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CRIMINAL LAW

Criminal Participation in the Form of Complicity in the Offenses of Tax Evasion Provided By Art. 9 Par. (1) Lit. C of Law No. 2412005 in the Situation of Intra-Community Goods Delivery Operations

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Abstract

In order to achieve the objective of establishing an internal market for the application in the Member States of legislation necessary for turnover taxes which does not distort conditions of competition or impede the free movement of goods and services, harmonization of laws has been harmonized. on turnover taxes through a value added tax system in order to eliminate factors that may distort the conditions of competition at both national and Community level.

Tax exemptions for intra-Community operations have been regulated by Council Directive 2006/112 / EC, finding a correspondent in Romania in the Fiscal Code and the Fiscal Procedure Code. In situations where the provisions on taxation are violated, the legislator adopted Law no. 241/2005 for preventing and combating tax evasion, where in Chapter II, art. 3 - 9 provided for a series of offenses that are supplemented by the general provisions of the Criminal Code.

The present study analyzes the crime of tax evasion provided by art. 9 para. (1) lit. c) of Law no. 241/2005 in the form of complicity as a form of criminal participation when we are in the situation of intra-community operations of supplies of goods.

Keywords: *perpetrators, complicity, judicial practice, tax evasion, intra-community delivery of goods.*

1. Introductory aspects regarding complicity

Committing crimes in commercial activities makes the perpetrators responsible for their actions. The offenses are provided in the Criminal Code or by special laws, as is the law no. 241/2005 for preventing and combating tax

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evasion[1], which establishes measures to prevent and combat tax evasion offenses and related offenses.

The special law provides for a series of offenses, as well as the one provided in art. 9 para. (1) lit. c) regarding the highlighting, in the accounting documents or in other legal documents, of the expenses that are not based on real operations or the highlighting of some fictitious operations.

We state from the outset that this crime must be committed in order to evade the fulfillment of tax obligations.

Persons who commit these offenses of tax evasion directly have the quality of perpetrators or co-perpetrators when they directly commit the same act provided by the criminal law (art. 46 Penal Code).

Compared to the perpetrators who directly commit the deed provided by the criminal law, as a form of criminal participation, the accomplices according to art. 48 para. (1) of the Criminal Code is the person who, intentionally, facilitates or helps in any way to commit an act provided by criminal law. Also in the same article, *in paragraph 2*, is complicit the person who promises, before or during the commission of the act, that he will conceal the goods derived from it or that he will favor the perpetrator, even if after the commission of the act, the promise does not is fulfilled.

From those mentioned in the criminal provisions, it results that the participation of the accomplice has a mediated and indirect character, being a secondary way of criminal participation, and the activity of the accomplice must be prior to the perpetrator or may be concomitant with the perpetrator. *The foregoing complicity* may be facilitated by the fact that it provides the perpetrator with material support, assistance, procurement of tools, or from a moral point of view through encouragement or advice to commit the act. Even in the conditions in which the complicity is concomitant with the commission of the deed, we are still in the situation of a secondary way, because the accomplice does not participate as the perpetrator directly in the commission of the deed.

For the existence of complicity are necessary: the commission of an act provided by the criminal law; to the activity of the perpetrator when he commits the crime there must be an effective contribution of the accomplice (regardless of whether it is material or moral), so that to his own participation he must act intentionally, as shown in the provisions of *art. 47 - 49 of the Criminal Code*. So, in complicity, it is required that the facilitation, the help or the promise be made all the time with intention, and as we showed above, when it comes to an offense provided by *art. 9 of Law no. 241/2005*, the essential requirement of the specific

[1] Published in the "Official Gazette" of Romania, Part I, no. 672 of July 27, 2005, the last amendment by Law no. 55/2021

form of guilt for this crime is the *direct intention* qualified by the purpose of evading the fulfillment of fiscal obligations.

The legislator provided in the provisions of art. 50 para. (2) of the Criminal Code that the circumstances regarding the committed deed affect the perpetrator and the participants only insofar as they knew or foresaw them.

2. Legal provisions on value added tax exemptions (Value Added Toll)

It has often been found in judicial practice that in addition to the perpetrators of tax evasion, other persons participate who help or facilitate their criminal activity, knowing that the perpetrators commit such acts. In such situations, those who have the quality of accomplices to the crime of evasion and it is clear that they participate in committing the acts of evasion, will answer together with the perpetrators. The problem arises with people who are not aware that the supporting documents provided to them by the perpetrators of the crime of evasion cover economic actions and / or unreal / fictitious goods. As mentioned by the *Constitutional Court in Decision no. 673/2016*[2], constitute the offenses provided for in *art. 9 para. (1) lit. a) - g) of Law no. 241/2005* only when they are committed for the purpose of evading the fulfillment of fiscal obligations. The existence of the crime of tax evasion is subsumed to a purpose - evasion from fulfilling tax obligations -, which appears as an essential requirement attached to the subjective element. However, where the rule of incrimination specifies the need for a special purpose for the act to constitute an offense, that act may be committed only with direct intent. Thus, the Court held that the crime is committed when all its constituent elements are met, in other words when there is a perfect coincidence between the actual act committed by the perpetrator and the standard model described in the criminal law. For this reason, in terms of the subjective side, *assuming the direct intention qualified by purpose*, ie to evade the fulfillment of tax obligations.

Regarding the Value Added Tax, we show that this is an indirect tax due to the state budget and which is collected according to the provisions of the Fiscal Code, it is not limited to the notion of "income". In this context, the Court referred that the phrase "*not based on real transactions*" refers to those transactions which do not correspond to factual or legal reality, and "*fictitious transactions*" refers to those imaginary transactions which do not in fact exist.

The legal provisions show that it is mandatory both in the case of sales of goods, as well as purchases, to be recorded both in the company's accounting in

[2] Regarding the rejection of the exception of unconstitutionality of the provisions of art. 9 para. (1) lit. c) of Law no. 241/2005 for preventing and combating tax evasion, published in the "Official Gazette", Part I, no. 193 of March 20, 2017.

chronological order, according to the provisions of accounting law *no. 82/1991,* as well as in the VAT return, special document for establishing, calculating and transferring the amounts owed by the taxpayer to the state budget and vice versa, because otherwise, the omission of highlighting these commercial operations, or the registration of lower incomes than those in reality lead to the commission of the crime of tax evasion.

With regard to the supply of intra-Community goods, as provided for *in Council Directive 2006/112 / EC* on the common system of value added tax[3], there are exemptions for intra-Community operations (Article 138/1) where Member States exempt the supply of goods or transported to a destination outside their respective territories, but within the Community by the seller or the person purchasing the goods or on their behalf for another taxable person or for a non-taxable legal person acting as such in a Member State other than the one in which the dispatch or transport of the goods begins. Also according to this directive it is shown that the transmission of invoices can be done by electronic means subject to acceptance by the recipient.

According to *art. 270 para. (9) of the Fiscal Code*[4] (former art. 128 of the old Fiscal Code) the intra-community delivery represents a delivery of goods, within the meaning of par. 1 (delivery of goods is considered the transfer of the right to dispose of goods as owner), *which are dispatched or transported from one Member State to another member state by the supplier or by the person to whom the delivery is made or by another person on behalf of hence the fact that the dispatch or transport of goods from one member state to another can be done by both suppliers and beneficiaries.*

As specified in *Order no. 103/2016*[5] of the Ministry of Finance, the tax exemption for intra-community deliveries is provided in art. 10[6] where the invoice must

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[3] Published in the" Official Journal of the European Union", no. L371 / 1 of 11.12.2006.

[4] Published in the" Official Gazette" of Romania, Part I no. 688 of September 10, 2015.

[5] Order no. 103/2016 on the approval of the Instructions for the application of the value added tax exemption for the operations provided in art. 294/1/ a-i, art. 294/2 and art. 296 of Law no. 227/2015 on the Fiscal Code, published in the "Official Gazette", Part I no. 106 of February 11, 2016.

[6] **Article 10 :**

(1) The tax exemption for the intra-community deliveries of goods provided in art. 294 para. (2) lit. a) of the Fiscal Code, with the exceptions from points 1 and 2 of the same letter a), is justified on the basis of the following documents:

a) the invoice which must indicate the registration code for VAT purposes assigned to the purchaser in another Member State;

b) documents certifying that the goods have been transported from Romania to another Member State, which may be different from the Member State which assigned the registration code for VAT purposes communicated by the buyer.

(2) In the case of intra-community deliveries of new means of transport to a buyer who does not communicate to the supplier a valid registration code for VAT purposes, provided in art. 294 para. (2) lit. b) of the Fiscal Code, the tax exemption is justified by:

a) the invoice or, if the supplier is not a taxable person, the sale-purchase contract;

b) documents certifying that the goods have been transported from Romania to another Member State.

(3) In the case of intra-community deliveries of excisable products provided in art. 294 para. (2) lit. c) of the Fiscal Code, with the exceptions from points 1 and 2 of the same letter c), to a taxable person or to a non-taxable legal person who does not communicate to the supplier a valid registration code for VAT purposes, if the transport of goods is performed according to art. 34 para. (1) and (2) or art. 19 of Council Directive 2008/118 / EC of 16 December 2008 on the general arrangements for excise duty and repealing Directive 92/12 / EEC, the exemption from duty is justified by:

a) the invoice which must not contain the VAT registration code of the purchaser in another Member State;

b) documents certifying that the goods have been transported from Romania to another Member State.

(4) In the case of intra-community deliveries assimilated of goods provided in art. 270 para. (10) of the Fiscal Code, respectively the transfers of goods, the tax exemption provided in art. 294 para. (2) lit. d) of the Fiscal Code is justified, with the exceptions provided in the same paragraph, on the basis of the following documents:

a) the self-invoice provided in art. 319 para. (9) of the Fiscal Code in which to be mentioned the registration code for VAT purposes assigned in another Member State of the person making the transfer from Romania;

b) documents for the transport of goods from Romania to another Member State, such as a signed CMR document or a signed consignment note, a bill of lading, the specific air waybill document (Air Waybill).

(5) In the situation of intra-community deliveries of goods provided in par. (1), if the tax inspection finds that the VAT code of the beneficiary is erroneously written on the invoice, for granting the VAT exemption the correction of the invoice by the supplier will be allowed during the control and the validity of the VAT code of the beneficiary will be verified by the bodies. fiscal inspection. This invoice will be attached by the supplier to the initial invoice, without generating entries in the tax return of the fiscal period in which the correction is made.

(6) Exemption of an intra-community delivery, within the meaning of art. 294 para. (2) of the Tax Code, cannot be denied to the seller for the simple reason that the tax administration of another Member State has withdrawn with retroactive effect the VAT registration code of the person who purchased the good, from a previous date this delivery, although the deletion of the code took place after the delivery of the good, as ruled by the Court of Justice of the European Union in Case C-273/11 - Mecsek Gabona.

(7) Article 45a of Implementing Regulation (EU) no. Council Regulation (EC) No 282/2011 of 15 March 2011 laying down measures for the implementation of Directive 2006/112 / EC on the common system of value added tax, as amended by Implementing Regulation (EU) 2018/1912 Decision of 4 December 2018 amending Implementing Regulation (EU) no. 282/2011 as regards certain exemptions for intra-Community operations, hereinafter referred to as Regulation 282/2011, provides that, in the event that the conditions of para. (1) lit. (a) and (b) of this Article, goods shall be presumed to have been dispatched or transported from a Member State to a destination outside its territory but within the Community. In this case, the documents attesting that the goods were transported from Romania to another Member State are those provided in par. (1) and (3) of art. 45a of Regulation 282/2011.

(8) By independent parties, within the meaning of art. 45a of Regulation 282/2011, means parties that are not considered affiliated according to the provisions of art. 7 point 26 of the Fiscal Code.

(9) In the situation where the buyer does not provide the seller with the written declaration provided in art. 45a alin. (1) lit. (b) point (i) of Regulation 282/2011, until the tenth day of the month following the delivery, the supplier benefits from the presumption established in this article

contain the provisions of prev. of art. 319 of the Fiscal Code, and if the buyer is not a taxable person - the sale-purchase contract, as well as the documents certifying that

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if he receives this declaration later, within the term provided in art. 1 para. (4).

(10) In the situations that do not fall within the presumption provided in art. 45a of Regulation 282/2011, the transport of goods from Romania to another Member State is justified according to the provisions of this article. Such situations may be, but are not limited to, those in which: the transport of goods is carried out with their own means of transport by the supplier or buyer, the goods that are the subject of delivery are means of transport that move alone on wheels, by road sea, river or air, the persons involved in the transport of the goods are not independent of each other and of the seller and the buyer or their independence cannot be proved. Own means of transport means the means of transport owned by the supplier or the buyer of the goods or which are made available to him through leases, leases, loans or other such contracts.

(11) For the purposes of par. (10), it is considered that the goods have been transported from Romania to another Member State, if the supplier has documents justifying the transport, such as:

a) in case of delivery of excisable products circulating under excise duty suspension: the administrative document in electronic format and the receipt report;

b) in the case of the delivery of means of transport moving alone on wheels, by sea, river or air: the sale-purchase contract stating that the goods will be transported to another Member State and proof of registration of the means of transport in the State destination member;

c) in case of delivery of other goods than those provided in let. a) and b):

1. transport documents, such as a signed CMR document or a signed consignment note, a bill of lading, the specific air waybill document; and

2. one of the following documents: an insurance policy corresponding to the dispatch or transport of the goods, bank documents proving payment for the dispatch or transport of the goods, official documents issued by a public authority, such as a notary, attesting the arrival of the goods in the Member State of a document certifying receipt of the goods, issued by a depositary in the Member State of destination other than the buyer of the goods, a written declaration from the buyer stating that the goods have been dispatched or transported to the Member State of destination and containing : date of issue, name and address of the buyer, as well as quantity and nature of the goods, date and place of arrival of the goods, identification of the person accepting the goods on behalf of the buyer.

(12) The fiscal bodies may reject the justification of the transport performed in accordance with par. (11), if they have sufficient evidence to show that the goods were not transported from Romania to another Member State.

(13) The VAT exemption provided in art. 294 para. (2) lit. a) of the Fiscal Code does not apply in case the supplier has not complied with the obligation provided in art. 325 para. (1) of the Fiscal Code to submit a recapitulative statement or the recapitulative statement submitted by it does not contain the correct information regarding this delivery, unless the supplier can duly justify the deficiency in a manner deemed satisfactory by the competent tax authorities.

(14) For the purposes of art. 294 para. (21) of the Fiscal Code, it is considered that the supplier duly justifies the deficiency, if it is remedied later, but not later than the completion of the fiscal inspection. The deficiency can be considered to have been remedied in situations such as:

a) the supplier did not include the intra-Community supply in the recapitulative statement relating to the period in which the duty became chargeable, but included it in the recapitulative statement relating to a subsequent period or in an amending declaration for that period;

b) the supplier included the intra-Community delivery in the recapitulative statement relating to the period in which the tax became chargeable, but unintentionally erred in one or more information concerning that delivery, such as its value, type of transaction, customer name and made the correction within an amending statement for that period.

the goods were transported from Romania to another Member State. Electronic communication a few days after the shipment of the goods by the buyer to the seller proves that these goods have reached their destination.

3. Application of legal provisions on intra-Community tax exemptions

In situations where the delivery conditions are made ex works for the seller, there are minimum obligations to make the goods available to the buyer, who will continue to bear all the risks involved in taking the goods and transporting them to the destination. For proof of transport of goods to another Member State consists in providing specific transport documents, depending on the type of transport (*art. 4 of OMFP no. 103/2016),* the invoice prepared according to art. 319 of the Fiscal Code as well as other documents such as the contract / order of sale / purchase, insurance documents. For these sales of goods, the company that delivers intra-community goods draws up Declaration 390 "recapitulative statement on intra-community supplies / acquisitions / services" which is sent monthly to ANAF (*Romanian National Agency for Fiscal Administration*).

Subsequently, these intra-community deliveries were discovered to have committed tax evasion offenses in the sense provided by art. 9 para. (1) lit. c) and art. 8 para. (1) of Law no. 241/2005, finding that the delivered goods did not leave the territory of Romania being traded in the country, so that for these goods it would no longer be possible to exempt customs duties. Thus, there have been situations when companies which have delivered intra-Community goods in the system provided above (*ex works*) have been held criminally liable in the form of complicity of persons from those companies as they have knowingly supported the perpetrators of the crime of evasion.

Without a minimum of verification, the courts considered that the supplier (seller) would not have taken all reasonable measures in its power to ensure that the delivery is intra-Community, so that the persons in that company would have committed the offense of tax evasion provided by art. 9 lit. c), in the form of complicity, as well as art. 8 of the law.[7]

In such a situation, the courts have taken over the position of the tax authorities

[7] Law 241/2005 for preventing and combating tax evasion - Art. 8. - (1) It constitutes an offense and is punishable by imprisonment from 3 to 10 years and the prohibition of certain rights or by a fine the establishment in bad faith by the taxpayer of taxes, taxes or contributions, resulting in the obtaining, without right, of sums of money as reimbursements or refunds from the general consolidated budget or compensations due to the general consolidated budget. (2) It constitutes an offense and shall be punished with imprisonment from 5 to 15 years and the prohibition of certain rights or with a fine the association in order to commit the deed provided in par. (1). (Law 241/2005 was published in the "Official Gazette" of Romania no. 672 of July 27, 2005).

in the sense that the company selling intra-Community duty-free goods has not taken all reasonable steps in its power to ensure that its intra-Community supply does not causes her to participate in a fraud (tax evasion). It is for the courts to prove on the basis of objective evidence that the selling company knew or should have known that the transaction which it carried out was part of a fraud committed by the person purchasing the goods and that it had not taken all reasonable steps. which were in his power to avoid his own participation in this fraud[8]. It is difficult to decipher what a certain company should have done in the situations in which it prepared the documents provided by art. 10 of Order no. 103/2016, the contracts concluded with companies operating in other countries in the community as well as the documents certifying the transports performed (CMRs).

Also in European practice in Case C-409/04 - Telos PLC and Others, the Court of Justice of the European Union interpreted the provisions of the first paragraph of *Article 28c (A) (a) of the Sixth Directive 77/388 / EEC*. that it does not allow the competent authorities of the Member State of supply to compel a supplier, who has acted in good faith and provided evidence which justified, at first sight, his right to exemption from an intra-Community supply of goods, to subsequently pay VAT. for such goods, where such evidence proves to be false, but without establishing the supplier's participation in the tax fraud, as long as the latter has taken all reasonable steps in its power to ensure that the intra-Community supply which he performs does not lead him to participate in such fraud.

4. Conclusions

We consider that in such cases, both the tax authorities and subsequently the criminal investigation bodies must establish in a concrete and non-presumptive way that the persons acting on behalf of a company selling intra-Community goods were aware or could have been aware of the fact found. by the subsequent control bodies (ANAF), that the goods did not physically leave the territory of Romania. All such activities should be carried out in accordance with the principle of proportionality, in particular where the selling company in a given case has submitted monthly declaration 390 on intra-Community supplies.

Moreover, as shown in the provisions of art. 50 para. (2) of the Criminal Code, the participants in the commission of a crime of tax evasion should have known before or during the commission of the crime about the criminal activities of the perpetrators and not after the knowledge of these activities a few years by

[8] CJEU C-273/11 Mecsek - Gabon, where the provisions of art. 138 of Council Directive 2006/112 / EC,[http://taxnews.ro/wp/2014/11/07/cjue-tva-directiva-2006112ce-articolul-138-alineatul-1-scutiri-pentru-operatiunile-intracomunitare-persoana-care-achizitioneaza-bunurile-neidentificata-in/, accessed on October 29, 2021].

ANAF and those of criminal prosecution, because in such a situation we no longer have complicity in tax evasion.

There can be no form of complicity in the form of complicity if, for example, persons in a company have not intentionally given assistance to certain persons whom they have not known or known to be committing criminal acts. It must be demonstrated by the criminal prosecution bodies whether these persons as accomplices knew what actions or inactions would be executed by the perpetrators of tax evasion, the acceptance or prosecution of the results of the crime committed by the perpetrator, and what was the actual contribution of accomplices to these acts. - to find out in the form of complicity in tax evasion.

GENERAL BIBLIOGRAPHY (working tools and articles)

- "Official Gazette" of Romania, Part I, no. 672 of July 27, 2005
- "Official Gazette" of Romania, Part I, no. 193 of March 20, 2017
- Official Gazette" of Romania, Part I no. 688 of September 10, 2015
- "Official Gazette", of Romania ,Part I no. 106 of February 11, 2016.
- "Official Gazette" of Romania, no. 672 of July 27, 2005
- Official Journal of the European Union", no. L371 / 1 of 11.12.2006
- CJEU C-273/11 Mecsek – Gabon, [http://taxnews.ro/wp/2014/11/07/cjue-tva-directiva-2006112ce-articolul-138-alineatul-1-scutiri-pentru-operatiunile-intracomunitare-persoana-care-achizitioneaza-bunurile-neidentificata-in/, accessed on October 29, 2021]