabilities for the state or local budget.

There are multiple causes that promote **the licit or legal tax evasion**, and here are some:

- Granting of tax expenditure such as total or partial exemption from payment, tax mitigation, deductions (for example, social security charges - 5% of the total salary costs are nontaxable; food expenses, expenses related to the use of company houses, contributions to the private pension funds in amount of 400 EUR/employee/year incurred by the employer, voluntary sickness insurance premiums in amount of 400 EUR/employee/year incurred by the employer; 50% as deductible expenses for the personal use of the company car; delegation allowance)

- Salary tax exemptions for the IT field;

- Exemptions for the employees in the construction field (precautionary labor contribution (Romanian: CAM), deductions for social security contributions (Romanian: CAS), exemptions from tax on salary, exemptions from the payment of the contributions to the health insurance (Romanian: CASS)

- Granting of some temporary exemptions, in case of newly established companies;

- Growth which is economically unjustified by unregulated general costs incurred by the companies;

- Taxation of higher than the average wage incomes as they were average wage incomes for the benefit of those with higher than average wage incomes, through non-payment of taxes resulting from this difference;

- Accelerated depreciation leads to a higher depreciation than the one resulted from the wear and tear allowances on fixed assets, by diminishing the corporate tax;

- The possibility to change some employees in self employed by the conclusion of consulting agreements or service agreements, by diminishing the costs incurred by the employer for the labor contract;

- Removal from the scope of taxation of incomes resulted from bank deposits and of investments in state bonds;

- Exemption from the payment of import and export duties for some categories of goods and services;

The illicit tax evasion is detailed in art. 3-9 of Law no. 241/2005.

The offenses involving concrete methods of avoiding the payment of tax liabilities are provided in art. 9. and the related crimes of attempted tax avoidance and fraud related to the failure of taxpayers to pay their tax duties correctly are provided in art. 3-8 [13].

„-Art. 3. The taxpayer, with intent or willful misconduct, fails to restore the damaged accounting records within the period specified in the audit reports;

- Art. 4. The unjustified refusal of a person to present the legal documents and the business assets to the competent authorities in order to prevent the financial, fiscal or customs controls, within 15 days at the most from the letter of notification;

- Art. 5. Preventing, in any way, the competent authorities from entering, by observing the law, the premises, locations or lands, for the purpose of carrying out financial, tax or customs audits;

- Art. 7(1). Withdrawal of some rights - Holding or putting into circulation, without right, of stamps, bands or standardized forms used in the fiscal field under a special procedure;

- Art. 7(2). Withdrawal of some rights - Printing, using, holding or putting into

circulation, knowingly, of counterfeit stamps, bands or standardized forms used in the fiscal field under a special procedure;

-Art. 8(1). Withdrawal of some rights - Calculation, in bad faith, by the taxpayer, of taxes, duties or contributions, resulting in obtaining, without right, of amounts of money as reimbursements or returns from the general government balance or compensations due to the general government balance.

-Art. 8(2). Withdrawal of some rights - Collusion in order to commit the act stipulated in paragraph (1);

-Art. 8(3). The attempt to commit the acts provided for in paragraphs (1) and (2);

-Art. 9(1).

a) Concealment of taxable or dutiable asset or source;

b) Failure, in whole or in part, to record in the accounting or other legal documents, the business transactions performed or the revenues obtained;

c) Recording, in accounting or other legal documents, of expenses that are not based on real transactions or recording of other fictitious transactions;

d) Alteration, destruction or concealment of accounting documents, of memory banks from the fiscal electronic cash registers or of other data storage means;

e) Keeping of double accounting records, using documents or other data storage means;

f) Avoidance of financial, tax or customs audits by the failure to declare, the fictitious or inaccurate declaration of the main or secondary offices of the audited persons;

g) Substitution, degradation or transfer by the debtor or by third parties of the assets seized according to the provisions of the Fiscal Procedure Code and of the Criminal Procedure Code.

(2) If the acts provided for in paragraph (1) caused a prejudice of more than EUR 100,000, in the national currency equivalent, the minimum and maximum limit of the penalty provided by the law shall be increased with 5 years.

(3) If the acts provided for in paragraph (1) caused a prejudice of more than EUR 500,000, in the national currency equivalent,

the minimum and maximum limit of the penalty provided by the law shall be increased with 7 years [7] [5].

The control activity within the companies could play an important part by identifying in due time the problems they are facing and by offering the decision maker operative and relevant information regarding the main issues of the company or of the managed assets [8].

MATERIALS AND METHODS

This paper is based on the analysis of the statistical data from the National Statistics Institute and the Ministry of Justice and the investigations made during the period 2013-2018. The results are also based on the analysis of the activity of the Prosecutor's Office attached to the Bucharest Court of First Instance in 2017, as regards the economic and financial offences.

The analyzed indicators are the following:

- **At the level of the courts of law**, as regards the money laundering offences, a total of 903 case files have been registered, with 419 case files being disposed of, and, as regards the tax evasion offences, in the same period, a total of 23,363 case files have been registered, with 13,574 case files being disposed of.

- **At the level of the Prosecutor's Office attached to the Bucharest Court of First Instance, in 2017**, for tax evasion offences, 20 indictments have been drafted, compared to 31 indictments in 2016, 60 defendants being indicted, compared to 51 in 2016; as regards the money laundering offences, 9 indictments have been drafted, with 33 defendants being indicted, compared to 6 indictments in 2016, with 23 defendants being indicted.

RESULTS AND DISCUSSIONS

An economic entity trying to avoid the payment of tax liabilities has several options to reach this goal:

In case of **corporate tax**, the tax evasion methods are the following:

- Expenses that are not based on supporting documents;

- Expenses that exceed the limit approved by the law;
- Deductions of personal expenses of the administrators;
- Failure to register the revenues obtained;
- Register of lower delivery prices;
- Failure to calculate the taxes due by the nonprofit organizations related to the revenues obtained from business activities;
- Failure to register in the accounting books the differences identified by the control authorities;
- The transfer of taxable revenues to newly created companies within the same group, that are within the exemption period.

As regards the **value-added tax (VAT)**, the following methods may be used:

- Failure to register as payer when exceeding the limit;
- Repeated calculation errors;
- Unjustified reimbursement;
- Declaring of some imports as temporary;
- Delay of issuing the fiscal invoice;
- Incomplete records in the purchase register;
- Economic entities issue invoices without VAT registering and payment;
- Fictitious deeds of donation from the external partners in order to avoid VAT payment related to imports;
- Failure to declare in returns the VAT related to customs clearance;
- VAT deduction in connection with the liabilities that are exempted from the right to deduct;
- Deduction based on illegal documents or without documents.

As regards the **payroll tax**, the most frequent methods related to fraud are the following:

- Non-taxation of paid earnings from work;
- Failure to register and pay the payable taxes on wages;
- Failure to register the payment liabilities;
- Fictitious expenses for the wages of some persons;
- Creating facilities for employees in view of paying lower taxes to the state budget;
- Failure to observe the laws on tax base.

In case of **excise duties**, the tax evasion methods are the following:

- Failure to include the taxable amounts in the tax base;
- Undervaluing the imported goods in customs with double documents;
- Failure to calculate the excise duties according to the alcohol content;
- Failure to include the excise duties in the sales prices;
- Failure to register in the accounting books the payment liabilities regarding the excise taxes;
- Changing the name of the products for which excise duties are to be paid in products with lower contribution, in order to avoid the payment of excise duties [1].

In case of other taxes, contributions and duties due to the state or local budgets, the following tax evasion methods have to be taken into account:

- Buildings are registered in the accounts with values that are lower than the market value;
- Failure to declare to the fiscal authorities the buildings, motor vehicles and lands belonging to the economic entities;
- Failure to declare the income earned by natural persons from various activities;
- Failure to withhold the dividend tax;
- Failure to appear in front of the fiscal authority or the alteration of the information supplied by the cash registers of the self-employed persons, regarding taxi services;

The economic entities exploit the lack of training of the control personnel and the regulatory gaps in the fiscal laws, applying new evasion methods impacting the public funds and generating huge damages.

Among these methods, some may mention the following: simulation of exports, transfer, on paper, of the operations through several companies, and bank transfers that simulate fictitious liabilities between partners. The stake of such fictitious circuits could be the diminishing of the corporate tax, the unlawful deduction of VAT, the avoidance of excise duty payment, thus providing for a perfect money-laundering environment [2].

Here we may specify the following crime schemes:

(i) Dummy companies that do not operate at the declared registered office, have partners or

administrators which cannot be contacted and do not submit the financial statements to the fiscal authority.

The dummy companies are used by the beneficiary in order to avoid the payment of taxes to the state budgeted, but with an appearance of legality.

(ii) **Carousel fraud** uses two methods:

- The first method, by which an economic entity from the country of origin issues an invoice, VAT excluded, being an intra-Community supply, and the entity from the country of destination applies the reverse charge. The entity from the country of destination issues an invoice to a direct beneficiary or through other dummy companies, without declaring the VAT that subsequently disappears, and the final beneficiary has the right of VAT deduction.

- The second method is a fictitious invoice to a presumptive intra-Community partner (VAT excluded), and this operation is followed by the sale of goods on the internal market, without issuing accounting documents or this scheme may be continued with the sale by the external partner to the Romanian beneficiary, through an intra-Community delivery with no VAT. In this case, the goods may be physically moved from the supplier to the beneficiary, without leaving the country, but, on paper, the intra-Community partner is included.

(ii) **Offshore companies** are companies that are registered in countries or territories where the taxation is lower or zero.

An offshore company is used by the economic entity for fictitious intra-Community

deliveries, liquidation of stocks with no accounting documents in order to obtain the deductible VAT and laundering of money resulted from tax evasion in Romania.

(iv) **Contraband with excise goods** is made by illegally bringing the products and their storage in a place that is not an authorized fiscal warehouse, with the purpose of their illicit sale [6].

State and reports regarding tax evasion

(a) **Statistical data from the Ministry of Justice - State of cases and convicted persons, 2013-2018**

According to the state of cases involving economic offences prepared by the Ministry of Justice, some may see a higher number of case files involving tax evasion offences, of 23,363 cases compared to 903 cases involving money laundering offences, indicating a higher vulnerability as regards tax evasion. Another issue that some may observe is the lack of mitigating these offences, according to the approximate similarity between the initial fund of cases and the number of received cases. As regards the money laundering offences, the initial fund was of 424 case files, and 479 received cases, and as regards the tax evasion offences, the initial fund was of 9,763 case files, and 13,580 received case files. These statistical data highlight the large number of offences registered each year and the lack of control performed by the control authorities.

An important issue is the files left unanswered, due to the shortage of judges in relation to the large number of registered files

Table 1. State of cases and convicted persons, 2013-2018

State of cases and convicted persons *-01.01.2013-31.12.2018								
Object causes	The competent court	Stock initially- no. causes	No. of incoming causes	Total causes	No. of solved causes	Stock causes at the end of the period	Number of convicted persons in mainstream cases	
							Total, out of which:	Minors
Tax evasion offences								
Money laundering offenses Law656/2000	Court	0	0	0	0	0	0	0
	Law Court	266	235	501	194	307	211	0
	Court of Appeal	158	244	402	225	177	28	0
Tax evasion offenses (Law87/1994, Law241/2005	Court	2121	1998	4119	2506	1613	845	2
	Law Court	5439	5784	11223	5328	5895	3576	5
	Court of Appeal	2203	5798	8021	5740	2261	16	0

*in mainstream cases

Source: [10]

(b) Situation of the activity of the Prosecutor's Office at the Bucharest Court in 2017, regarding economic-financial crimes.

In 2017, the Prosecutors of the Prosecutor's Office attached to the Bucharest Tribunal focused mainly on the recovery of the damages found out of offenses of tax evasion and money laundering.

The damages identified with the help of the anti-fraud inspectors in the cases investigated in 2017 amounted Lei 264,814,459 (EUR 57,946,271, respectively).

In 2017, the Prosecutor's Office attached to the Bucharest Court of First Instance has prepared 20 indictments in cases regarding **tax evasion offences**, compared to 31 indictments in 2016, 60 defendants being indicted, compared to 51 defendants in 2016. In 2017, the Prosecutor's Office attached to the Bucharest Court of First Instance has concluded 10 plea agreements with 10 defendants, in cases involving **tax evasion offences**.

In 2016, there were no plea agreements in cases involving **tax evasion**.

As regards the **money laundering offence**, 9 indictments have been prepared, 33 defendants being indicted, compared to 6 indictments in 2016, and 23 indicted defendants.

In 2017, the Prosecutor's Office attached to the Bucharest Court of First Instance has concluded 3 plea agreements with 3 defendants, in cases involving **money laundering offences**. In 2016, there were no plea agreements in cases involving money laundering.

The damages acknowledged in the indictments and plea agreements as being caused by committing the **tax evasion offences** were of Lei 38.8 million (EUR 8.6 million), compared to Lei 35.7 million in 2016 (EUR 7.9 million).

The value of the damages caused by committing **tax evasion offences** and paid in 2017 to the state budget, by virtue of Art. 10 of Law no. 241/2005, amounted Lei 23.6 million (EUR 5.2 million).

The total value of the amounts representing the physical object of the **money laundering**

offences, indicated in the indictments was of Lei 71.5 millions (EUR 15,881,643 respectively), compared to 2016, when the total value of the „laundered” amounts was of Lei 56.8 million (EUR 12.6 million).

The value of the precautionary measures indicated in the indictments and effectively implemented amounted Lei 34.2 million (EUR 7.6 million), compared to Lei 15.6 million in 2016 (EUR 3.4 million). In 2017, **the activity of investigating economic and financial offences** was affected by a series of deficiencies with negative impact on the efficiency of investigation and disposal of cases involving tax evasion and money laundering offences.

In 2017, 1,084 cases, for which more than 3 years elapsed from the day of their notification, have been disposed of (for 687 cases, more than 5 years elapsed from the day of their notification). As regards the cases registered in our prosecutor's office, which are older than 5 years (227 case files) and are not disposed of, their high number is also determined by the change of jurisdiction for the courts of law (implemented by Law 202/2010 on some measures taken in order to accelerate the trial disposition). **The change of jurisdiction of the prosecutor's offices attached to the courts of law resulted in an increase of the number of cases involving tax evasion offences investigated by this public prosecutor's office.**

According to art. XIII item 3 of the above mentioned law, **tax evasion offences** provided for in art. 9 of Law no. 241/2005 for the prevention and fight against tax evasion, as subsequently amended, are under the jurisdiction of the courts of first instance. Thus, in 2011, a number of 4026 cases were registered with the Prosecutor's Office attached to the Bucharest Court of First Instance and allocated to the prosecutors of the prosecution oversight division. During the period 2012-2017, the local prosecutor's offices (notified in 2010 or previously), as well as other structures of the Public Prosecution Service have declined their jurisdiction in favor of the Prosecutor's Office attached to the Bucharest Court of First

Instance regarding a significant number of case files (hundreds) involving offences provided for in art. 9 of Law no. 241/2005 [12].

CONCLUSIONS

The mechanism of tax evasion does not operate within the developed societies. Each time a society creates a coherent system of tax collection, inevitably, methods to avoid their payment also emerge. The laws of the European member states and of Romania are similar, the difference occurs in the application of legal provisions, the organization and functioning of the state tax system, the judicial decisions taken in the cases of tax evasion and, last but not least, the consolidation of the trust relation between the tax authorities and taxpayers. The tax evasion offence is committed by submitting incorrect or incomplete information to the tax or customs authorities, by hiding tax information by failing to declare the income, by using fiscal signs and symbols with no right, by reducing the taxable base for its own benefit or for the benefit of other person, all these acts being committed with intent.

We suggest that, in the near future, the following implementing measures to be taken:

- Providing for the equality of taxpayers as regards the taxes, as main principle of the fight against tax evasion;
- Increasing the control efficiency;
- A better acceptance, by the taxpayer, of inspections: a coherent, correlated, efficient control, with a minimum impact on the taxpayer's activity;
- Continuous improvement of the fiscal indiscipline prevention activities;
- Highlighting the preventive and educative role of control;
- Transparency in the institutions authorized to implement laws and to perform controls of the taxpayers;
 - Increasing the professionalism and integrity of the employees of the control authorities;
- Lower taxation, but used more efficiently;
- Providing assistance and guidance to taxpayers which are more specialized and adapted to their needs;

- Software, information about the laws and of public utility - all provided free of cost;
- Providing for the refunding, within the legal period, of the amounts due to the taxpayers, for them to be able to finance their activity;
- Providing for an environment in which, in relation with the tax authorities, and also with the competitors, the provisions of the Fiscal Code and of the Fiscal Procedure Code are observed;
- Fight against corruption among its own employees;
- Providing for a polite and amiable behavior of the public servants in relation with the taxpayers.

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