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Criminal liability of the Director in case of tax evasion offences

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Abstract. Tax evasion, which is included in the category of economic and financial offences, essentially consists of all unlawful procedures by means of which natural or legal persons evade taxable income by failing to fulfil their fiscal obligations. Tax evasion offences are mainly based on economic activities carried out by companies, which raises the question of the criminal liability of the statutory Director, de facto Director or the Company. The criminal liability of the natural person does not remove the criminal liability of the legal person, although in the judicial practice, there is a temptation to use the criminal liability of the legal person as a form of strict liability for the act of another. The criminal liability of the legal person includes the actual analysis of the elements of guilt of the legal person.

Keywords. economic-financial crime, tax evasion, director, legal entity, "de facto director", shell company, guilt

The term *economic-financial crime* does not have a legal or even a doctrinal definition; however, in practice, the terminology, which is quite comprehensive, is used to designate offences which concern economic relations between participants in social relations and which cause damage, whether we are talking about damage to public property or damage to the public patrimony.

Without claiming to be exhaustive, economic-financial crimes include offences against property by breach of trust (fraud, breach of trust by defrauding creditors, fraudulent bankruptcy, fraudulent management), as regulated in the special part of the Criminal Code¹, customs offences (smuggling and similar smuggling)², offences covered by Title³ VIII of Law No. 31/1990 or offences covered by Law No. 227/2015 on the Fiscal Code⁴.

But perhaps the most well-known crime associated with the concept of *economic-financial crime* is the crime of tax evasion.

In fact, in the Criminal Code of the Republic of Moldova, tax evasion offences⁵ are regulated in the special part of Chapter X entitled *Economic Offences, together with other*

¹ Title II. Offences against property. Chapter III Offences against property by breach of trust.

² See Title XII Penalties. Section 1 Offences. Art. 270 -275 of Law No 86/2006 on the Customs Code of Romania.

³ Misdemeanors and offences: Article 270³-280³.

⁴ Title VIII Excise duties and other special charges. Chapter IV Offences: Article 425.

⁵ Article 244 *Tax evasion by businesses, institutions and organizations*; Article 244' *Tax evasion by natural persons*.

offences such as *Illegal practice of financial activity, Obstructing banking supervision, Mismanagement or fraudulent management of a bank, investment company, insurance company, Acquisition of credit, loan, or insurance compensation/indemnity by fraud, Money laundering*⁶.

The term *tax evasion* has been defined in the literature⁷ as "the totality of lawful or unlawful procedures by means of which natural or legal persons evade all or part of the taxable amount and consists in the willful failure of the taxpayer to comply with tax obligations".

It would seem that the concept of *tax evasion* contains components of illegality, but it can also contain exclusively legal components, which indicates two types of tax evasion: illegal tax evasion and legal tax evasion.

The first normative act criminalizing the offence of tax evasion was Law No. 87/1994 on fighting tax evasion, which defined tax evasion as *the evasion by any means, in whole or in part, of the payment of taxes, duties and other amounts due to the State budget, local budgets, the State social security budget and special extra-budgetary funds by natural persons and Romanian or foreign legal persons, hereinafter referred to as taxpayers*⁸.

The expression "*by any means whatsoever*", in our opinion, refers to any concrete means of theft, which are circumscribed to the material element on the objective side, and not to the "lawful or unlawful means" by which the fraud takes place.

Moreover, according to the Explanatory Dictionary of the Romanian Language defines this technical concept as "evasion by any means from the payment of taxes, duties and other amounts due to the state budgets by natural or legal persons, who earn taxable income, according to tax regulations"⁹.

The expression *according to tax regulations* leads to our conclusion that tax evasion is understood as the totality of illicit procedures with the help of which natural or legal persons evade, in whole or in part, the taxable amount and consists in the deliberate non-fulfilment of tax obligations by the taxpayer.

Thus, taxable income must comply with *tax regulations* in all its dimensions; the entire operation of evading the payment of taxes, duties and other amounts due to the state budget, local budgets, the state social security budget and special extra-budgetary funds by taxpayers is clearly unlawful.

⁶ Republic of Moldova Criminal Code, published in the Republic of Moldova Official Gazette No. 72-74/14.04.2009.

⁷ Apauș D.A.P. Florescu, D. Bucur, TH. Mrejeru, M. Pantea, A. Martinescu, V. Manea, *Evaziune fiscal (Tax evasion)*, Universul juridic Publishing House, Bucharest, 2013, pg. 20.

⁸ Article 1 of Law No. 87/1994 on fighting tax evasion, published in the Official Gazette No. 299/24.10.1994.

⁹ www.dexonline.ro

By Law No. 241/2005, a new legislative framework for fighting tax evasion was adopted, which established the offences of tax evasion in Article 9¹⁰ of the Law and offences related to tax evasion¹¹.

This time, the Law does not indicate, in essence, whether tax evasion concerns the evasion of taxes, duties and other amounts owed to the state budget, local budgets, the state social security budget and special extra-budgetary funds by taxpayers, or whether it concerns the evasion of taxes, duties and other amounts owed only to the state budget.

Thus, the controversy remains as to whether the evasion of local taxes and duties can constitute the offence of tax evasion.

We consider that an answer to this question is to be found in the recitals to Resolution No. 17/2015¹², delivered by the High Court of Cassation and Justice (ICCJ), on appeal in the interest of the law, according to which, *“in cases where the offence of tax evasion has been committed, the taxpayer, as the passive subject of the tax procedural legal relationship, shall be charged with either an action or an inaction with regard to the obligations incumbent on him in connection with the administration of taxes, taxes, contributions or other amounts owed to the General Consolidated Budget¹³, according to the Law, and the State, through the tax authority, as the active subject of the tax procedural legal relationship, has the right to obtain compliance with the taxpayer's obligations in relation to the administration of taxes, duties and contributions or other amounts owed to the general consolidated budget.”*

In view of the above, we consider that tax evasion is understood as the totality of unlawful procedures by means of which natural or legal persons evade, in whole or in part, the taxable amount by willfully failing to fulfil their tax obligations to the general consolidated budget.

Most often, tax evasion crime is committed as a prerequisite for companies to carry out economic activities and evade paying taxes.

In practice, two trends have been identified: either the company was set up to carry out a commercial activity and, in the course of this activity, has been diverted from its lawful activity in the direction of tax evasion, or the company was *ab initio* set up for the purpose of

¹⁰ Article 9 (1) The following acts committed for the purpose of evading tax obligations constitute tax evasion offences and are punishable by imprisonment from 2 to 8 years and disqualification from certain rights:

(a) concealment of property or of the taxable source;

(b) failure to record, in whole or in part, in accounting or other legal documents, the commercial transactions carried out or the income obtained;

(c) the entry in the accounts or other legal documents of expenditure not based on actual transactions or the entry of other fictitious transactions;

(d) altering, destroying or concealing accounting records, memories of tax invoicing or electronic fiscal registers or other means of data storage;

(e) keeping double accounting records, using book entries or other means of data storage;

(f) evading financial, tax or customs controls by failing to declare, making fictitious declarations or making inaccurate declarations concerning the principal or secondary establishments of the persons being controlled.

¹¹ Articles 3 – 9.

¹² ICCJ - Resolution in the interest of the Law No. 17/05.10.2015, published in the Official Gazette No. 875/23.11.2015.

¹³ Article 3(2) of Law No. 69/2010 on fiscal-budgetary responsibility: *General Consolidated Budget* - all the component budgets of the budgetary system, including the state budget, the state social security budget, the special funds budgets, the centralised general budget of the administrative-territorial units, the State Treasury budget, the budgets of autonomous public institutions, the budgets of public institutions financed wholly or partly from the state budget, the state social security budget and the special funds budgets, where applicable, the budgets of public institutions financed entirely from own revenues, the budgets of funds deriving from external loans contracted or guaranteed by the State and whose repayment, interest and other costs are covered by public funds, the budgets of non-reimbursable external funds, as well as of other entities classified within the general government, aggregated, consolidated and adjusted in accordance with Regulation (EU) No.../.... 549/2013 to form a whole.

tax evasion, but does not actually carry out commercial activities, being integrated into more complex tax evasion schemes.

In such a context, the question legitimately arises *What is the liability of the company and its director?*

The most prominent institutional structure of society that has an existence and is perceived as being, volitionally, society itself, is its director¹⁴.

The concept of director, generically, designates a person who administers affairs, who runs a service in the state administration, a person skilled in the management and organization of an activity¹⁵.

However, one should not confuse the meaning of the term "*director*" in common parlance with the legal meaning of the term; the "*director*" institution which covers a wider range of legal concepts or functions within the system of organization and management of companies.

Traditionally, the director was the one who managed the company, but with the evolution of companies the director's status has changed so that the traditionalist conception has been replaced by a corporatist view of this legal institution.

By Law No. 441/2006 amending and supplementing Law No. 31/1990, there has been a profound reform in the system of administration and management of joint-stock companies, calling on the principles of corporate governance, by harmonizing national legislation with the regulations of European Union member countries.

The office of Director is exercised on the basis of a mandate agreement, but its minimum powers derive directly from the Law.

Just as a company has a dual nature, as an agreement and as an institution (legal person), so the legal relationship between the director and the company has a dual nature, contractual and legal.

In the "contractual" theory, the director is considered to be a mere trustee of the company, revocable *ad nutum*. At the other extreme, in the "organizational" theory, the director is an organ of the company which derives its power from the law and not from the contract with the company or the shareholders. Neither theory fully explains the increasingly complex situations that arise in practice, especially because of the different types of tasks that directors perform¹⁶.

In its original form, Law 31/1990 embraced the unitary view of company management.

Thus, the joint stock company was managed by one or more temporary and revocable directors. When there were several directors, they formed a Board of Directors.

The Board of Directors could delegate part of its powers to a Steering Committee, composed of members elected from among the Directors.

The Chairman of the Board of Directors was also the Managing Director or Director, in which capacity they also headed the Management Committee.

Currently, the regulatory variant provides for two systems of management, namely the unitary system (management is carried out by the board of directors and the company's managers) and the dual system (by the management board and the supervisory board).

¹⁴ C. Gheorghe, *Tratat de drept comercial român (Treatise on Romanian Commercial Law)*, C.H. Beck Publishing House, Bucharest, 2020, pg. 315.

¹⁵ Explanatory Dictionary of the Romanian Language.

¹⁶ Gh. Piperea, *Drept comercial român. Teoria generală, întreprinderea și insolvența (Drept comercial român. Teoria generală, întreprinderea și insolvența)*, C.H. Beck Publishing House, Bucharest, 2020, pg. 325.

While from a civil point of view the director's liability is mainly governed by Law No. 287/2009 on the Civil Code and Law No. 31/1990, criminal liability is generally governed by Law No. 286/2009 on the Criminal Code, Law No. 135/2010 on the Criminal Procedure Code and Law No. 241/2005 on preventing and fighting tax evasion.

In the doctrine¹⁷, it has been considered that, in the case of tax evasion offences, the active subject is unqualified, i.e. it can be any natural person responsible for evading the payment of tax contributions in the case of the normative variant in Article 9(1)(a), i.e. where the concealment of the property or of the taxable or taxable source takes place; on the other hand, in the case of the other normative variants in Article 9(1), it has been considered that the active subject is qualified, i.e. it can only be a person with financial-accounting duties.

We consider that the opinion expressed above is deficient, or at least incompletely addressed.

The first issue to be addressed is that companies with legal personality can also be held liable for committing the offence of tax evasion, regardless of their form of organisation: general partnership, limited partnership, joint-stock company, limited partnership or limited liability company.

The criminal law and criminal procedure legislation explicitly provide that the legal person is criminally liable for offences committed in the performance of their activities or in the interest or on behalf of the legal person¹⁸.

Introduced in the post-December criminal legislation by Law No 278/2006, the institution of criminal liability of legal persons enshrines the system of the general clause, i.e., "the legal person may commit, in principle, as perpetrator, instigator or accomplice, any offence, regardless of its nature, it being established in each specific case whether or not the conditions for incurring criminal liability are met"¹⁹.

Although there are still difficulties in determining which offences can be committed by legal persons and practitioners are still reluctant to invoke legal person liability, it is clear that legal persons can be liable for tax evasion offences. In fact, judicial practice is replete with cases where companies with legal personality are held criminally liable for committing offences.

It is therefore conceptually wrong to consider that a legal person cannot be held liable as an active subject for the offence of tax evasion.

On the other hand, the view already expressed that the active subject is qualified in most of the normative variants of Article 9(1), is at least controversial, if not unfounded.

Offences with a special active subject are offences that can only be committed by a person who has the capacity provided for in the incriminating provision²⁰, a capacity that is explicitly provided for, as in the case of the offence of abuse of office, or that derives from the criteria laid down in the incriminating legal text²¹.

¹⁷ Al. Boroi, M. Gorunescu, I. A. Barbu, *Dreptul penal al afacerilor (Dreptul penal al afacerilor, ediția 5)*, 5th edition, C.H. Beck Publishing House, Bucharest, 2011, pg. 191-203.

¹⁸ Article 135(1) of Law No. 286/2009 on the Criminal Code.

¹⁹ Explanatory memorandum on the Law No. 278/2006 amending and supplementing the Criminal Code and amending and supplementing other laws, published in the Official Gazette No. 601/12.07.2006.

²⁰ F. Stretianu, *Tratat de drept penal. Partea generală (Treatise on Criminal Law. General part), 1st Volume*, C.H. Beck Publishing House, Bucharest, 2008, pg. 380.

²¹ In the case of breach of trust, the active subject (the perpetrator) is the person to whom the property has been entrusted on the basis of a title and for a specific purpose; in the case of fraudulent management, the active subject (the perpetrator) is the person who has or should have the care of the administration or preservation of the property etc..

However, it is not sufficient to infer from the rule criminalising the tax evasion crime that the offender must have any special status.

It is true that in most practical cases the directors of companies involved in commercial transactions are held criminally liable. In this regard, we illustrate a case²² in which the defendant was prosecuted for the offence of tax evasion, in continuous form, as provided for in Article 9(1) and (2)(c) of Law No. 241/2005 with the application of Article 35(1) of the Criminal Code since, in the period 2012-2013, as statutory director of a Limited Liability Company, he evaded the payment of corporate income tax as well as value added tax, in which sense they used as cover another company with "shell" behavior, defendant in the case, declaring fictitiously to the tax authorities, commercial relations with this company, in the total amount of RON 4,150,663, and thus incurred General Consolidated Budget loss of RON 1,339,454 in total.

The same defendant was also indicted for tax evasion, in continuous form, as provided for by Article 9(1)(b) and (2) of Law No. 241/2005 with the application of Article 35(1) of the Criminal Code, holding that, in the period 2013-2015, as director of the same company, he did not record in the accounting records and did not declare to the tax authorities income in the amount of RON 1,290,621, causing damage to the state budget in the total amount of RON 520,043, consisting of value added tax and corporate income tax.

The above case is a typical one in which the statutory director is the one who is justifiably held criminally liable for tax evasion.

As Article 135(3) of the Criminal Code recalls, the criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed to the commission of the same crime. The legislator has thus provided for the cumulation of criminal liability of natural and legal persons; the liability of one of the two categories does not serve as a ground for exonerating the other from liability.

On the other hand, the two persons - natural and legal - who are liable for the same act will not be considered as being in a form of criminal participation.

However, after analyzing 19 cases concerning tax evasion crimes²³, it was found that all of them concerned the criminal liability of natural persons, directors of companies, although some of them also included assessments of the guilt of legal persons, without ultimately holding them criminally liable. This trend leads to the unfortunate conclusion that, in the practice analyzed, the criminal liability of the legal person is seen as a form of strict liability for the act of another, rather than a personal legal liability of the legal person for its own act.

The statistics extracted from the records of the Public Prosecutor's Office attached to Constanta County Court reveal that in the period 2018-2022, 81 natural persons and 8 legal persons were prosecuted for tax evasion, which reveals once again that the criminal liability of legal persons occurs to a large extent when natural persons are not prosecuted, thus the criminal liability of legal persons is a form of liability for the actions of others, even though the reasoning of the judgments provides sufficient evidence that tax evasion is committed in the performance

²² Constanța County Court, Criminal Division - Criminal Judgment No. 103/17.03.2023, delivered in case No. 6509/118/2020.

²³ Delivered by Constanța County Court in the period 2018-2022, and randomly identified (for example: Constanța County Court, Criminal Division - Criminal Judgment No. 563/16.08.2018, delivered in case No. 3551/118/2018, Constanța County Court, Criminal Division - Criminal Judgment No. 563/16.08.2018, delivered in case No. 3551/118/2018, Constanța County Court, Criminal Division - Criminal Judgment No. 563/16.08.2018, delivered in case No. 3551/118/2018, Constanța County Court, Criminal Division - Criminal Judgment No. 426/11.11.2020, delivered in case No. 4852/118/2018, Constanța County Court, Criminal Division - Criminal Judgment 239/17.06.2022 delivered in case No. 3807/118/2021).

of the activity, in the interest of or on behalf of the legal persons in which the directors are active.

The case law also includes the second hypothesis mentioned above, i.e., the company was established for the purpose of evading the payment of obligations to the General Consolidated Budget, but does not actually carry out commercial activities, being integrated into more complex evasion schemes.

In such a hypothesis, questions arise such as *Who is the person against whom the criminal investigation should be directed? Is it legitimate to hold criminally liable the 'shell' company and possibly the statutory directors, persons with no education, even with limited intellect, who were not even the beneficiaries of the criminal action, but merely 'fall guys'?*

In another case²⁴, indictment was ordered for tax evasion, in the normative manner provided for by Article 9(1)(c) and (3) of Law No. 241/2005, of the Defendant natural person accused and the Limited Liability Company whose statutory director he was, consisting in the evasion of tax obligations in the form of corporate income tax and VAT by means of accounting, in the legal documents submitted to the tax authorities (D300 VAT statements and D394 information statements on deliveries/services and purchases made within the national territory), for the period from September 2013 to May 2014, consisting of purchases allegedly made from the supplier, operations which in reality were fictitious, with the consequence of damaging the general consolidated budget of the State by a total amount of RON 3.496.042 representing corporation tax and value added tax.

During the investigation, it was confirmed that the transactions between the defendant company and the alleged supplier did not exist, by reporting them, concealing the reality and creating the appearance of a commercial relationship that, in reality, did not exist, with the consequence of evading tax obligations consisting of value added tax and corporate income tax.

The investigation revealed that the defendant, who was the statutory director of the company, did not own a home, been on social assistance for a period, had previously been employed as a security guard but was dismissed because of alcoholism, and had lived in a homeless shelter for a while.

Accordingly, the court ordered the acquittal of the natural person defendant, who was the statutory director of the defendant company, under the provisions of Article 16(1)(c) of the Code of Criminal Procedure, i.e., the crime of tax evasion was not committed by the defendant.

The analysis of the case considered above invalidates the theory according to which only a natural person who meets the special conditions of a director can be an active subject of the tax evasion crime.

We are of the opinion that criminal prosecution should be directed against those who effectively administer and manage the affairs of the company and evade the payment of tax contributions, enriching themselves with the equivalent of the damage caused to the State, regardless of their statutory status.

In this context, a new concept emerges, namely that of "de facto director", a concept less known in Commercial Law but with significance in legal relations under criminal law and criminal procedure.

This *capacity* of "de facto director" requires only the fulfilment of the general conditions of criminal liability, which is a sufficient condition for being a passive subject of the reports of criminal liability.

²⁴ Constanta County Court, Criminal Division – Criminal Judgment No. 71/14.02.2020, delivered in case No. 3939/118/2016*.

Most of the time, the "de facto director" does not have any capacity whatsoever within the shell tax evasion company - the so-called taxpayer - this being a cover, a factual and legal fiction that this "de facto director" uses to illicitly enrich himself.

Thus, under such a scenario, of the use of a "shell company" to commit the tax evasion crime, we consider that the company cannot be held criminally liable, as it lacks guilt as an element of the subjective side.

The guilt of the legal person is based on proof of objective elements, such as the act of conduct of the natural person proven to have been carried out in the interest or in the performance of the scope of business or on behalf of the legal person, and on proof of subjective elements, external to the actual act of conduct of the natural person, arising from the organization of the legal person prior to the production of the socially dangerous result, the authority exercised by the legal person over the natural person, the number and importance in the internal organization of the natural persons involved in the act provided for by the criminal law, over whom the legal person has moral or administrative or disciplinary authority²⁵.

Therefore, the criminal liability of the legal person is not an objective liability for the fault of another person, similar to civil liability, but it is necessary to include the analysis of guilt, i.e. to establish the form in which the offence provided for by the criminal law was committed, intention or fault.

However, if the question of holding a 'shell company' criminally liable arises, it is difficult to assess whether it has the will to commit tax evasion crimes.

By way of recommendation, we consider that there is a need for a more thorough analysis of the guilt of natural or legal persons involved in the evasion phenomenon, so that no innocent person is held criminally liable and the offenders are punished according to the Law.

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²⁵ A.R. Trandafir, G.A. Lazăr, ș.a., *Răspunderea penală a persoanei juridice. O instituție transatlantică. De la evaluarea vinovăției la aplicarea și executarea sancțiunilor (Criminal liability of legal persons. A transatlantic institution. From the assessment of guilt to the application and enforcement of penalties)*, Solomon Publishing House, Bucharest, 2021, ap. 115.

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