RE-QUALIFICATION OR TAX EVASION?

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Abstract: *This dilemma is much discussed in the legal literature, especially in the form of the answer to the question: "Is it an "abuse of tax law" or a "tax optimization?" or "tax evasion?". Since, concerning the fiscal and criminal legislation in Romania, the respective frameworks are extremely difficult and confusing, the final answers to the above questions should, at least in the application of the relevant legislation, take into account the answers to other questions formulated both from the fiscal and criminal perspective. They should also be formulated distinctly and, finally, synthetically interpreted, taking into account the fact that there is a close connection between the two and that first, we must determine the answers to the fiscal legal report and only then to the criminal one, if it is considered that the fiscal norm is violated and that the rebalancing of the fiscal legal relationship cannot be achieved only through fiscal measures considered insufficient in relation to the degree of social danger sanctioned by the criminal law. We believe, along with others, that in this practical approach, the application of the principle of proportionality should be the key element.*

Key words: *fiscal optimization, re-qualification, fiscal evasion, economic substance, economic purpose*

JEL codes: M40, M41

Introduction

In our research we have identified the following four main objectives: (1) Identification of the specific aspects of "compliant taxation vs. re-qualification", furthermore (2) Identification of the specific aspects of the raining vs. tax evasion", moreover (3) Identification and applicability of the common elements of the "compliant taxation vs. retraining vs. tax evasion", and finally (4) Identification of fiscal principles established by the jurisprudence of the European Court of Justice (ECJ), applicable in solving the dilemmas formulated in objectives 1-3 above.

The research model constructed, applies in different stages appropriate research methods: (a) qualitative analysis of relevant national and international fiscal principles; (b) the empirical method used for the interpretation of case studies using specific applicable elements identified within the research objectives; (c) the participatory observation method used in interpreting empirical research results, respectively in expressing opinions during the research. At the same time, reasoning, analysis, synthesis, and interpretation were used throughout the research.

I. Theoretical considerations

I.1. Fiscal considerations

On the fiscal level, we are therefore talking about an "aggressive fiscal optimization" that can be "requalified" from the perspective of the fiscal authorities, according to art. 11 para. 1 Fiscal Code: "the fiscal authorities may not take into account a transaction that does not have an economic purpose, adjusting its fiscal effects, or may reframe the form of a transaction/activity to reflect the economic

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content of the transaction/activity[2]". The phrase "economic content" is not properly defined except through the prism of economic criteria according to Fiscal Procedure Code[3] - art 14: (1) Income, other benefits and patrimonial values are subject to the tax law regardless of whether they are obtained from activities that fulfill or not the requirements of other legal provisions.

(2) The fiscally relevant factual situations are assessed by the fiscal body according to their economic content.

Regarding this differentiation (the economic criterion), there are only two relevant references in the fiscal legislation:

- the general rule of deductibility of expenses in the matter of profit tax is the one from art. 25 para. (1) C. tax[4]. according to which: "For the determination of the fiscal result, the expenses "carried out to carry out the economic activity..." (authorized or unauthorized?) are considered deductible expenses.

– according to point 4 of the Methodological Norms of the Fiscal Code[5], "Transaction without economic purpose" means any transaction/activity that is not intended to produce economic advantages, benefits, or profits and that determines, artificially or conjecturally, a more favorable fiscal situation".

Obs.:

- we note the existence of a double condition for recognizing the transaction without an economic purpose;

- the existence of only the first condition (even the lack of economic destination) is not sufficient for the transaction to be classified as re-classifiable;

It should be mentioned that regarding the link between a deductible expense and the purpose of the economic activity, there is also the theory of the abnormal act of management[6] developed in the French administrative and judicial system, relevant at the level of principle, according to which there are two characteristics to qualify an act as abnormal, in the sense of lacking economic content:

- the expense is not necessary: when it is not related to operating needs; per a contrario, if the expense is related to the needs of the business, it is presumed to be in the interest of the company,

- the non-existence of a counterparty: per a contrario, the existence of the counterparty, i.e. the benefit that generated the expense, does not justify a qualification of abnormality;

Obs.: neither in the fiscal legislation nor in the specialized literature there is the issue of exchange equivalence as a necessary condition for a normal management act (the so-called onerous contracts) - an aspect also confirmed by jurisprudence.

Since the constitutional provisions stipulate that taxes and fees are established by law (para. 1, art. 139 - Taxes, fees, and other contributions from the Constitution), it follows that the method of interpretation by analogy is not admissible, the fiscal provisions, as well as their application, must be express and not implicit. Since the legislator has in mind two notions - "economic purpose" and "economic content" - both notions referring to the transaction, so the cause of the legal act cannot be interpreted by the tax authorities, in the sense that they cannot "judge" and "reconsider" the internal causes of transactions.

[2] LAW no. 227/2015 of September 8, 2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015

[3] LAW no. 207/2015 of July 20, 2015 regarding the Fiscal Procedure Code, Official Gazette of Romania, Part I, no. 547 of July 23, 2015

[4] LAW no. 227/2015 of September 8, 2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015

[5] GD no. 1/2016 of January 6, 2016 for the approval of the Methodological Norms for the application of Law no. 227/2015 regarding the Fiscal Code, point 4, M.O. Part I, no. 22 of January 13, 2016

[6] Fiscal law treaty. Volume 1. General theory of fiscal law, Hamangiu Publishing House, 2016, ISBN 978-606-27-0603-6

Partial conclusion: the economic purpose is defined extremely broadly, being interpretable, and the effects of the transaction without an economic purpose must be related to a more favorable fiscal situation compared to the bearer and not the payer, which is in most situations neutral towards the bearer.

I.2. Criminal considerations

Fiscal evasion, in essence, is essentially characterized by evading the fulfillment of fiscal obligations in the case of crimes under art. 9 of Law no. 241/2005[7]. All the situations regulated in this way include as the main element the "damage" created by the commission of these facts on the consolidated budget, there being also lesser situations of "intention" - without the production of a damage, such as those from art. 9 paragraph 1 letter e) "execution of double accounting records, using documents or other means of data storage" or lit. f) "evading financial, fiscal or customs checks, by non-declaration, fictitious declaration or inaccurate declaration regarding the main offices").

It is relevant, in terms of the existence of "damage" in this sense, ICCJ Decision 25/2017 regarding tax evasion[8], in which the Panel for resolving legal issues in criminal matters resolved the referral in order to pronounce a preliminary decision for resolving legal issues , namely: "if the actions listed in art. 9 lit. b) and c) from Law no. 241/2005 represent distinct normative ways of committing the crime of tax evasion or alternative versions of the material element of the single crime of tax evasion".

Considering that art. 9 para. (1) of Law 241/2005 provides that "(1) The following acts committed to 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:

b) the omission, in whole or in part, of highlighting, in the accounting documents or other legal documents, the commercial operations performed, or the incomes achieved.

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

Decision 25/2017 of the ICCJ admitted the notification regarding the pronouncement of a preliminary decision, formulated by the Bucharest Court of Appeal – Criminal Division I in file no. 27155/3/2013* (3289/2014) and, consequently, established that:

"It admits the referral made by the Bucharest Court of Appeal — Criminal Section I in File no. 27,155/3/2013* (3,289/2014) and establishes that the actions and inactions stated in art. 9 para. (1) lit. b) and c) from Law no. 241/2005, which refers to the same commercial company, represents alternative variants of committing the act, constituting a single crime of tax evasion provided by art. 9 para. (1) lit. b) and c) from Law no. 241/2005 for preventing and combating tax evasion."

Partial conclusion: according to the special legislation, we currently have situations classified as tax evasion crimes, even without causing damage to the consolidated budget, and "intent" cases are also included in this category.

Question: why cannot cases of tax evasion that are not accompanied by damages, such as those from art. 9 paragraph 1 letter e) respectively "the execution of double accounting records, using documents or other data storage means" or letter f) "evading the performance of financial, fiscal or customs checks, by non-declaration, fictitious declaration or inaccurate declaration regarding the main offices", in common crimes be "reconsidered"?

[7] LAW No. 241/2005 of July 15, 2005 for the prevention and combating of tax evasion published in the Official Gazette of Romania, Part I, no. 672 of July 27, 2005

[8] Official Gazette no. 936 of 28.11.2017

II. Case situations that can constitute valuable benchmarks in the interpretation of "fiscal vs. re-qualification vs. criminal":

ICCJ Decision 21/2017 - Registration of accounting documents through falsified tax invoices constitutes tax evasion[9]:

"The fact of showing in the accounting documents or other legal documents the expenses that are not based on real operations or the highlighting of other fictitious operations, through the use of falsified invoices and tax receipts, to evade the fulfillment of tax obligations, constitutes the crime of tax evasion provided by art. 9 para. (1) lit. c) from Law no. 241/2005 for preventing and combating tax evasion".

C-210/91 European Commission vs. Greece, C-286/82 and 26/83 Luisi and Carbone v. Ministero del Tesoro and Case 203/80 Casati[10]

These cases show the importance of the principle of proportionality regarding the sanctions that can be instituted by the member states in various fields: Administrative measures and penalties must not go beyond what is strictly necessary so that the control procedures do not restrict the freedoms that require the Treaty and must not be accompanied by a penalty disproportionate to the seriousness of the violation, to become an obstacle to the exercise of that freedom (paragraph 20, C-210/91 European Commission vs. Greece). "Relations between taxpayers and fiscal bodies must be based on good faith, to fulfill the requirements of the law" (art. 12 of the Fiscal Procedure Code).

European Court of Justice – C - 18/13[11]

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted in the sense that it is opposed to a taxable person deducting the value added tax appearing on the invoices issued by a supplier when, although the service was provided, it is proven that it was not actually provided by the respective supplier or subcontractor, especially because the latter did not have the necessary personnel, fixed assets and assets, that the costs for providing the service were not entered in their accounting records or that the identity of the persons who signed certain documents as suppliers proved to be inaccurate, with the double condition that such facts constitute fraudulent behavior - which must be proven (and not reclassified) and proven, considering the objective elements provided by the tax authorities, that the taxable person knew or should have known as an operation she invoked as a basis for the right of deduction was involved in this fraud, which is up to the referring court to verify.

European Court of Justice - C-610/19[12]

Council Directive 2006/112/EC of November 28, 2006 regarding the common system of value added tax corroborated with the principles of fiscal neutrality, effectiveness and proportionality must be interpreted in the sense that it opposes a national practice whereby the tax administration denies a taxable person the right to deducts the value added tax paid for purchases of goods that were delivered to him for the reason that the invoices related to these purchases are not credible, since, first of all, the manufacture of the respective goods and their delivery could not be carried out by the issuer of these invoices , in the absence of the necessary material and human resources, and the mentioned goods were, therefore, purchased in reality from an unidentified person, secondly, the national accounting rules were not respected, thirdly, the supply chain that led to the mentioned acquisitions was not justified from an economic point of view and , fourthly, some previous operations that are part of this supply chain were affected by irregularities. In order for such a refusal to be justified, it must be proven (and not reclassified) that the taxable person actively participated in fraud or that

[9] O.G.. no. 1024 of 27.12.2017

[10] https://codfiscal.net/32470/principiul-proportionalitatii-in-dreptul-european-exemple-de-neproportionalitate-din-legislatia-si-practica-romaneasca

[11] https://curia.europa.eu/juris/liste.jsf?num=C-18/13&language=RO

[12]https://curia.europa.eu/juris/document/document.jsf?text=&docid=230844&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=10922891

these operations were involved in a fraud committed by the issuer of the invoices or by any other operator who intervened upstream in the mentioned supply chain, the verification of which is the competence of the referring court.

European Court of Justice - C-331/88 - the principle of proportionality [13]

Seen as a safety measure against the excessive use of the legislative and administrative power of the state, the principle of proportionality, C-331/88, R v. Ministry of Agriculture, Fisheries and Food ex parte Fedesa, the following were ruled: "The Court held consistently that the principle of proportionality is one of the general principles of Community law. By virtue of this principle, the legality of the establishment of a prohibition on the carrying out of a certain economic activity is subject to the condition that the prohibition measures are appropriate and necessary to the public objective protected by the legislation in question; where there is the possibility to choose between several measures considered appropriate, the least onerous one must be used, and the disadvantages must not be disproportionate to the goal pursued"[14].

Proposal: the explicit introduction in criminal matters of the principle of proportionality in matters of tax evasion;

Justification: - there were practices even in European countries (e.g. Italy) in which sums were repatriated from offshore areas (partly accumulated from tax evasion), without criminal sanction and without fiscal effects, so that we can speak of a "positive disproportionality" on the part of the state; - to the question "Retraining or tax evasion?" it must be determined which is the least restrictive of the possible administrative measures to achieve the proposed goal; - in European jurisprudence in fiscal matters, the principle of proportionality is invoked mainly in two types of situations: o those in which the formalism imposed by national legislations in order to exercise a right established by European legislation (for example, the right to deduct VAT, refund VAT from other member states, etc.) is put into question; o those in which the protection of the exercise of certain rights is discussed, in comparison with the rigors necessary in the fight against tax evasion and abuses of law. We consider equally with the above that in Romania precisely the lack of formalism that should have been imposed by the fiscal code with reference to the notions of "economic purpose" and "economic content", amply justifies the application of the principle of proportionality in the matter fiscal and fiscal evasion, respectively even criminal, considering the extremely wide possibilities that the fiscal and criminal investigation bodies have in the requalification of transactions. In this sense, Professor Grainne de Búrca believes that "the general principle of proportionality (with regard to an imposed administrative measure) is verified by performing the following test[15]:

1. is the administrative measure correspondent to the achievement of a legitimate goal?
2. is this measure necessary to achieve the legitimate goal or the least restrictive of the measures necessary for this goal?
3. does this measure have an excessive effect on the person's interest?

We invoke the following reference cases of the Court of Justice of the European Union in which the principle of proportionality was established:

C 286/94 Garage Molenheide BVBA v. Belgian State [16]

The plaintiff Garage Molenheide BVBA asks the court to find that the measure imposed by the Belgian legislation, which allowed the tax authorities to refuse to refund the VAT (this amount being retained by the authorities as an insurance measure), violates the principle of proportionality. The Court of Justice of the European Union has found that such a measure, i.e. the refusal to reimburse

[13] https://www.cdep.ro/caseta/2017/11/20/pl17479_se.pdf
[14] Paragraful 13 din C-331/88, R v. Minister of Agriculture, Fisheries and Food ex parte Fedesa
[15] G. de Búrca ,The Principle of Proportionality and its Application in EC Law, (1993) 13 Yearbook of European Law 105–150, p. 106
[16] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0286

a negative VAT balance or the taking over in the subsequent statements, in the conditions where the said taxable person appears with contested tax debts or in contentious proceedings, is not prohibited by The Sixth Directive on VAT, however, noted that "in accordance with the principle of proportionality, a Member State must employ those means which, allowing it to achieve its proposed objectives, bring the least harm to the goals and principles supported by Community legislation".

C-255/02 Halifax[17]

In this case, the Court considers it necessary to evaluate the abuse of law. Invoking the fact that the prevention of possible tax evasion or the abuse of law is an objective recognized and encouraged by the Sixth Directive, the Court of Justice even went beyond the applicability of the principle of proportionality, appealing to the principle of legal certainty: "[…] obliging the tax authorities to initiate checks on taxable persons in order to identify their intentions regarding future economic activities would be contrary to the objectives of the common VAT system regarding the principle of certainty of the law according to which VAT must be applied following an objective analysis on the specifics of each economic operation" (paragraph 57). "Furthermore, it is clear from the previous jurisprudence that a trader's option to choose between carrying out VAT-exempt or taxable operations can be based on a whole series of factors, including those of a fiscal nature" (paragraph 73). "Considering the above arguments, it follows that, in the sphere of VAT, an abusive practice exists only if the economic operation, despite the formal application of the conditions provided for by the Sixth Directive, aims primarily at the accumulation of a fiscal advantage, the granting of which would be contrary of the respective provisions (n.r. of the Directive)" - (paragraph 74). "The prohibition of the abuse of law loses its relevance in cases where the economic activity carried out is based on considerations other than those related to obtaining tax advantages" (paragraph 75).

C-196/04 Cadbury-Schweppes

This case is relevant for the comparative analysis of the importance of defending the principle of freedom of establishment and the fight against tax evasion and abuse of law. *In this case, according to a provision of the UK tax legislation, the company's profits in Ireland, which benefited from a lower tax rate, were included in the taxable base and subject to a more demanding tax treatment in the UK.*

The Court's conclusions were the following[18]: *"Regarding the freedom of establishment, the Court has already ruled that the establishment of a company in one of the member states in order to benefit from a more advantageous tax treatment does not in itself constitute an abuse of law. On the other hand, a national provision that restricts the freedom of establishment can be justified when it mainly refers to completely artificial structures designed to circumvent the application of the legislation of that Member State" (paragraph 37). "It follows that in order for a restriction of the right to free movement to be justified based on the prevention of abusive practices, the objective of such a restriction must be the elimination of absolutely artificial structures that do not reflect economic reality, but only aim to evade the normal tax treatment applicable on the national territory"* (paragraph 55).

C - 188/09 Profactor Kulesza, Frankowski, Jóźwiak Orłowski [19]

"...it is useful to remember that, in the absence of harmonization of Community legislation in the field of sanctions applicable in case of non-compliance with the conditions provided for by a regime established by this legislation, the Member States are competent to choose the sanctions that seem appropriate to them. They are, however, obliged to exercise their powers in compliance with Union law and its general principles and, consequently, with compliance with the principle of proportionality" (para. 29).

[17] https://curia.europa.eu/juris/liste.jsf?language=en&num=C-255/02

[18] R. *Bufan*, Contribuţia dreptului fiscal la realizarea obiectivelor Uniunii, în Scientia Iuris nr. 1-2/2012.

[19] https://curia.europa.eu/juris/liste.jsf?language=en&num=C-188/09

Examples of violations of the principle of proportionality in Romania:

1. The retroactive collection of VAT for real estate transactions, with the calculation of late penalties, represents, in the opinion of practitioners and specialized literature, gross examples of violation of the principles of certainty, predictability of the law and the principle of proportionality, since in the period 2007- 2009 there were no express provisions of the fiscal legislation that would regulate the fiscal treatment from the VAT perspective of these economic operations.

2. Sanction of permanent cancellation of registration for VAT purposes

Art. 316 para. (11) of the Fiscal Code regulates the situations in which the competent fiscal bodies can cancel the taxpayers' registration for VAT purposes, and in para. (12) the cases in which taxable persons whose VAT code was canceled can regain it. In this situation, the competent fiscal body checks whether the conditions for reactivation are met, respectively whether the situation that led to the cancellation of the code has ended registration for VAT purposes. The results of the performed analysis are recorded in a report, and based on it the reactivation decision is drawn up, there is also the option of maintaining the definitive cancellation of the registration for VAT purposes, in which case, practically, this decision is equivalent to removing the taxpayer from the market, respectively with a commercial measure, instead of other less "definitive" sanctioning measures in relation to the market in which the state intervenes as a competitor. It is probably the most serious and intense fiscal sanction among the measures possible and necessary to achieve the proposed goal, having an excessive effect (even removing it from the market) on the person's interest, even in relation to the provisions of art. 12 of the Fiscal Procedure Code, according to which "Relations between taxpayers and fiscal bodies must be based on good faith, in order to fulfill the requirements of the law"[20].

III. Applicability:

Situation no. 1:

The fiscal authorities have reconsidered the advance payment operations between a provider and a beneficiary, as loan operations. We consider that the reasoning given by the tax authorities is illegal because:

- the fiscal bodies cannot change the factual situation that was the basis of the legal case - the conclusion of a transaction regarding the granting of advances, an aspect that results from the substantive interpretation of the operation according to the invoices issued and not from the interpretation of its form;

- fiscal laws, being of strict interpretation, apply only to related fiscal situations. Under these conditions, the granting of an advance in making a loan cannot be reconsidered, the method of interpretation by analogy not being admissible;

- Fiscal bodies cannot infer, induce, assume or presume the will of the legislator.

o In this sense, one cannot justify the finding and imposition, assuming that if the advance has not been returned or closed, then it is a matter of financing;

o In the same sense, starting from the premise (unanimously accepted in the literature and fiscal practice) that advances are not loans in accordance with this legal definition, the operations of granting advances between two private companies have the following unique characteristics:

- they are legal, i.e. they are expressly established by a legal act (fiscal and civil code);

- the rights and obligations of the parties are specialized, i.e. they are specific to this type of contract and result from the will of the parties, so that no third party (respectively fiscal body) can modify, cancel, or give them another legal meaning, invalidating the decision of business of the parties;

[20] LAW no. 207/2015 of July 20, 2015 regarding the Fiscal Procedure Code, Official of Romania, Part I, no. 547 of July 23, 2015

- the fiscal body cannot attribute, on its own power, other characteristics to a real economic transaction, in the sense of reconsidering an advance in a loan operation (in the given case);

Situation no. 2:

In 2013, as a result of several fiscal controls, the specialized bodies launched a criminal investigation regarding the regime of insurance premiums paid to several commercial companies through an Insurance company, in favor of some of their employees - employers, establishing additional fiscal obligations to pay from the profit tax and related accessories in significant amounts. In fact, in accordance with the INSURANCE contract between the INSURER and several commercial companies, sums representing insurance premiums were paid in favor of the insured who at the same time fulfill the status of employee, as optional insurance. Later (often the next day), based on the provisions of the INSURANCE contract, the direct beneficiaries (insured persons) redeemed, against a commission borne by them, the respective insurance premiums, thus obtaining benefits. There are no provisions in the employment contract regarding these payments.

Fiscal aspects regarding the Profit Tax:

- Since these payments are not made on the basis of the individual or collective employment contract and are not related to the object of the employer's activity and since, based on art. 21 para. (4) letter k) of the Fiscal Code[21], the expenses with insurance premiums paid by the employer, on behalf of the employee, which are not included in the salary income of the employee, it follows, according to title III of the Fiscal Code, that they are not deductible in the calculation taxable profit;

- Since from a fiscal point of view, the Fiscal Code does not detail the regime of these amounts, we will refer to the provisions of the Civil Code, meaning that these expenses can be considered as liberalities, respectively donation; Fiscal aspects regarding Income Tax: - according to point 63 index 1: Methodological norms ref. Art. 42, lit. b) Fiscal Code[22], 7. If the bearer of the insurance premium is an independent natural person, legal entity or any other entity carrying out an activity, then the value of the insurance premiums represents taxable income for the beneficiary natural person;

- according to Art. 42 Non-taxable income from the Fiscal Code[23], In the meaning of income tax, the following incomes are not taxable: j) sums or goods received as an inheritance or donation.

Personal comments: - according to point 70 of the Rules for the application of art. 55 para. (3) from the Fiscal Code[24], in our opinion, in the case of insurance premiums borne by the legal entity, the tax treatment of the advantage representing the counter value of the insurance premiums is taxation, in the case of the existence of an employment contract that includes these insurance premiums;

- since there is no employment contract that includes these insurance premiums, logically, these provisions have no object in the present case;

- procedurally, three parts coexist:

o The supporter to whom we register a non-deductible expense for the profit tax, it being possible to classify it as a donation;

o Income payer: Insurer

o Holder of the income: the employee

[21] LAW no. 227/2015 of September 8, 2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015

[22] GD no. 1/2016 of January 6, 2016 for the approval of the Methodological Norms for the application of Law no. 227/2015 regarding the Fiscal Code, point 4, M.O. Part I, no. 22 of January 13, 2016

[23] LAW no. 227/2015 of September 8, 2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015

[24] GD no. 1/2016 of January 6, 2016 for the approval of the Methodological Norms for the application of Law no. 227/2015 regarding the Fiscal Code, point 4, M.O. Part I, no. 22 of January 13, 2016

The classification of fiscal bodies was the reclassification of transactions according to art. 11 paragraph 1) Fiscal Code[25] through the prism of "reclassifying the form of a transaction / activity to reflect the economic content of the transaction / activity"

The inclusion of criminal investigation bodies was made by referring to tax evasion based on Law no. 241/2005 - art. 9 paragraph 1 letter c)[26] *"the highlighting, in the accounting documents or other legal documents, of expenses that are not based on real operations or the highlighting of other fictitious operations".*

Obs.: we consider that some of the constitutive elements of this crime are not fulfilled;

Partial conclusion:

In my opinion, from the point of view of the tax framework, from today's perspective, the respective incomes should be taxed as other incomes assimilated to salaries (for the part of income equal to the insurance premium paid by the Employer), respectively as Other incomes - for the part of income from the Insurer, without being the case of requalification but of direct imposition to the Employer and the Insurer, taking into account the following aspects:

- The income was made by the employee (assimilated as a bearer by the transfer of the obligation from the Employer by extending the applicability of OMFP no. 3201/2018)[27], so that it had to be imposed by establishing a debit by the Employer (accompanied by a declaration and payment of tax and contributions), respectively withholding tax made by the Insurer (for the respective part of the income) - being the one obliged to declare them;

- Restitution to the Employer of the amounts established and paid by him to the consolidated budget, in the absence of a fiscal administrative act;

o Obs. 1: These amounts still appear today at the fiscal body in the analytical sheet as receipts without debit (in addition);

o Obs. 2: These amounts meet the statute of limitations for restitution;

We show that in accordance with point 5 of MFP Order no. 3201/2018[28] regarding the Procedure for regularization of fiscal obligations in case of reconsideration of a transaction/reclassification of the form of an activity by the central fiscal body, the provisions of art. 171 of Law no. 207/2015 on the Fiscal Procedure Code[29], with subsequent amendments and additions, are applicable in any situation where the fiscal body reconsiders a transaction/reframes the form of an activity, regardless of whether, from a fiscal point of view, following the reconsideration/reframing, translation takes place fiscal obligations from one natural/legal person to another natural/legal person.

Partial conclusion: indirect (but applicable) transfer of fiscal obligations from one natural/legal person to another natural/legal person is allowed.

Proposal: expanding the situations in which MFP Order no. 3201/2018[30], except for the reconsideration of a transaction for which the income tax was applied from the transfer of real estate properties from the personal patrimony of natural persons and which was reclassified as an independent activity - the only field in which the regularization is currently applied;

Situation no. 3:

[25] LAW no. 227/2015 of September 8, 2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015

[26] LAW No. 241/2005 of July 15, 2005 for the prevention and combating of tax evasion published in the Official Gazette of Romania, Part I, no. 672 of July 27, 2005

[27] MFP ORDER no. 3201/2018 of December 20, 2018 regarding the Procedure for regularization of fiscal obligations in case of reconsideration of a transaction/reclassification of the form of an activity by the central fiscal body, published in the OFFICIAL GAZETTE NO. 61 of January 23, 2019

[28] Idem

[29] LAW no. 207/2015 of July 20, 2015 regarding the Fiscal Procedure Code, Official of Romania, Part I, no. 547 of July 23, 2015

[30] MFP ORDER no. 3201/2018 of December 20, 2018, idem

Prosumers, NATURAL PERSONS, other than those organized under GEO no. 44/2008 regarding the development of economic activities by authorized natural persons, individual enterprises and family enterprises[31] (n.n. other than PFA, II, IF), for the income obtained from the sale of electricity to the electricity suppliers with which the respective prosumers have concluded supply contracts of electricity, if the power plants producing electricity from renewable sources that they own have an installed electric power of no more than 27 kW per place of consumption, they are exempt from paying income tax according to art. 60 point 6 of the Fiscal Code[32].

It would appear from the tax code that the UNIQUE Declaration regarding income tax and social contributions owed by natural persons - Cap. I "Data on realized revenues" IS NOT SUBMITTED for revenues from the sale of electricity by prosumers, NATURAL PERSONS, other than those organized according to GEO no. 44/2008, to the electricity suppliers with whom the respective prosumers have concluded electricity supply contracts, if the power plants producing electricity from renewable sources that they own have an installed electric power of no more than 27 kW per place of consumption , according to art. 122 para. (4) lit. j) from the Fiscal Code[33].

Controversial aspects found:

a) Contrary to this provision, in our opinion, for CASS (Chap. I - section 3- DATA REGARDING THE SOCIAL INSURANCE CONTRIBUTION AND THE SOCIAL HEALTH INSURANCE CONTRIBUTION DUE) the single declaration (Form 212) must be submitted, because otherwise it is not possible to declare the CASS database.

Contrary to this provision, in our opinion, for CASS (Chap. I - section 3- DATA REGARDING THE SOCIAL INSURANCE CONTRIBUTION AND THE SOCIAL HEALTH INSURANCE CONTRIBUTION DUE) the single declaration (Form 212) must be submitted, because otherwise it is not possible to declare the basis of calculation of CASS

Since, obviously, the nature of the incomes achieved is similar to those from independent activities, there is a contradiction between subsection 3 and subsection 1 in which the incomes from independent activities should be declared, which are not declared according to 122 par. (4) lit. j) from the Fiscal Code[34]. A similar inconsistency may occur if, e.g. from the change in the energy price, the prosumer will exceed the mandatory registration threshold for VAT purposes according to art. 310 para. (1) of the Fiscal Code[35], even if it will not exceed the installed electrical power of no more than 27 kW per place of consumption, becoming a VAT payer (under the exemption regime), without being a payer of income tax.

b) In the case of reconsideration - according to art. 11 of the Fiscal Code[36] of income from independent activities, since in accordance with art. 68 paragraph (1) of the Fiscal Code[37] *"The annual net income from independent activities is determined in the real system, based on the data from accounting, as the difference between the gross income and the deductible expenses incurred for the purpose of generating income"* and since the prosumer's personal expenses (own energy consumption) do not represent deductible expenses, it results that the entire income from the delivery of green energy to the network (less, in principal, amortization), will represent taxable income from independent activities (subject to the 10% income tax rate of 10%, CAS 25% and CASS – 10%) as

[31] EMERGENCY ORDINANCE No. 44/2008 of April 16, 2008 regarding the conduct of economic activities by authorized natural persons, individual businesses and family businesses, published in the Official Gazette of Romania, Part I, no. 328 of April 25, 2008

[32] LAW no. 227/2015 of September 8, 2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015

[33] idem

[34] idem

[35] idem

[36] idem

[37] idem

the exception regarding the exemption of prosumers, NATURAL PERSONS, other than those organized according to GEO no. 44/2008[38];

c) In accordance with the Decision given in Case C - 219/12 Fuchs[39], "Article 4 paragraphs (1) and (2) of the Sixth Directive 77/388/EEC of the Council of May 17, 1977 on the harmonization of the legislation of the member states relating to taxes on turnover - the common value added tax system: the unitary basis of assessment, as amended by Council Directive 95/7/EC of April 10, 1995, must be interpreted in the sense that *the operation of a photovoltaic installation located on or near a residential building, designed in such a way that the amount of electricity produced, on the one hand, is always lower than the total amount of electricity consumed privately by the operator and, on the other hand, it is delivered to the network in exchange for income with a continuity character, falls within the notion of "economic activities"* in the sense of this article".

d) Prosumers are exempted from the obligation to issue the invoice, with the exception of the case where the beneficiary requests the invoice, for electricity deliveries made by prosumers, natural persons, other than those organized according to GEO 44/2008[40] (n.n. PFA, II, IF), to the electricity suppliers with whom the respective prosumers have signed electricity supply contracts, if the power plants producing electricity from renewable sources that they own have an installed electric power of no more than 27 kW per point of consumption.

Conclusions and proposals regarding Situation No. 3:

The exemption regarding the failure to submit Declaration 212 should be cancelled, respectively the activity should be recognized as an independent activity, the recognition requirements of this activity being fulfilled according to art. 7 point 3 definition of independent activity from the Fiscal Code[41].

Questions still unanswered for the situation of natural persons with max. 27 Kw per place of consumption

1. In the event that the tax exemption (exception) for prosumers up to 27 KW is cancelled, how will the realized income be taxed, in the sense that the recognized income is equivalent to the value of the green energy delivered to the network or the net value (after reducing self-consumption)?

2. Is the same question valid today in the sense that the exemption should not be granted only up to the level of self-consumption, and not for excess income?

3. What happens to the capital made available by the prosumer (investment in panels) from the point of view of excess income taxation?

4. Based on the jurisprudence - the Decision given in Case C - 219/12 Fuchs[42], the provisions of Art. 11: Special provisions for the application of the Fiscal Code can be applied, according to which the fiscal authorities may not consider a transaction that does not have an economic purpose , adjusting its fiscal effects, or can I reframe the form of a transaction / activity to reflect the economic content of the transaction / activity?. As they are regulated now, practically these activities do not have an economic purpose in the sense of the tax code.

5. Isn't the fiscal code artificially introducing a more favorable fiscal situation?

[38] OUG nr. 44/2008,idem

[39] https://www.taxlawapp.eu/Web/rechts.php?mode=content&id=62012CJ0219&language=RO&origineel=ja

[40] OUG nr. 44/2008,idem

[41] LAW no. 227/2015 of September 8, 2015 regarding the Fiscal Code, published in the Official Gazette of Romania, Part I, no. 688 of September 10, 2015

[42] https://www.taxlawapp.eu/Web/rechts.php?mode=content&id=62012CJ0219&language=RO&origineel=ja

Final conclusion situation no. 3: - according to situation no. 3 we have a new dilemma with reference to natural person taxpayers of the Prosumator type: independent activity according to the Fiscal Code[43] vs. GEO 44/2008[44] vs. Civil Code[45] ;

- could this dilemma be defined as follows?: if the state can generate an "abuse of tax law", i.e. a punctual "tax optimization", by way of exception, the taxpayer could not be sanctioned more easily

III. Conclusions, limits and the directions of the research

We consider that the established objectives have been achieved in this research, as follows:

1. Identification of the specific aspects of the "compliant taxation vs. requalification" - fulfilled; 2. Identification of the specific aspects of the "retraining vs. tax evasion"

3. Identification and applicability of the common elements of the "compliant taxation vs. retraining vs. tax evasion";

4. Identification of fiscal principles established by the ECJ jurisprudence, applicable in solving the dilemmas formulated in objectives 1-3 above - partially fulfilled;

In my opinion, as a response to the research objectives, respectively to all the dilemmas above, the solution consists in the coherent application of the principle of proportionality, together with the other applicable fiscal principles, both in fiscal and criminal matters.

The current research is limited, summing up only to some aspects, which are still considered relevant, for the fiscal or criminal qualification or requalification of the transactions, so that a much wider development is necessary that includes at least the following aspects:

- The joint liability of the income payer with that of the bearer;
- The transfer of fiscal obligations from one natural/legal person to another natural/legal person.

Continuation of the research - as a direction: "Re-qualification of evasion" or "Re-qualified evasion?"

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