

TAX EVASION BETWEEN LEGALITY AND FRAUD

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Abstract:

Tax evasion is, from a semantic point of view, an evasion from the payment of legal obligations due to the state. Therefore tax evasion is an actual or potential behavior of the economic subject (individually or collectively, as the case may be) likely to lead to the avoidance of payment of legal obligations due to the state. Therefore, not any evasion from the payment of legal obligations represents tax evasion, but only the evasion from the payment of legal obligations due to the state. This is logical, given that the tax obligations are set by the state for its benefit. The purpose of this study is to help to define more clearly and bridge the gap between "legal" and fraud evasion, intentionally committed by taxpayers. If the tax evasion is defined as a legal reorganization of a business so as to minimize the tax liability, tax fraud is seen as an illegal rearrangement of a business for the same purpose. Tax evasion refers to minimizing taxation by using acceptable, real alternatives. On the other hand, tax fraud is caused by those taxpayers intended to disregard the tax law. We must understand that the tax evasion decision has a variety of factors and a clear demarcation is difficult. This paper aims at identifying and highlighting as clearly as possible these factors, clarifying the differences between legal and the fraudulent ones. We want to establish the imperfections, the legislative "leaks", which would prevent the phenomenon of tax evasion, contributing to a correct collection of tax liabilities from taxpayers, according to their contributory power.

Key words: tax fraud, tax evasion, evasion of tax liability, minimization of tax liability

JEL Classification Codes: H20, H30, G28.

1. Introduction

The purpose of this study is to estimate the dimensions of the phenomenon of tax evasion in which case it is necessary, at least theoretically, a delimitation of legal tax evasion from fraud. In practice, however, it is very difficult to draw a line between legal and illegal evasion, because the successive attempts to take advantage of the loopholes of the law lead the taxpayer from legal to illegal, to tax fraud.

Tax evasion could be the result of an imperfect and insufficiently assimilated legislation. Tax evasion represents one of the most important economic and social phenomena that all countries in the world are currently facing. The effects of tax evasion cause distortions in the mechanism of the financial market, may contribute to creating social inequities between the correct payers of taxes and fees and those who evade their payment and impact directly the size of tax revenues collected by the local and central budgets of each state. The forms of manifestation of tax evasion are very diverse, requiring a realistic, rapid and effective intervention of the financial and fiscal, national and international control bodies, to prevent and combat this phenomenon, to improve tax legislation and its practical application. However, the total eradication of this phenomenon is impossible.

2. General and particular aspects of the tax evasion phenomenon

There are several interpretations of the concept of tax evasion in the specialized literature.

The first definition and interpretation of tax evasion was supported by Lerouge and Piatier between the two world wars. According to it, fraud is an extensive concept, the notion of tax evasion being included in that of fraud.

The economists De Brie and Charpentier gave a new meaning to tax evasion, considering it the art of avoiding falling into the attraction field of the tax law (De Brie and Charpentier, 1975).

Another interpretation of the concept of tax evasion was given by Maurice Duverger, who considers that tax evasion is a generic term designating the manifestation of escape from paying taxes.

In the local literature, Professor Iulian Văcărel defines tax evasion as the evasion of taxation of a part of the taxable matter.

Carmen Corduneanu (1998) considers that tax evasion consists in evading taxpayers from paying their tax liabilities, in part or in full, using legislative loopholes or resorting to ingenious maneuvers, in order to hide the taxable matter.

Dan Drosu Șaguna and Mihaela Tutungiu (1995) define tax evasion as the totality of licit or illicit procedures by means of which, the interested parties evade, in whole or in part, their taxable matter to the liabilities established by the fiscal laws.

The economic and financial globalization has led to the transfer of tax law enforcement actions from national tax systems beyond national tax borders.

Taking advantage of the tax havens, the offshore companies resort to money-laundering from national tax fraud. In most cases, tax evasion through offshore companies is harmoniously intertwined with fraudulent bankruptcy, smuggling and money laundering. Most large money-laundering cases involve the use of one or more commercial or financial companies based in a tax haven.

According to the Law no. 87/1994, amended by the Law no. 241/2005 for the prevention and combating of tax evasion, tax evasion is the evasion by any means, in whole or in part, from the payment of taxes, fees and other amounts due to the state budget, local budgets, state social insurance budget and special extra-budgetary funds by Romanian and foreign individuals and legal entities, called taxpayers.

Regardless of how it is defined, tax evasion is the deliberate non-fulfillment of tax liabilities by the taxpayer.

The phenomenon of tax evasion is condemned everywhere. It persists in all countries and at all times, despite any kind of sanctions imposed by the state.

When the tax burdens weigh too heavily on a taxable matter, it tends to escape. Tax fines will not cause the taxpayer to declare the income he has, because there is a psychology of the taxpayer not to pay, only what he cannot not pay.

The notion of tax evasion is often confused with that of fraud. When we talk about fraud, we also refer to “legal” or legitimate fraud, to illegal fraud, to “legal” and illegal evasion. From this series of terms and expressions, it results that the authors who deal with the analysis of tax evasion use the same range of words, which makes it difficult to accurately and clearly capture the phenomenon of evasion of tax contributions.

Moreover, the vocabulary inaccuracy is complicated by the comparisons of the terms used in different countries, because they differ. Thus, in the Anglo-Saxon countries "tax evasion" means fraud and "tax avoidance" means tax evasion.

Other authors consider that, according to the way in which the effects of the fiscal regulations are avoided, a distinction is made between “legal” tax evasion and fraudulent tax evasion (tax fraud).

When the evasion from fulfilling the budgetary liabilities is made by interpreting the tax laws in favor of the taxpayer, we are in the area of legal tax evasion, which does not constitute a crime. If the taxable object is concealed, the amount of taxable matter is underestimated or other means of evading the due tax are used, we are in the field of fraudulent tax evasion or tax fraud.

Tax evasion is the way through which the economic entities respond to tax pressure, when it exceeds a certain threshold considered necessary for starting, maintaining and developing a business or any lucrative activity, as well as in connection with their current wealth or income.

Although tax evasion has connotations that fall into the semantic sphere of the underground economy, it is not a component of the underground economy, but it rather lies in the inherent interference of the underground economy with the official one.

The evasion behavior is generated by two essential factors:

- the natural factor, derived from the free rider instinct. The free rider behavior is that behavior by which an economic subject tries to benefit from the advantages it can extract from the economic environment, without paying the cost of procuring these advantages. Tax evasion is a broader concept of evasion in relation to the social norm, meaning a kind of free rider behavior in relation to any external regulation of the individual in question. Therefore, the evasion behavior must be understood as part of the psychological and cultural structure of the environment in which a certain individual (economic subject) lives and carries out his activity that generates fiscal liabilities;

- the institutional factor, derived from the implementation of the fiscal pressure (as size, structure and evolution). In fact, it is not only about the fiscal pressure, but about any legal pressure regarding the collection of fiscal revenues from the economic subjects making them. For example, the paralegal pressure which refers to the collection of social and tax contributions, also leads to evasion behavior. The inflationary pressures can also lead to evasion behavior, aimed at avoiding the taxation of inflation (taxation generated by the so-called seniority practiced by central banks, by increasing the real monetary base of the economy). The importance of analyzing the tax evasion derives both from its impact on the budget balance and from the implications it has in the general architecture of the economic behavior of taxpayers, individuals and legal entities.

From a legal point of view, tax evasion is defined by the Law 87/199/98: “evasion, by any means, in whole or in part, from the payment of taxes, fees and other amounts due to the state budget, local budgets, social insurance state budget and special extra-budgetary funds, by Romanian and foreign individuals and legal entities, called taxpayers...”.

One of the most delicate issues related to tax evasion refers to the delimitation between “legal” (legal) tax evasion and illegal (illegal) tax evasion. Although such a delimitation seems superfluous, because, once it is incriminated, any tax evasion means the defeat of the law, so it is illegal, from a theoretical point of view such a distinction can be argued. Thus, “legal” tax evasion should be considered as that tax evasion that manages to avoid the payment of budgetary obligations (in whole or in part) by exploiting certain “loopholes” of the law.

Avoiding the payment of budgetary liabilities by exploiting these “loopholes” leads to a levy reduction to the state, but at the same time does not constitute a defeat of the law: this means that we are dealing with tax evasion, but which occurred not by violation but by ... obeying the law.

In this case, we could talk about a violation of the law by ... the legislator who, out of incompetence or interest, left the respective “loopholes” of evasion from the payment of generic budgetary liabilities. The issue of the legislator's own liability for the existence of legal tax evasion is not yet sufficiently debated by lawyers and economists due to the fact that it is almost impossible to prove the fault of the legislator (he can defend himself by claiming that he was ... incompetent). However, as a possibility, the judgment of such a situation could be based on the way of judging the ministerial liability, in the case of negligence in office: a legislator who, out of incompetence, left such “loopholes” that generated legal tax evasion, may be accused of negligence in office (the concept of negligence in office remains to be substantiated in the case of a legislator who is elected and not appointed, meaning that he does not have a management contract).

It seems that the legal tax evasion (which, therefore, is not incriminated) is due to the conjunction between a competence (the taxpayer's competence to choose the most advantageous solution in the law) and an incompetence (incompetence of the legislator who missed the “loopholes” mentioned above). The situation in which it can be proved that the legislator “designed” the tax evasion gates based on the text of the law under pressure from some economic interest groups (lobby) and to the detriment of the state interest does not automatically fall into the

category of illegal tax evasion, because the taxpayer used a legal text that has not been violated, but may lead to other qualifications, such as the qualification of a deed.

Therefore, although the legal tax evasion is not directly incriminated, if it is the effect of an act of corruption produced at the level of the legislator, then the latter act is incriminated. Corruption can therefore be the basis for creating the legal conditions for the existence of legal tax evasion.

Things are obvious for the illegal tax evasion, meaning that any violation of the tax rule, likely to harm the financial interests of the state, must be qualified as illegal tax evasion.

Summarizing all the above analysis, we consider that the following may be stated about the concept of tax evasion: the legal tax evasion is a tax evasion that aims not at the effectiveness of harming the financial interests of the state, but rather at the potential for such damage. Indeed, if the tax evasion occurred without violating the law, the programming of the budget revenues did not logically take into account the budget revenues that might not be collected as a result of the provisions of the tax law.

That being so, it turns out that the financial interests of the state were not, in reality, harmed. For example, what can be said about the situation in which the scheduled (planned) budget revenues are not accomplished not as a result of tax evasion, but as a result of the inability of the tax administration to collect the budget obligations? Is this a prejudice of the financial interests of the state? In our opinion, it is, we can talk about a tax evasion produced by the tax administration itself, although there is no direct violation of the law (there is, however, a negligence in the service, as we have seen that the incompetence of the legislator should be considered on tax law). As a result, there are two types of legal tax evasion:

a) the underestimation of the budget revenues by the legislator, by leaving some "loopholes" to siphon off possible public revenues, ie by incompetence or negligence in the service (when corruption cannot be proven);

b) the under-collection of the budget revenues by the administrator, through incompetence or negligence in the service (also when corruption cannot be proved). Therefore, the so-called legal tax evasion seems to be a contradiction in terms: on the one hand, the concept of tax evasion refers to the defeat of the law, so to a situation of illegality and, on the other hand, the tax evasion can be ... legal.

The economic taxpayer can practice tax evasion even if the sanction for this deed is low or the probability of being identified and sanctioned is low. This behavior can occur regardless of the tax rate (therefore, regardless of the tax burden in general), and tax evasion can therefore occur even if the tax burden decreases. The weakness of the tax administration can be the effect, on the one hand, of its corruption and, on the other hand, of its logistical or professional incapacity (incompetence). Regardless of the cause of the weakness of the tax administration, when it becomes notorious or even when it is intuited by the taxpayer, it "accesses" tax evasion.

The weakness of the fiscal administration (whether objective or subjective) has the effect of reducing the degree of collection of budgetary obligations. Since it is a question of reducing the public revenues actually collected compared to the programmed public revenues, we are dealing with the prejudice of the financial interests of the state. Therefore, according to the definition of tax evasion, a tax evasion occurs.

The causes of the evasionist behavior are directly proportional to the extent of tax evasion: the more they increase, the more tax evasion increases. At the same time, however, there are certain interconditioning relationships between these causes. The weaker the tax administration, the greater the contagion. Other relationships between these causes of evasion may be the following:

a) the increase of the fiscal pressure can lead to the need to grant new fiscal facilities, in order to stop the effect of the Laffer curve, which increases the moral hazard;

b) the increase of the weakness of the fiscal administration can attract the increase of the fiscal pressure, in order to counteract the decrease of the budget revenues.

However, it is clear that if the legal tax evasion is committed voluntarily (deliberately), then we are facing a theft of public revenue (it does not matter in whose interest, it only matters that the evasion was done to the detriment of the financial interests of the state), so we are in front of the tax evasion as it is defined by the law 87/1994, and if the tax evasion is committed involuntarily, then we are not facing a tax evasion, in the sense of the law 87/1994, but other offenses (negligence in the service, for example). In this situation, in our opinion, the concept of legal tax evasion is a concept that has no counterpart in any real circumstance, so it is an artificial semantic construction that should be abandoned.

3. Conclusions

In conclusion, according to all the above, there is only one type of tax evasion (that tax evasion (a pleonastic expression called illegal tax evasion), and the legal tax evasion does not exist (the phrase being a logical contradiction in terms used by economists). In other words, we consider that the legal tax evasion does not exist, in the proper sense of the term. We propose, in this context, that the so-called legal tax evasion be considered as representing the underestimation or collection of possible budget revenues. The illegal tax evasion is the only proper kind of tax evasion, because it is done with the defeat and violation of tax laws. In this sense, the phrase "illegal tax evasion" is a pleonasm, because the tax evasion is illegal by definition.

Tax evasion has existed, exists and will exist as long as the state and the tax will continue to exist, but its forms of manifestation undergo structural changes and improve over time.

Each taxpayer chooses whether or not to resort to tax evasion depending on his perception of a set of exogenous and endogenous variables. The delimitation of the legal tax evasion from the fraudulent one is necessary and useful because it offers the possibility, at least theoretically, to estimate the magnitude of the phenomenon, on its two forms of manifestation. Moreover, this delimitation contributes to raising the awareness of decision - makers in seeking and establishing the appropriate means to limit and combat the phenomenon in question.

However, in practice, it is very difficult to distinguish the legal tax evasion from the fraudulent one, so that between the legal and the illegal there is not a rupture but rather a continuity. The successive attempts to take advantage of the loopholes of the law lead the taxpayer from legal to illegal.

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