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ORGANIZED CRIMINAL GROUP IN THE CONTEXT OF TAX EVASION. THEORETICAL AND PRACTICAL ASPECTS

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ABSTRACT

The fact that following some controls carried out by the fiscal bodies, the crime of tax evasion was apprehended at some commercial companies on financial circuits whose object is different periods of time, those companies being constantly identified in collaboration with certain economic firms on the first criminal level and occasionally with other economic companies in the second financial circuit, does not constitute a sufficient reason to impose the reunification of the cases as long as, on the one hand, none of the situations provided for by article 43 Criminal Procedure Code (C.P.C.), and on the other hand, the resolution of the case is delayed by the ordered meeting. Regarding the crime of constituting an organized criminal group, in the case deduced for analysis, no typical elements could be proven that could objectively invoke that there was such an association between the investigated persons, a fact that led to the delay in the solution criminal investigations. When several people carry out an activity for an insignificant period, without continuity, its "members" do not have determined roles and there is no coordination of actions, an accusation in this sense cannot be proven.

KEYWORDS: tax evasion, organized criminal group, crimes in continuous form, reunification of criminal cases, competence to solve criminal cases.

INTRODUCTION

Committing the crime of tax evasion (frequently in one of the variants provided for in art. 9 paragraph 1, letters a, b, c and e) leads to the prejudice of the collection of fees and taxes, being in fact prejudiced to the state budget.

Concealing the asset or the taxable or taxable source, omitting to highlight the income or the operations performed, the highlighting of expenses that are not based on real operations or other fictitious operations - represent the variants of tax evasion itself, the other forms being adjacent methods of accomplishment.

Regarding the special legal object, the forms of committing the crime of tax evasion assume a common point that indicates the reality that the right of the state to have knowledge of the goods or income subject to taxation or taxation to collect the amounts owed by the taxpayers is violated, and this violation it is done scripturally.

In the annex that is an integral part of the paper, we will present the main aspects of a real situation of illegal conduct in violation of the provisions of art. 9 para. 1 lit. c from Law no. 241/2005 on the prevention and combating of tax evasion by means of reducing the taxable asset through active conduct, respectively by highlighting in the accounting documents or other legal documents the expenses that are not based on real operations, or the highlighting of other fictitious operations committed for the purpose evading the fulfilment of fiscal obligations.

1. DESCRIPTION OF THE CASE

We are in the situation of committing the crime of tax evasion through several companies: "boon" or "phantom" - which involves the successive registration of purchases and sales in the records of several companies, so that in the end the last company that performs the registration of fictitious expenses be the one who benefits from the results of committing the crime[1]. In the case inferred from the present work, numerous files that have as their common object the commission of tax evasion crimes were declined and respectively brought together in the basic file.

Analysing the ordinances by which the refusals were ordered, it was found that the factual reasons are shown in an extremely generic way without being able to identify, concretely, what were the activities carried out by the investigated persons and which, according to art. 43 paragraph 1 C.P.C., impose the reunification of the cases respectively: continued crime, the formal contest of crimes or the cases when two or more material acts make up a single crime.

The same situation is found in the case of the ordinances by which the declined cases were joined to the present file, in the same general and formal manner they were assessed as having met the legal conditions that require the joining of the cases.

The declines and subsequent reunions were ordered by reference to the provisions of art. 43 C.P.C., appreciating that there is a link between the commercial activities carried out by the commercial companies and for a better administration of justice the cases must be brought together.

Apparently, the joining of the cases would have been required, in accordance with the provisions of art. 43 paragraph 2 letter c C.P.C., holding that there is a link between the investigated crimes and the reunification of the cases is required for a better administration of justice, but this reunification can only be ordered if it does not delay the resolution of the case, or this condition has not been analysed.

The fact that because of controls carried out by the tax authorities at some commercial companies, on the invoicing circuits, the two basic companies referred to in the Annex were also occasionally identified, is not a sufficient reason to impose the reunification causes if, on the one hand, none of the provided situations can be concretely identified of art. 43 paragraph 1 C.P.C. and on the other hand, the resolution of the case is delayed.

In conclusion, we consider that the reunification of most of the cases was ordered through the wrong application and without a thorough analysis of the incidence of the previous provisions. of art. 43 C.P.C. a fact which, indisputably led to the delay in the resolution of the case.

The joining of cases is ordered in accordance with the provisions of art. 43 C.P.C:

(1) The court orders the reunification of the cases in the case of the continued crime, of the formal contest of crimes or in any other cases when two or more material acts make up a single crime.
(2) The court may order the consolidation of the cases, if this does not delay the trial, in the following situations:
    a) when two or more crimes were committed by the same person;
    b) when two or more people participated in the commission of a crime;
    c) when there is a connection between two or more crimes and the joining of the cases is required for the proper administration of justice.
(3) The provisions of par. (1) and (2) are also applicable in cases where there are several cases with the same object before the same court.

[1] ANNEX 1 to this document.

The competence to resolve the present case was attracted by the specialized DIICOT structure, for the fact that the commission of tax evasion crimes fell within the scope of an organized criminal group and according to the provisions of art. 22 paragraph 1 of GEO 78/2016, the cases registered at DIICOT prior to the entry into force of this GEO, the specialized structure shall be resolved by it.

According to the law establishing DIICOT, respectively Organic Law no. 508/2004 regarding the establishment, organization and functioning within the Public Ministry of the Department of Investigation of Organized Crime and Terrorism, DIICOT had competence for the crime of tax evasion from the date of its establishment - 23.11.2004 and until 29.12.2006, when GEO no. 131/2006 for the amendment and completion of Law no. 508/2004. Over time, the incident legislation in the matter has undergone several changes. Thus, in the beginning period 2004-2006, the crime of tax evasion was provided for in the opus of the crimes regarding which DIICOT had material competence, detailed opus in art. 12 para. (1) from Law no. 508/2004. According to GEO no. 78/2016 approved by Law 120/2018 (which defines DIICOT's competence at this time), DIICOT does not have the material competence to carry out criminal prosecutions regarding the crime of tax evasion, nor regarding group acts aimed at the crime of tax evasion, for new cases, starting from 22.11.2016 and until now[2].

The delay in solving the criminal case in the analysed case was undoubtedly also due to the insufficiency of evidence to argue that we are in the presence of an ORGANIZED CRIMINAL GROUP.

To incriminate the persons investigated on this criminal level, it is necessary to accumulate several conditions, for which the following must be known:

- Law no. 39/2003 regarding the prevention and combating of organized crime[3].
  - Art. 7 repealed (on 02-01-2014, art. 7 was repealed by point 2 of art. 126 of Law no. 187 of October 24, 2012, published in the Official Gazette no. 757 of November 12, 2012).
- Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code[4].
  - Art. 126: Law no. 39/2003 regarding the prevention and combating of organized crime, published in the Official Gazette of Romania, Part I, no. 50 of January 29, 2003, as amended, is amended as follows:

  1. In art. 2, letters a) and b) will have the following content:

  a) organized criminal group - the group defined in art. 367 para. (6) from the Criminal Code;

  b) serious crime - the crime for which the law prescribes the punishment of life imprisonment or the prison sentence of which the special maximum is at least 4 years, as well as the following crimes..."

  2. Art. 7-10 and 13 are repealed.

  3. Throughout the law, references to art. 7 will be made in art. 367 of the Criminal Code.
- The establishment of a criminal group organized according to art. 367 of the New PENAL CODE[5].
  - Art. 367: Establishment of an organized criminal group

  (1) Initiating or forming an organized criminal group, joining, or supporting, in any form, such a group is punishable by imprisonment from one to 5 years and the prohibition of the exercise of certain rights…

[2] https://www.juridice.ro/650182/necompetenta-diicot-in-materie-de-evaziune-fiscala.html
[3] Law no. 39/2003 regarding the prevention and combating of organized crime.
[4] Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code
[5] Criminal Code of Romania, art. 367 – the establishment of an organized criminal group.

(6) Organized criminal group means a structured group, consisting of three or more persons, constituted for a certain period and to act in a coordinated manner for the purpose of committing one or more crimes.

Thus, the offense of constituting an organized criminal group provided for in art. 367 of the Criminal Code (C.C.), represents a framework criminalization that arose from the legislator's desire to abandon the existing parallelism, prior to the new Criminal Code, between the texts that criminalized the same type of acts (organized criminal group, association to commit crimes, conspiracy, grouping terrorist).

Article 367 of the Civil Code represents, in part, the correspondent of the crimes of: conspiracy, provided for in art. 167 C.C. previous; association in order to commit crimes, listed in art. 323 C.C. previous; initiating, establishing, joining or supporting a group, provided for in art. 8 C.C. previously and initiating, establishing, joining or supporting an organized criminal group, criminalized in art. 7 of Law no. 39/2003 regarding the prevention and combating of organized crime.

The plurality of criminals necessarily implies the plurality of persons, criminal unit, material cooperation and subjective cohesion and, as such, involves a joint effort of several persons materialized in the production of a unique illicit result; the plurality highlights the indivisible character of the contribution of all the perpetrators to the defeat of the criminal law. Plurality of criminals can be realized in three different forms: natural (necessary) plurality, constituted (legal) plurality, and occasional (criminal participation) plurality.

High Court of Cassation and Justice - The panel for resolving some legal issues, by Decision no. 12 of June 2, 2014, noted that:

- by the action of associating is understood the entry into the association at the very moment of its constitution, thus giving birth to the plurality constituted by the perpetrators, a group of persons that is subject to a certain internal discipline, certain rules regarding the hierarchy, the roles of the members and the plans of activity, creating, through the consensus of several people, an autonomous nucleus, in order to exist in time and to prepare, organize and carry out the commission of crimes;
- by the action of initiating the formation of an association is understood the performance of acts intended to determine and prepare the formation of the association, this can be carried out by a single person or several, each having the capacity of perpetrators of the crime, regardless of whether or not the formation has been reached of the association and regardless of whether the person or persons who initiated the establishment entered the association or not;
- joining an association means entering the association as a member of it, and the supporting action consists in facilitating or helping the association throughout its existence.

The organized criminal group must have a certain structure and a precise purpose, and its object of activity must include serious crimes.

In terms of occasional participation in the commission of crimes, this participation will constitute one of the forms of criminal participation in the commission of the deed that forms the object of the group, not an organized criminal group.

The probation on which the accusation of committing the crime is based prev. of art. 367 paragraph 1 and 2 C.C. (previously the provisions of art. 7 of Law no. 39/2003) and as it has been constantly established by the final court decisions, it must aim mainly to establish the circumstances from which it results:

- the manner in which the organized group was constituted;
- the moment when the understanding would have taken place, what was the hierarchy and the role of each member;

- what is the element of subjective cohesion between group members;
- the way the defendant(s) supported the organized group and their knowledge at the time of the support, that all co-defendants had already constituted the organized group.

Regarding the analyzed case, in view of the lack of sufficient evidence administered regarding the commission of the crime of constituting an organized criminal group, the following conclusions can be drawn:

- The circumstances in which the defendants ended up carrying out illegal commercial activities as well as the goal pursued, respectively, that of each obtaining a financial gain, in a short period of time and without continuity, are not specific to a criminal group and cannot be appreciated as being a way in which the alleged group was constituted and acted;
- No evidence could be presented that could establish the moment when the agreement took place, what was the hierarchy and the role of each member, nor the fact that the person who coordinated this whole circuit was one of the representatives of the two incriminated companies and that they are those who had constituted a criminal group;
- The manner in which the defendants collaborated in the illegal activities carried out, through their companies, constitutes a form of criminal participation/occasional association for the purpose of committing the crime of tax evasion, not having met the necessary conditions for the existence of the crime prev. of art. 367 paragraph 1,2 C.C.;
- There is no "solid" evidence to show the moment or the circumstances in which the defendants unequivocally agreed to the association, according to a well-established plan, with assumed roles for each, to obtain material benefits. Undeniably, they related through the companies they owned and through the involvement of other companies, but the existing evidence shows that this was done, in most situations, according to the "opportunities" they identified during their activities.

The accusation of constituting an organized criminal group must result only from the corroboration of all the administered evidence, the prosecutor not being able to substitute their lack with a subjective interpretation.

Without disputing aspects related to the complexity of the case, the large number of people, companies involved, the extent of the damage, these, by themselves, are not likely to attract the competence of DIICOT, the competence being attracted only by the existence of a criminal group that has committed the crimes of tax evasion, money laundering and others.

It is not possible to establish without doubt what the structure of the group is, from whom it was constituted, when exactly it was constituted, possibly which persons joined/supported the criminal group, what was the role of the members, the manner in which they supported/joined the organized group and nor did they know at the time of giving their support that the initiators had already constituted the organized group.

In view of the passage of a long period of time from the date of the execution of the material acts, it was no longer possible to use the means of evidence from which it could be concluded that there was an unequivocal criminal agreement between the investigated persons, regarding their association in a structure organized to act in a coordinated manner, according to well-established rules, and on the other hand, the mere existence in the invoicing chains of common companies cannot prove an element of connection.

When the alleged group carries out an activity for an insignificant period, without continuity, its "members" do not have determined roles and there is no coordination of actions, an accusation in this sense cannot be formulated.

Therefore, the two companies had commercial relations during the years 2009-2011, but with regard to the crime of constituting an organized criminal group, no elements of typicality could be proven that could objectively invoke, that between the persons of above there was such an association.

CONCLUSIONS

The simple fact that a commercial company conducts commercial relations with one/several partners over a period is not sufficient to conclude that organized group-type criminal links have been created between their representatives, even if there are serious suspicions regarding the behavior their escapist.

The present work, without the pretense of exhaustiveness, hopefully at least has the merit of raising and supporting a question whose importance is more fascinating than the certainty of the answer.

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3. Law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code;
4. https://www.juridice.ro/650182/necompetenta-diicot-in-materia-de-evaziune-fiscala.html;
5. National casuistry.

ANNEX 1 - The onset and evolution of the cause

On 03.01.2013, the police bodies from the Brigade for Combating Organized Crime from a county in the center of the country were notified ex officio about the *fact that in the respective* area *of the county they act with an organized criminal group, consisting of the appointees "**MC**" and "**SME**" who, as associates and administrators of the companies "**V**" and "**U**", through special criminal manipulations and attracting in illicit activities, administrators of some companies from counties in the east and north-west* of the *country, have committed the crime of tax evasion.*

The complaint was registered with DIICOT under no. of criminal file ____ regarding the commission of prev offenses. art. 7 of Law no. 39/2003 and art. 9 paragraph 1 of Law no. 241/2005.

Since the date of the notification, during the criminal investigation, it was found that in the case initiated at DIICOT, another 39 files were gathered, coming from various prosecutor's offices, which, in their turn, were notified about the commission of tax evasion offenses and to which other files had previously been gathered.

The declinations and subsequently the meetings were ordered by reference to the provisions of art. 43 of the Code of Civil Procedure, considering that between the *commercial activities carried out by the companies, there was a connection, and for a better achievement of justice, it is necessary to reunite the cases*.

As a result of all these reunions, in the present case, a number of 6 offences were notified regarding the establishment of an organized criminal group, for which the investigations were carried out in some situations, only with regard to the deed and in other situations, the investigated persons acquired the quality of defendants.

I: the acts committed between 01 August 2009 – 31 December 2009 on the relationship: **V > DC > RC > CC > LL > UG > VP.**

At the time of the fact's "V" was not in insolvency and the administrator of the company was "SME". The company went into insolvency starting with 17.06.2010.

"V" was supplied from the foreign market with various goods, in particular rolled products. The acquisitions being intra-Community were exclusive of VAT. As a result of the capitalization of the goods supplied from the external market to the internal market, internal supply with VAT, "V" collected VAT, which he had to transfer later to the State. In order not to pay this collected VAT, "V" recorded in the accounts of the company fictitious domestic acquisitions (with VAT) so that the VAT payable (because of intra-Community acquisitions following domestic supplies) was compensated with the VAT – the registered following fictitious domestic purchases.

Thus, a scriptic circuit of the goods with which the fictitious "V" was supplied was created, a circuit in which the following companies were scriptically involved: V > DC > RC > CC > LL > UG > VP.

Throughout this fictitious invoicing circuit between the above-mentioned companies, the goods were introduced into the "V" invoicing circuit with a value without VAT of 9,208,924 lei (Romanian currency = RON), so that in the end the same goods reach again the same company – "V" but at a value without VAT of only 7,751,653 lei, achieving a decrease in the price of goods (without VAT) entered in invoices of 1,457,271 (9,208,924 – 7,751,653), this represents a decrease in the value of goods by 18.8%, a percentage almost identical to the VAT

rate in the period, which was 19%. The purpose of this fictitious billing circuit was to obtain by the "V" of deductible VAT.
Thus, V:
- delivers the goods with 9,208,924 lei without VAT (VAT = 0 lei).
- repurchases the same goods with 7,751,653 lei without VAT, 1,472,814 lei vat, total 9,224,467 lei.
Related to these fictitious operations, "V" deducted VAT in the amount of 1,472,814 lei.
II. acts committed during 2012:

It was noted that at the beginning of 2012, the accused SMEs and MC initiated and set up, together with the appointees DC and CN, a criminal group organized for the purpose of committing the serious crime of tax evasion and money laundering.
The leaders of the criminal group actually manage the companies "U" and "V". They set up a financial circuit because of which the companies controlled by them registered deductible VAT. The amounts thus obtained from committing the crime of tax evasion were reintroduced into the civil circuit, being used for the current financial operations of the company that registered the deductible VAT. The main task of dn was to find companies and to control them, directly or through intermediaries, companies that were later used in the script circuit of documents, in the sense that they issued invoices to the other controlled companies, excessively increasing the delivery prices, so that the final billing value to "U" to be as high as possible, as a result of which the VAT recorded as deductible should have as high values as possible. DN received 3% of the value of the goods invoiced to the "U".

DN obtained control over the companies: "a", "b", "c", "d", "e", "f", "g". In some cases, to have direct control, he drew up power of attorneys delegating the administration of those companies to himself.
The persons who took over these companies did so from the order of the so-called DN in exchange for sums of money ranging from 1,200 lei to 1,500 euros and in exchange for some promises of help for the construction of a house, the purchase of a land, the construction of a factory, etc. In exchange for these benefits, the appointees AS and SV also filled in the documents of delivery of goods from the order of DN. The named DN found suppliers for these companies, generally of Roma ethnicity, which invoiced him various goods at the requested prices, there being situations when these persons gave him invoices that resulted in the supply from some commercial companies. The latter proved to be "ghost" type companies, respectively companies that do not carry out their activity at the declared registered office and that do not submit the declarations required by law to the tax authorities. Also, no company in Romania declares to the tax authorities that it has supplied these "ghost" companies. Thus, so far, the companies "a", "b", "c", "d", "e", "f", "g" etc. have been identified as being in this situation.
Also, there were situations when those who delivered the overvalued goods, handed over to the named DN fiscal invoices from which the delivery resulted, and after the checks carried out, it turned out that the legal representatives of these companies have no knowledge about these transactions, because of which no payments were made. In other situations, even the companies controlled by the appointed DN did not draw up the declarations provided by law to the tax authorities. The products, which consisted mostly of electrodes, nickel wire, copper wire, bearings, electrical materials, screws, and ferroalloys, were invoiced between the companies controlled by the so-called DN, so that, in the end, only three companies delivered the goods directly to the "U".
After using the commercial companies in this financial circuit, some of them were alienated to the citizens of the Republic of Moldova or the administrator declared his accounting documents as stolen.
Due to the large volume of registered transactions, there were situations when the three companies that invoiced directly to the "U" issued such invoices, without the goods being in stock, this not even being in the written stock.
As regards the payment of the value of the goods invoiced at the overvalued prices, this was generally not done, using the compensation procedure or assigning various claims. There were also situations in which payments were made through the bank, successively, through and to several companies on the billing chain, but there was an amount determined and used for this purpose. Thus, successive payments were made through the bank, the last company on the payment chain took the money out of the bank, which then returned to the representatives of the company "U" and the same amount was again paid through the bank, on several occasions, on the same circuit, thus finally figuring as being paid much higher amounts, although in fact the initial amount was introduced into the banking system, determined, which at the end was also returned to the first payer. After returning this amount, SME and MC made available to DN a part of this amount, and he also "invested" that amount, the origin being from the same "commission" of 3% that he also received from the two. From the resulting money, goods were purchased again, which was introduced on the billing circuit at much overpriced prices.

Their commercial activity, because of the checks carried out, which leads to the suspicion of committing the crime of tax evasion is limited as follows:

"V" declared/made during 2012 intra-Community acquisitions (reverse charge – without VAT) worth 59,902,658 lei, the main suppliers being "M LTD Ireland" – 40,045,323 lei, "PS JSC" – 19,644,190 lei and "AAOM Vek KFT" – 156,715.
The intra-Community goods were recovered to the "U" (main customer), the sale being with VAT.
In order not to pay the VAT collected on domestic supplies, "V" recorded in the company's accounts fictitious invoices for acquisition from the related company "U", supplies justified by "U" with fictitious purchases to the group of companies "a", "b", "c", "d", "e", "f", "g" controlled by the fault of DN.
In the acts of starting the criminal investigation, the setting in motion of the criminal proceedings, it was noted that most of these "goods" fictitiously purchased by "U" from the group of companies "a", "b", "c", "d", "e", "f", "g" was delivered to "V", and a smaller part had as final beneficiary "U". For these fictitious supplies, it was held that:
- "V" deducted **VAT in the amount of 12,512,609 lei**, and
- "U" deducted **VAT in the amount of 3,644,945 lei**.

On the 'U':
"U" evaded the payment of obligations to the state budget with the total amount of 18,298,525 lei, representing:
1. VAT in the amount of 8,951,511 lei (1,802,362 lei + 7,149,149 lei) with accessories in the total amount of 2,865,630 lei;
2. Profit tax in the total amount of 4,766,099 lei with accessories in the total amount of 897,119 lei;
3. Tax on dividends in the amount of 780,395 lei with accessories in the amount of 37,771 lei.
Vat:
1.a. "U" deducted VAT in the amount of 1,802,362 lei written in 22 invoices issued by a and b, representing industrial goods (tungsten bars, bearings, special electrodes for welding) in the custody of the 2 companies mentioned above.
1.b. Between September 2012 and May 2013, "U" recorded in the accounting records in the account 371 – goods, the acquisition of a quantity of 312,982 kg of ferroalloys (ferromangan and ferromolibene) in the total value of 59,750,836 lei, of which taxable base 48,186,158 lei and VAT 11,564,678 lei, from the following companies "a", "b", "c".
Out of the above-mentioned quantity of 312,982 kg of ferroalloys, deliveries were recorded to:
- "V": between September 2012 and March 2013, the quantity of 162,825 kg of ferroalloys would have been delivered; In April 2013, "U" buys back from "V" the quantity of 54,288 kg of ferroalloys based on 3 invoices totaling 11,658,828 lei, of which VAT in the amount of 2,256,547 lei. During the period checked, "U" delivered to "V" the quantity of 108,537 kg (162,825-54,288);
- "IC G INC Panama": between March 2013 and May 2013, "U" recorded the sale to needles ofthe quantity of 204,445 kg of ferroalloys based on 10 external invoices totaling $ 11,812,457, respectively $ 39,753,597.

Between February and May 2013, he made intra-Community acquisitions of goods (rebar) totaling 21,967,423 lei from "MLTD Ireland". For intra-Community acquired goods, the reverse charge was applied. Subsequently, the goods acquired intra-Community were invoiced with the VAT collected to various domestic customers. Given that "U" would not have made other internal acquisitions, for the goods acquired intra-Community and delivered to internal customers would have had to pay to the state budget a VAT payable in the amount of at least 5,272,182 lei.
Thus, in order not to register that VAT payment, the company 'U' recorded in the accounts domestic purchases of ferroalloys (at prices much overvalued from the abovementioned group of companies) some of which were recorded to have been subsequently delivered to 'V' and another part that they had been exported to the company 'ITG INC Panama'.
"U" deducted a VAT in the amount of 7,149,149 lei, related to goods (ferroalloys) registered as purchased from "a", "b", "c" and subsequently exported to "IT G INC Panama".