

# THE OBJECT AND THE CONTENT OF THE REPORT OF FISCAL LAW, PREMISE CONCEPTS IN THE JURIDICAL FRAMING, THE INVESTIGATION AND TRIAL OF THE OFFENCE OF TAX DODGING

Ph. D. professor **Vasile Luha**

„1 Decembrie” University of Alba-Iulia

The Faculty of Law and Social Sciences

## **Abstract:**

*The author sets the abstract and conceptual frame for the investigative evaluation of the economic activity of any entrepreneur, a potential active subject of committing an offence with a specific content from the business area; it starts from the premise that the actions of fighting offences cannot be efficient without balanced juridical frames which should not disturb unjustified the economic circuit; by interpretation he reaches two conclusions having the value of principles: **a.** the entrepreneur does not have the constitutional obligation to have a conduct which to make him pay the highest fiscal imposition and **b.** the investigator, in his legal approach, must never exclude the possibility that the fiscal authority may abuse; these theoretical fundamentals may become operational when appreciations are made on the objective or subjective side of the offence, when the juridical frame of the investigated misdeeds is done.*

**Key words:** fiscal law, investigation, trial, offence, tax dodging.

## **Specification**

The economic activity implies a diversity of actions having an economic content or only an economic meaning done by the entrepreneurs in order to achieve their interests. The juridical classification of their actions, to distinguish between a permitted action and an unpermitted one, from the perspective of the existence or inexistence of an offence of tax dodging, which is the concern especially of the judicial or law enforcement bodies, is an intellectual and logical and complex approach which needs previously a compulsory and exact definition of the conceptual frame of the compulsory juridical report of fiscal law<sup>172</sup>. The juridical object and the content of the fiscal juridical report are two essential components of the fiscal juridical report. The precise setting of the sphere and content of the two concepts is necessary for directing the conduct of the entrepreneurs in their business actions and of the activities of the law enforcement agencies or juridical

---

<sup>172</sup> For details related to the specific of the investigation of offences from the business environment see: Augustin Lazăr, *The antifraud research in the business aria*, Lumina Lex Publishing House, Bucharest, 2004; Augustin Lazăr, *Criminalistic*, Altip Publishing House, Alba Iulia, 2004, pages 320-365.

bodies for the investigation, prosecution or bringing to trial the offences of tax dodging<sup>173</sup>.

### **The object of the fiscal juridical report**

The object of the fiscal juridical report is the conduct of the parties, this is the actions or lack of actions to which the active subject is entitled and from which the passive subject is held.<sup>174</sup> This can be: declaration of incomes by the tax payer, paying the taxes and contributions, paying back the sums that are not owed, compensation etc.

The object of the fiscal juridical report must not be mistaken with its content, as one can not equal the conduct of the parties with their rights and obligations. Both represent different elements which put together make up a whole: the fiscal juridical report.

When discussing about the object of the fiscal juridical report, about the object of the fiscal duty we notice that this is much more complex than that what people are generally willing to accept. It does not mean only the duty that the tax payer has to pay as it is generally considered (payment of the taxes, contributions etc.), but also other tasks to do something: records, registers, formalities, submitting documents, declarations on one's own account.

We must notice that also the fiscal authority is entitled and, why not, obliged to some duties which must not be forgotten in the case of a conceptual analysis on the fiscal juridical report: to control, to evaluate, to set circumstances, days, processes, actions, all these in a frame that has been established only by the law.

Each of the subjects of the fiscal juridical report acts in a frame determined, in abstract by the law and fixed operationally, casuistically, by jurisprudence or by administrative orders for the fiscal authorities. Each of the subjects of the fiscal juridical report, the entrepreneur or the fiscal authorities, when projecting their actions they do it based on their own evaluation of their interests and, especially, on the legitimacy of their future actions.

The approach has a practical signification which must not be neglected, especially in the area of responsibility, of setting the conditions of responsibility. Any juridical frame of setting the responsibility for not fulfilling the obligations in this area must start from the object and content of the fiscal juridical report which sets the responsibility: which are the duties to which the parties were entitled or which they had to fulfil and which were the limits within which they were fulfilled.

---

<sup>173</sup> We consider here in the meaning of our approach the tax dodging incriminated by art. 9 paragraph 1 letter.b and c from the Law no. 241/2005 concerning the prevention of and fight against the tax dodging. Official Gazette no. 672/2005 from 27<sup>th</sup> July 2005; the author considers that these texts regulate the principle regulation of tax dodging; the other incriminations express particular forms of the illegitimate, tax dodger conduct of entrepreneurs.

<sup>174</sup> M. N. Minea, C. Fl. Costaş, *The law of public finances. Fiscal law*, 2<sup>nd</sup> volume, Sfera Publishing House, Cluj- Napoca, 2006, pages 11-15.

If the approach starts from the stated principle according to which the fiscal authority also has to maintain a certain conduct, the interpretation perspectives change radically.

Our interpretation starts from the observation according to which the fiscal authority operates within a legal frame set by the fundamental law and by ordinary laws. The conduct of the authorities, which is inevitably part of the object of the determined fiscal report, is linked to two constitutional principles: the respect of the market economy and the direct economic interest of the tax payer.

Even more, the rules of the constitutional state, which has been undoubtedly consecrated in the constitutional norm, impose that the state which issues the norm also follows it.

The tax payer who declares or registers his incomes for which he has to pay taxes to the budget interprets the norms issued by the state making his own qualifications on his fiscal duties, considering, obviously, his economic interest; the fiscal authority must respect this qualification if it was done by respecting the law and in the spirit of the positive market economy.

Or, starting from such a conceptual approach, we reach to the conclusion that the interpretation of the fiscal norm must be done within the spirit of the market economy and not in the interest of the state. In practical terms one can notice that no tax payer must to have a conduct which to force him to pay the highest taxes.

In practical terms this means that one must distinguish between a managerial and financial dexterity which has as a goal to diminish the spending or to increase the incomes and the entrepreneurs' options to fraud the fiscal authority. The objective side of the offences of tax dodging cannot be set without the judiciary agent having previously made the difference, between a diligent or cautious financial management and fraud.

Even more, we cannot ignore the reason of the approaches of the subjects of the juridical report, the immediate reason for their actions: the concrete reasons which drive them to one or the other option, the certitude, the interior drive that they act legitimate or fraudulently<sup>175</sup>. Setting the subjective side of the crime done by the entrepreneur must start from this theoretical support.

### **The content of the fiscal juridical report**

The content of the fiscal juridical report is made up of the correlative rights and obligations of the parts involved in this juridical report<sup>176</sup>.

The rights and obligations of the subjects of the fiscal juridical report results from the law and are enumerated explicitly in art. 21 and 22 from the Code

---

<sup>175</sup> Details on the theory of the law abuse in the fiscal area see in: Maurice Cozian, *Les grandes principes de la fiscalite des entreprises*, 4<sup>-ème</sup> edition, Litec, Paris, 1999, pages 19-81.

<sup>176</sup> D. G. Şaguna, *Financial and fiscal law. Treaties on*, Eminescu Publishing House, Bucharest, 2000, page 685; Vasile Luha, *The business law. Elements of the fiscal obligation's general theory*, Risoprint Publishing House, Cluj-Napoca, 2007, pages 26-31.

of Fiscal Procedure, although the expression is in our opinion wrong, by calling the rights found in the content of the fiscal juridical report as “fiscal debts”.

This way, the main subjective fiscal rights were the right to collect taxes, contributions and other sums which make the incomes of the general consolidated budget, and the right to reimburse the VAT, the right to reimburse contributions, taxes and other sums like these which constitute incomes to the general consolidated budget, and those accessories were the right to collect interests and delay penalties.

The subjective fiscal rights are this way patrimonial rights which are specifically stipulated by the law.

On the other side, the main fiscal duties are the following: the obligation to declare the taxable goods and incomes or, according to situation, contributions, taxes and other sums owed to the general consolidated budget; the obligation to calculate and register in the bookkeeping and fiscal registers the contributions, taxes and other sums owed to the general consolidated budget; the obligation to pay in due time the contributions, taxes and other sums owed to the general consolidated budget; the obligation to calculate, retain and register in the accounting and payment registers, within the legal deadlines, the contributions and taxes which are collected at the source<sup>177</sup>; any other obligations of the tax payers, physical or legal persons, in the enforcement of the fiscal laws.<sup>178</sup>

The accessory fiscal obligations were the obligation to pay interests and delay penalties, related to the contributions, taxes and other sums owed to the general consolidated budget.

Next to the above enumeration we would like to draw attention to some other rights conferred by the lawmaker – through art. 11 from the Fiscal Code (Law no. 571/2003) – to the fiscal bodies, as follows:

- To “not take into consideration a transaction which does not have an economic purpose” or to “reconsider the form of a transaction in order to reflect the economic content of the transaction” in establishing the amount of a contribution or of a tax or
- In a transaction between affiliated persons, to “adjust the sum of the income or expense of any of the persons, as necessary, in order to reflect the market price of the goods or services offered in the transaction”. It is also stipulated that “in establishing the market price of the transactions between affiliated persons the most adequate of the following methods is used:

---

<sup>177</sup> One can notice that in this case it is an obligation of procedural fiscal right and not of material fiscal right, of persons who have the obligation to pay or retain in the name of the debtor contributions, taxes, fines and other budget incomes.

<sup>178</sup> Regarding the tax payers one can notice that the legal text mentioned does not contain all their obligations, and obligations resulting from other legal texts can be added.

- a) The method of price comparison, through which the market price is established based on the prices paid to other persons who sell comparable goods or services to independent persons;
- b) The plus-cost method, through which the market price is established based on the costs of the good or service done through the transaction, increased with the corresponding profit limit;
- c) The method of the resell price, through which the market price is established based on the resell price of the good or service sold to an independent person, diminished by the sell expense, other spending of the taxpayer and a profit limit;
- d) Any other method that is recognized in the guidelines concerning the transfer prices admitted by OECD.

In the first case the fiscal authorities are given the possibility to appreciate that the goal of a transaction is not the one specified by the two parties and to eliminate this transaction in the moment of establishing the contribution or tax or to reinterpret the transaction in another manner and to set the contribution or tax starting from this own interpretation.

In the second situation a legal presumption of stimulating price in transactions closed between affiliated persons is instituted, with the possibility to take in consideration another price than the one set by the parties for determining the contribution or tax.

By affiliated persons we understand relatives up to the 3<sup>rd</sup> degree inclusively, in the case of physical persons and physical or legal persons who own directly or indirectly at least 25% of the value/number of the participation titles or of the voting rights of the other person in the case of legal persons, respectively the third party that holds directly or indirectly at least 25% of the value/number of participation titles or voting rights of both legal persons.

What mean and what are the consequences of these rights that are granted to the fiscal authorities?

One can notice that the lawmaker granted the fiscal bodies similar attributions to those of the courts of law. These have the possibility to “notice” that the goal of a transaction may be entirely different to that specified by the parties involved in the transaction and to disregard a transaction or to “adjust the sum” of the income or spending when setting a contribution or tax.

Although the legal expression can lead to the impression that it refers only to the economic goal or content of the transaction, we consider that the implications are much broader, exceeding from the frame used to set a tax or a contribution.

In other words, although the convention closed between the parties is still perfectly valid, not being cancelled or modified by any court of law, it is ignored or reinterpreted by the fiscal body empowered to establish the corresponding tax or contribution.

We are practically in the situation of a juridical contradiction: a convention cannot produce effects in relation to the fiscal bodies, which have the quality of a third party in this case, if they consider that the price or the transaction itself would be simulated but it produces effects to the contracting parties and the others as it was established initially.

On the other side we must not forget that the contract closed with the intention to avoid the payment of some taxes and contributions is null and void. Is it enough though the observation of the fiscal bodies in this respect or is it necessary to have a decision from a court of law? A normal question, in a space of the free thought.

Therefore, the analysis of the concept shows us undoubtedly that in the fiscal matter, the authority has a privileged position. We can even call it the privilege of power<sup>179</sup>: the authority, by its own exclusive power, sets the juridical content of the reports established between the debtor of the fiscal duty and its partners, according to the own evaluation and according to the own interest, establishes the opposability situations in the juridical relations of the third parties, observes the cases of fraud of the creditor<sup>180</sup>, accepts evidences or rejects them, accepts or rejects exceptions, ascertains nullities, gathers patrimonial or administrative consequences, all from a unilateral perspective; one of the subjects of the fiscal report is the judge of the own case in the determined juridical relation of setting the actual fiscal duty.

Obviously, there are practical reasons that justify such prerogatives in the hands of the fiscal authorities just as the law grants the taxpayers the right to contest in the court the fiscal observations and the debt titles.

But this reality of the positive law must be known by the judiciary authorities and approached as it is: not all the allegations of the fiscal authority, not all their observations are clearly equidistant; on the contrary, as a principle they are interested as they express the point of view of a party which is interested from the juridical report of fiscal law. However objective and legitimate the fiscal agent would be he cannot deny that he is the agent of one of the interested parties. From this approaching perspective comes the idea that the abuse of the fiscal agent cannot be excluded; therefore the judiciary authority must consider with precaution his observations and his value judgments.

Taking in consideration the establishing protocols fulfilled by the fiscal authority as exclusive means of evidence in the probation of the offences of tax dodging must be done extremely careful; the observations from these documents

---

<sup>179</sup> Details on this approaching type, see: Fl. Deboissy, *La simulation en droit fiscal*, L.G.D.J., Paris, 1997, pages 266-267; Ph. Bern, *La nature juridique du contentieux de l'imposition*, L.G.D.J., Paris, 1972;

<sup>180</sup> In the juridical reports of private law this type of observation is done only in front of the judge by specific actions: see in this respect: C. Stătescu, C. Bîrsan, *Civil law. General theory of obligations*, 9<sup>th</sup> edition, Hamangiu Publishing House, București, 2008, pages.352-360; Liviu Pop, *Treaties on civil law. The obligations*, I, Juridical General policy, C.H.Beck Publishing House, Bucharest, 2006, pages 350-413; Mircea N. Costin, Vasile Luha, *General theory of obligations*, II, Risoprint Publishing House, Cluj-Napoca, 2007, pages 172-284.

must be checked, the judgments of the fiscal agents must be resumed in the specific conditions of presenting the evidence according to the rules established by the penal procedure<sup>181</sup>.

---

<sup>181</sup> Related to this area see: Gr. Teodoru, *Treaties on penal procedure law*, Hamangiu Publishing House, Bucharest, 2007, pages 329-425; Ad. Tulbure, *Romanian penal procedure*, Continent Publishing House, Sibiu, 2005, pages 169-2003.