

THE EVOLVING JURISPRUDENCE OF THE CONSTITUTIONAL COURT REGARDING THE OFFENSE PROVIDED BY THE ARTICLE 6 OF LAW 241/2005

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Abstract

The manner of criminalization of the offense of tax evasion provided by article 6 of Law 241/2005, has been repeatedly subjected to constitutional review. In an initial phase, in 2011-2013, examining text unpredictability of the offense, the Constitutional Court rejected as unfounded exceptions. Subsequently the decision 363 / 07.05.2015 Court revisited its previous jurisprudence and found that the contested provisions do not comply with constitutional requirements regarding the quality of the law or do not qualify for clarity, accuracy, predictability and accessibility, being contrary to article 1 paragraph (5) of the Constitution, with the consequence of decriminalization.

Key words: criminalization of the failure to pay, taxes, human rights

1. Legal provisions

Under the provisions of art. 6 of Law 241/2005 on preventing and combating tax evasion "an offense punishable by imprisonment from one year to three years or with fine, retention and not paying intentionally within 30 days of the due date, the amounts of taxes or withholding contributions. "Introduction of this crime, called in judicial practice "the withholding legal practice" was regarded as being determined by the reappraisal degree of social danger presented by the offense provided by art. 13 letter. e of Law 87/1994, consisting in " non-retention or not paying, according to the law, within the legal deadlines by taxpayers which assume such obligations of taxes and other contributions which are withheld at source", with only the criminalization of the non-paying , while non-retention continued to be an offense (C.I. Gliga, *Tax Evasion*, CH Beck Publishing House, Bucharest, 2007, p. 72; M. Mihalache, *The Criminal Liability of the Civil Servant*, Hamagiu Publishing House, 2011, p.58).

2. *The jurisprudence of the Constitutional Court regarding the offense provided by art. 6 of Law 241/2005*

MATERIAL AND METHOD

An analysis of specific criminal legislation, considered in light of the legal effects of the

decisions of the Constitutional Court of Romania, was conducted in the elaboration of this study.

RESULTS AND DISCUSSION

After the entry into force of Law 241/2005 on preventing and combating tax evasion, the Constitutional Court was repeatedly sensed with regard of unconstitutionality exceptions of art. 6, solutions being specifically targeted:

- violation of the constitutional provisions of art. 20 para. (2) related to international treaties on human rights and the provisions of art. 1 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the prohibition of imprisonment for debt. The plea was rejected, having regard to the fact that the relied provisions refer only to contractual defaults (Constitutional Court's Decision no. 1313 of 04.10.2011, published in the Official Journal of Romania no. 12 of 06.01.2012; Constitutional Court's Decision no. 162 of 28.02.2012, published in the Official Journal of Romania no. 272 of 24.04.2012);- the legislature does not take into account the realities of Romanian society and the dynamism of the market economy, because it makes no difference, although it should, between the act committed by an individual and by a company, which leads to violation of Art. 21 para. (3) of the Constitution and Art. 6 para. (1) of the Convention for the Protection of Human Rights and Fundamental

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Freedoms. It was argued in the decision in which was rejected this exception, that as opposed to art. 111 of Law no. 76/2002, it is a distinct offense, retention and not paying intentionally the amounts representing taxes or withholding what is in appreciation of the legislature, they are a more serious offense than simply avoiding the obligation to pay contributions to unemployment insurance fund. The ownership is not violated because the payment of taxes or contributions provided by law do not represent an infringement of property rights, but a citizen's duty, which, according to art. 56 of the Basic Law (Constitutional Court's Decision no. 1205 of 20.09.2011, published in the Official Journal of Romania no. 795 of 09.11.2011);

- violation of the constitutional provisions of art. 1 para. (3) of the Constitution related to Romanian state, of art. 45 of the Constitution on economic freedom, of art. 56 para. (2) on financial contribution and of Art. 135 para. (2) letter a) of Constitution on the economy. The exception was dismissed, taking into account that economic freedom is a right that is exercised under the law and it is subject to the payment of taxes and charges imposed by tax legislation, including withholding contributions, with manifestation diligence in economic activities and the lack of liquidity available to operators, due to reduced activity and to late time of receivables outstanding, does not exempt them from paying taxes and other withholding contributions and it does not constitute grounds for removal of criminal liability or of punishment imposed (Constitutional Court's Decision no. 963 of 13.11.2012, published in the Official Journal of Romania no. 20 of 10.01.2013)

In judicial practice, the offense has generated discussions regarding demonstration of the subjective side, concerning the direct or indirect intention, as a result of registration error for the amount in the balance sheet (Decision no. 264/10.03.2008 O the Court of Appeal of Ploiești; R. Schmutzer, I. Hobjilă, Spătaru, *Tax Evasion. Case Law*, Moroșan Publishing House, Bucharest, 2010, p. 81), committing an offense that is not under criminal law, when based on a warrant are forwarded responsibilities for company management, which would attract only civil liability (Decision no. 123 of 28.01.2015, ruled in case no. 12824/233/2013 of the Court of Appeal of Galați).

Changing jurisprudence consisting of unconstitutionality rejection occurred in 2015. Thus, by decision no. 363 of 07.05.2015 (published in the Official Journal of Romania no. 495 of 06.07.2015), The Constitutional Court admitted the exception of unconstitutionality and found that art. 6 of Law 241/2005 on preventing

and combating tax evasion are unconstitutional. Arguments considered are taking into account the fact that the constitutional text does not meet the quality of law, as the legislature complied his powers to legislate in formal terms, by the lack of clarity and accuracy of the material object of the crime, which renders its predictability.

Regarding the requirement of accessibility of the law, neither this is respected, as the provisions of art. 6 of Law 241/2005 do not define the concept of "taxes or withholding" and do not refer to any act of rank equal that would be in connection with. With reference to the issue in the case which was invoked the plea of unconstitutionality, the Constitutional Court held that the only indication regarding tax transfer of real estate from the personal property is contained in an administrative document given in the application of laws for primary regulation, with no regulatory connection with the subject of the Law 241/2005.

Dissenting opinion brings arguments regarding the inadmissibility of the plea, as this is not about resolving the case submitted for trial, because is not about the fact of unrestraining the amounts of taxes or withholding, but about retaining and not paying intentionally of the amounts representing taxes or withholding. On the other hand, it was considered that the way to motivate the exception admission solution envisages corroboration of rule criminalization provisions with Law no. 571/2003 regarding the Fiscal Code, so as declaring the unconstitutionality of art. 6 of Law 241/2005 does not solve the unpredictability of the Tax Code.

In this context, although it starts from a particular situation determined by the invoked cause of the Decision no. 363 of 05/07/2015 of the Constitutional Court, this makes to assume the character of an admission decision, not of an interpretation one, having the the consequence of the suspension of the legal provisions, granting a period of 45 days from publication of the decision in the Official Gazette of Romania to legislate, with the consequent cessation of the effects due to inactivity, according to art. 147 of the Constitution. and art. 31 para. 1 of Law 47/1992 (M. Buzea, *Considerations on the effects of the Constitutional Court's decisions, in light of decisions ruled after the entry into force of the new Criminal Code and the Criminal Procedure Code*, Journal of Legal Sciences, Craiova Centre of Legal Studies of Private Law, vol. 30/2015, p.61 www.universuljuridic.ro; M. Buzea, *Reflecting the legal security of tenure in constitutional law*, Conference "Exploration, Education and Progress in the Third Millenium", Pro Universitaria Publishing House, Bucharest, 2015, p. 171).

CONCLUSIONS

Thus, after publishing, as a following of the non-intervention of the legislature, it determined the application of art. 16 para. 1 letter b thesis I Criminal Procedure Code and delivery of payment solutions through invalidation, since it has been more than 45 days without the legislature to amend the provisions (Decision no. 861 of 15.09.2015, ruled in case no. 19277/233/2013 of the Court of Appeal of Galați, Decision no. 853 of 10.09.2015, ruled in case no. 11527/233/2014 of the Court of Appeal of Galați, Decision no. 986 of 01.10.2015, ruled in case no. 23300/233/2014 of the Court of Appeal of Galați).

We believe that the arguments raised in the dissenting opinion, related with this solution, having the meaning of "disappearance of legal means to protect the state budget and to protect individuals to whom were detained taxes with different situations but were not returned to the budget" should have prompted the intervention of the legislature.

At this time, due to the solution ordered by the Constitutional Court through decision no. 363

of 05/07/2015, the next challenge facing the judicial practice, it will be that to settle the review applications based on art. 453 para. (1) letter f from Criminal Procedure Code.

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