

DEFICIENCIES IN THE FISCAL CONTROL OF THE NATURAL PERSON FROM ROMANIA

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Abstract

In this paper we tried to identify the legislation adopted on the correlation of the sources of income for individuals with assets owned by the same individual. We thought it appropriate to present indirect methods for determining the adjusted taxable base and considerations about the adoption, in September 2013, of OMPF nr.1504/2013, on the declaration of assets and income of the individual investigated at the request of the tax authority. In our opinion, the "weakness" of the instrument above is that in the wording of statement it is not explicitly stated where and whether you should declare the cash in lei or foreign currency, and we refer here to the cash held both at the beginning of the period under examination and the end of it. By identifying the "weak point" of the Romanian instrument, we have tried to present the regulation according to which Moldova modified the Tax Code and imposed to the individuals who carry out economic activities, to submit to the fiscal organ a statement showing the amounts held in cash. In the second part of the paper we made a presentation and interpretation of the legal provisions on confiscation incidence from Romania by presenting the conditions that can be applied in the case of the confiscation of goods.

Keywords: goods, fiscal organ, indirect methods, crime, confiscation.

JEL classification: H26

1. Introduction

In civilized societies the origin of the goods whose source is not identified, goods owned by individuals, was in time an ongoing concern for both the bodies entitled to verify this aspect as well as for the common people. We consider that a system based on checking the correlation between assets, the assets and obligations of individuals versus the income obtained by the same person, declared personally or by third parties to the tax authorities would create a climate with a solid foundation in the social equity. The ostentatious display -by certain categories of persons-of goods for which there is not an effective body to analyze the state of origin of the revenue sources in which these assets have been acquired generates distrust and rebellion for the common man. The scientific challenge of our paper lies in the fact that in Romania there are broad categories of persons who hold movable, immovable goods in accounts or cash for which they can not justify the income origin that generated the amount of money needed for the purchase or holding of such assets. The topic is timely given considering that in December 2013 a draft European directive was adopted for extended confiscation of unjustified assets. We consider that the present paper can be useful both for the professionals in the field and for teaching purposes with students, master and PhD.

The research methodology used in the preparation of this paper is based on the processing and interpretation of the present regulations regarding the natural person subjected to the fiscal check-up in Romania.

2. Indirect methods for income taxation

In December 2010, for the first time after December 1989, in the Romanian legislation there was adopted a normative act regarding the correlation of the sources of income of an individual with the owned assets. In this act is stated that: "any income found by the fiscal organs, income whose source was not identified, is to be taxed at a rate of 16% on adjusted taxable basis by tax authorities using indirect methods of reconstructing income or expenses." [9]

Between 2011-2014 there were adopted several normative acts legislation referring to the fiscal check-up of a natural person, as follows:

- in the Tax Procedure Code it was introduced a chapter on verifying individuals subjected to income tax; [12]
- it was established the application of indirect methods for determining adjusted taxable basis; [14]
- there has been adopted the procedure of risk analysis for the natural subjected to prior fiscal check up; [13]
- it was clearly indicated the organization competent in performing verification of personal fiscal situation, namely, Fiscal Check Department within the National Agency for Fiscal Administration; [17]

- it has been established the model sheet for the property and income statement as well as for the individual assets and income to be reported by the natural person subjected to personal fiscal check-up; [16]

- it was approved the carta with the rights and obligations of the natural person subjected to fiscal check-up. [15]

For the fiscal authority to initiate the procedure of verifying an individual the difference between declared income and personal tax position must be bigger than 10% but not less than 50,000 Ron. The difference which does not fulfill simultaneously these two criteria is accepted by the tax authorities as minimal risk of concealing. The personal fiscal situation/position is defined as follows: “all the rights and obligations referring to property, cash flow and other elements whose role is to determine the real fiscal situation of the natural person during the check-up period” [10].

The taxpayers subjected to personal fiscal check-up are required to fill a statement of assets and income to the tax authority's request. We appreciate that the model for the declaration of assets and income has enough loopholes in the sense that the contents of the declaration do not clearly specify where and if it should be declared the cash (in lei or foreign currency) held both at the beginning of the period under verification and at the end of it.

This lack of explicit mentioning of cash, may be the "Gordian knot" in researching the wealth of individuals regarding the property held, since they can be "justified" with existing cash at the beginning of the fiscal verification period. Considering that the Tax Procedure Code stipulates that the tax authority has the right to determine tax obligations within 5 years, prior to the year of reference, or within 10 years, if there are tax liabilities resulting from offenses. [11] The “evidence” provided can exceed the period of 10 years, after which we can talk about a prescription, even in the case of fiscal fraud. The above mentioned statement is based on the fact that in Romania's post-revolutionary period there were conducted extensive illegal activities that generated cash, such as: revenues from excise goods trade embargo violation with former Yugoslavia, income from black work in Romania and abroad, the illicit trade of goods in Romania and abroad, etc.

We consider that "time zero" or so-called "moment of truth" would be in the Romanian legislation the adoption of legislative provisions which stipulate the obligation to submit to the fiscal organ a declaration for the amounts held in cash and deposits over a certain threshold. For the purposes of the above statements, we have in mind the legislative provisions adopted in 2012 by the Republic of Moldova according to which it was required that each individual who is not engaged in economic activities, to declare to the fiscal organ in the neighbourhood, the funds held on 01.01.2012. [6] The deadline to submit the declaration was 31.12.2012. The minimum amount for which there was an obligation of declaration is MDL 500,000, the equivalent of 33,150 Euro. If the amount declared exceeded one million Moldavian lei, the equivalent of 66,300 Euro, the statement made there should have been accompanied by documentation to confirm the available amount declared, namely:

- statement issued by the banking unit in the name of the holder of money means;
- copy of the loan agreement and/or certificate issued by the person who received the loan.

The statement of cash contained five subcomponents:

- cash in national currency;
- currency cash;
- the amounts held in accounts in financial institutions in Moldova in national currency or other currency;
- amounts held in accounts in foreign financial institutions;
- amounts lent to other people;

The stake in submitting the funds held on 01.01.2012 is that the reported amounts were taken into account as income received by 01.01.2012 and if the statement was not made or the amounts in it were lower than those estimated by the fiscal organ, the positive difference was assimilated to the income after 01.01.2012. The existence of such a declaration here in Romania would be beneficial not only for the natural person subjected to fiscal check, but for the fiscal organ too in applying the indirect methods of taxation.

Some researchers, in order to find some solutions to rebuilt the Romanian economy and to establish a new fiscal philosophy here, have offered legislative solutions regarding the fiscal amnesty, as it follows:

- The researcher Biris has in mind that: “a limited period in time in which the persons who know that they hold assests of any kind (cash or bank accounts, movable goods or property in their country or abroad) for which they can not prove the source, should declare them and the applied tax should a low one in order to make them pay it without any attempt to withdraw themselves from this obligation”; [2]

- The League of the Romanian Enterpriser, a patronal organization that reunites small and average enterprises in Cluj county, through its chairman Mr. Coroian, mentions that:” in 20 years of transition, there were removed important sums of money which are to be found abroad deposited by different persons from Romania. The State could perceive a tax of 5-10% for those amounts, which can be later repatriated without any explanation regarding their source. The resulted sums of money, valuing millions of Euros or even more, can be used in direct investments”. [3]

According to the legislation from Romania, there are considered three indirect methods to establish the adjusted taxable basis which can be used individually or combined according to the findings, sources of information and the documents identified by the fiscal organs, such as:

- **method source and fund spending** - consists in comparing the income declared by a natural person for the costs incurred during the verified period. This method is also called “T accounts” method in which on one side of the T's there are reflected the fund sources, while on the other side there are presented fund usages. If the fund usages are bigger than the sources the difference comes from potential undeclared sources.

- **cash flow method** –resides in the analysis of the bank accounts and cash flows to determine the movements of cash and their association with sources of income and their use. The method is based on the approach that money

collected must be spent or stored. The analysis performed by this method requires access to the bank accounts of the natural person checked and also to the documents used for payments in cash. If we compare on one hand the availabilities in the bank accounts and the cash used for payments, and on the other hand all the taxable income of a natural person, we can determine possible income evading taxes.

• **The property method** - is known as the method of net acquired asset or method increase in net asset and it is based on the fact that any increase in the property of a taxpayer, after adjustments are made on non-deductible expenses and non-taxable income, represents taxable income which should be included in the statements filled by the taxpayer or other payers of income. The method is similar to the method source and fund spending, the difference being that it extends over a longer period of years to observe the evolution of net assets from one year to another.

We consider that the wide application of the indirect methods of income tax fundamented on a statement regarding all the goods and sums hold by any mature natural person at the end of the fiscal year would be a solid reference framework for the fiscal organs during their investigation.

3. Legislation regarding the confiscation of goods in Romania

After reviewing the declaration of assets and income and indirect methods envisaged by the fiscal body when checking the personal tax situation we will mention some legislative provisions with incidence in the confiscation of goods, as follows:

- the legally acquired wealth may not be confiscated and the legality of the acquisition is presumed; [4]
- the goods intended, used or resulting from offenses or crimes can be confiscated only according to law; [5]
- there are subjected to special confiscation goods produced, given, acquired and used through performing the deed mentioned by criminal law; [7]
- there are subjected to extended confiscation other goods than those subjected to special confiscation if the person is convicted for offenses especially mentioned in the Criminal Code, including tax evasion, if the penalty provided by law is imprisonment for more than four years and the deed is likely to provide material benefit. To apply extended confiscation, the value of the assets acquired by the convicted person, within a period of five years before and, if appropriate, after the moment of performing the offense, until the date when the document instituting the proceedings, must clearly exceed the revenue lawfully obtained by the person and the court to have the certitude that the respective goods come from illegal activities for which the individual was convicted. [8]

Given the above we have the following situations in which we apply the measure of goods confiscation:

- confiscation of goods intended, used or resulting from offenses;
- confiscation goods intended, used or resulting from offenses, for which the special confiscation is applied when there is a direct link between the crime and assets used, destined or realized through the offense;
- extended confiscation of goods acquired through criminal offenses clearly stipulated in the Criminal Code, when the person is convicted, and the penalty stipulated by law is four-years imprisonment or even more. It is also necessary the existence of a clear discrepancy between the goods acquired by the convicted person and the lawful income obtained by a person in a period 5 years prior to the time of the offense or after the time of committing it and only when the court is convinced that the goods acquired by the convicted person derive from crime for which the extended confiscation is applied.

We can conclude that in the situation when a person is not convicted for an offense clearly indicated in the Criminal Code for which extended confiscation may be applied, or even if the person is convicted for this type of crime, but the court is not fully clarified that the goods and the amounts gained come from the offenses for which the extended confiscation is applied, in this case confiscation can not be applied.

4. Conclusions

Considering the above data, if the fiscal authority uses indirect methods of taxation and proves that between the value of goods acquired by a natural person in a certain period of time and the lawful income obtained in the same period, there are major discrepancies, but the court is not convinced of the criminal character of the goods and the obtained sums, then confiscation can not be applied. In this case the fiscal organ will apply a rate of 16% over the adjusted tax base obtained through indirect methods.

We appreciate that at present normative acts are not able to create the "foundation" that the Romanian society needs to start off on premises such as: fairness, equity in fulfilling tax obligations and respect for institutions.

We believe that wide application of indirect methods of income taxation, having a "zero point" where all the mature persons should be required to declare amounts held in RON or foreign currency, cash or accounts, over a certain threshold, would constitute an efficient frame of reference to which the tax authorities should appeal to in their investigations.

We also consider that in the case of individuals who perform economic activities that exceed the minimum risk of failure to declare income required it is necessary a simultaneous analysis of both activities, i.e. the business and personal one. Please note that if it is analyzed just the personal fiscal situation, without taking into account the quality of the individual as partner or shareholder of the legal entities, the cash flows between the natural and legal persons to which the natural person is associate or identified shareholder are not to be identified by the fiscal organ. There are also

considered: cash loan granted by individual to the legal entities, loan repayment made by the legal person to the shareholder/shareholders, raising cash from the cashier of the legal entity or bank account by the partner or shareholder, under the name of cash advances or sundry debtors.

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