

“The presumption of guilt” in the investigation of tax evasion crimes

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Abstract

Although it is one of the fundamental principles of the criminal process, whose observance is required at all stages of the trial, and therefore in the criminal prosecution stage as well, the principle of the presumption of innocence is often "forgotten" or transformed into the "presumption of guilt" when a tax evasion crime is under investigation. The major interest in investigating these offenses is the recovery of the damage, which is why there is a need to find solvable persons who are involved in these activities. Due to the fact that most of the times it is difficult to prove their involvement, in practice one can notice a tendency to prosecute such persons for the simple fact of having purchased products or services from dummy companies. The article presents examples of judicial practice and seeks to argue the mistaken view of criminal investigation bodies in the light of European directives as well as ECJ jurisprudence.

Keywords: *presumption of innocence, tax evasion, European directives, ECJ case law.*

JEL Classification: K14

1. Introduction

The considerable amount of damages that the tax evasion causes to the consolidated general budget as well as the social danger and the virulence of the tax evasion phenomenon led the Romanian lawmaker to adopt strict criminal measures for preventing and fighting against it.²

At the time of the adoption of the anti-tax evasion law³, the recovery of the damage caused by a crime of tax evasion was a priority for the legislator, even in view of the need to prosecute those involved in such activities. The concern of the legislator for the recovery of damage arises from the fact that the initial form of the anti-tax evasion law provided for a cause of non-punishment in the event of the full payment of the damage. Although this article was criticized at the time the Bill was under the analysis of the Legislative Council, which stated in the Opinion that this cause of non-punishment does not fit the general concept of the Criminal Code and the concept of criminal responsibility, thus proposing to be considered at most a cause for liability mitigation, and that it could lead to the encouragement of

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² Explanatory memorandum to Law 241/ 2005 <https://www.senat.ro/legis/PDF/2005/05L113EM.pdf>, last accessed on 9 November 2017.

³ Law 241/2005 on preventing and fighting against tax evasion.

evasion⁴, the bill was adopted with the maintenance of this cause of non-punishment.

At the same time, the obligation to institute the measure of the distraint upon the goods in the investigation of the tax evasion offense (according to Article 11 of the Tax Evasion Law) denotes the same preoccupation for the recovery of the damage⁵.

This concern for the recovery of the damage does not only belong to the legislator but also to the judicial bodies. But, as the efforts to identify individuals guilty of committing tax evasion crimes have often directed investigations into insolvent entities, so-called "dummy companies," basically the legitimate aim of the legislator to incriminate the deeds could not be achieved. Thus, lately, we can see an increase in the field of investigations, which include people who apparently did not violate the law. These are those natural or legal persons who have entered into commercial relationships with "dummy companies," but who have recorded in accounts both the inputs and the outputs, who have real business activities and pay taxes to the state budget. These people become "victims" of both those with whom they enter into commercial relations and of the judiciary. They are accused of tax evasion considering that the invoices issued by "dummy companies" are not real, for the simple reason that these companies did not have inputs, so they could not supply the goods. This orientation of the investigation bodies, whose obvious (sometimes even stated) goal is the investigation of solvable persons for the purpose of recovering the damage, is basically a reversal of the principle of the presumption of innocence. It is based on the idea that the natural / legal person is guilty, and then he will have to prove his good faith, in the sense that he did not know the real situation of the co-contracting company (the dummy company). That is why we can state that in the case of the investigation of the tax evasion offenses, the applied principle is that of the "presumption of guilt".

In the following, we will analyze what it means to be presumed innocent, how this principle is violated in practice when investigating tax evasion offenses and what is the European perspective on this issue.

2. The presumption of innocence

More than two centuries ago, the principle of the presumption of innocence finds a first legal regulation⁶ in the famous Declaration of the Rights of Man and of the Citizen. It happened on August 26, 1789, when the Marquis of Lafajette, in front of the Estates-General, read the Declaration that represented the spirit of independence brought by the French volunteers in the North American War of

⁴ Legislative Council approval of the Bill on the preventing and fighting against tax evasion no. 333/8 April/2005, <https://www.senat.ro/legis/PDF/2005/05L113LG.pdf>, last accessed on 9 November 2017.

⁵ Regarding the constitutionality of this article, The Constitutional Court gave its ruling no. 320/2016 published in the Official Gazette of Romania no. 636/ 2016.

⁶ A. Ș. Tulbure, *Prezumția de nevinovăție. Contribuții la integrarea europeană*, Ed. Red, Sibiu, 1996, pp. 18; 22-23.

Independence. "Any man being presumed innocent until he is declared culpable if it is judged indispensable to arrest him, any rigor which would not be necessary for the securing of his person must be severely reprimanded by the law."

On December 10, 1948, the General Assembly of U.N. adopted and proclaimed the Universal Declaration of Human Rights. Art. 11 paragraph (1) of the Declaration provided that "*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*"

At the same time, the International Covenant on Civil and Political Rights, art.14, paragraph 2 states that "*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*"

The presumption of innocence is also expressly regulated in Art. 66 of the Rome Statute of the International Criminal Court, according to which "*Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.*"

At European Union level, the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, refers to the presumption of innocence in Art. 48, which states: "*Any accused person is presumed innocent until his guilt is legally established.*"

In the system of the European Convention on Human Rights signed on 4 November 1950 in Rome, the presumption of innocence has the same regulation as the one in the European Charter, being provided for in Article 6, which regulates the right to a fair trial. According to art. 6 paragraph (2) of the ECHR: "*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*" The practical applicability of this principle can be deduced from the vast jurisprudence of the Strasbourg Court, which has the role of interpreting the Convention.

In our legislation, the presumption of innocence was not initially treated as a principle in the original Code of Criminal Procedure, being only regulated as a rule on the burden of proof and the taking of evidence, in that the accused or defendant must not prove his innocence. However, its importance goes beyond the matter of evidence and influences the development of the whole criminal process.⁷ However, the current Code of Criminal Procedure gives it the value of general principle in the criminal proceeding, thus recognizing its importance and its applicability in all stages and criminal proceedings, not just as regards the administration of evidence⁸. The principle of the presumption of innocence is

⁷ A.Șt.Tulbure- *Prezumția de nevinovăție în Constituția României și în perspectiva modernizării legislației penale*, in "Dreptul journal" no. 9/1993, p. 47.

⁸ The Romanian Constitutional Court, in Decision no. 208 of 15 February 2011, stated, as in other decisions for that matter, that the presumption of innocence is inherent only to the criminal trial, having nothing to do with civil, commercial, fiscal or administrative litigation cases. See Lucian Chiriac, Ximena Moldovan- *No one shall be twice tried for the same offence. Ne bis in idem*, „In The Juridical Current”, nr. 2/2017, p. 109.

considered in doctrine also an essential right in a civilized society, circumscribing the notion of rule of law.⁹

Last but not least, the presumption of innocence is an essential element in strengthening the right to a fair trial. This is the view of the European Parliament and of the Council, which on 9 March 2016 adopted EU Directive 2016/343 on strengthening certain aspects of the presumption of innocence and the right to be present at the trial during criminal proceedings. The preamble to this Directive states that the presumption of innocence applies from the moment a person is suspected or accused of committing a crime or an alleged crime, that is to say, even before that person is informed by the competent authorities of the charge is being brought against him (paragraph 12 of the Preamble). Under the Directive, the presumption of innocence implies aspects such as: the prohibition of making public statements by public authorities to refer to an offense and to a person suspected or accused of being guilty for as long as that person has not been proved guilty according to law (paragraph 16 of the Preamble), the use of measures of physical restraint, such as handcuffs, glass boxes, cages and leg irons, unless the use of such measures is required for case-specific reasons (paragraph 20 of the Preamble), assigning the burden of proof for establishing the guilt of suspects and accused persons to the prosecution, and the interpretation of any doubt the suspect or accused person may benefit (par.22/Preamble), the seeking of both inculpatory and exculpatory evidence (paragraph 23/Preamble), the right to remain silent (paragraph 24), the prohibition to force a person to produce evidence or documents or to provide information which may lead to self-incrimination (par.25).

One of the most important aspects of the presumption of innocence arises from the obligation of the prosecution bodies to produce evidence; they must clarify all aspects of the case on the basis of evidence, so that the burden of proof lies with the criminal investigation body and not the defendant.¹⁰

3. On the charge of committing tax evasion offense

From the above mentioned one can conclude that there is undoubtedly a concern at both national, European and international level, of raising the presumption of innocence at the rank of principle and of ensuring the required guarantees for its observance. However, we have to see how this principle is actually applied in practice when investigating a tax evasion case.

As we have pointed out above, the lawmaker, the criminal investigating authorities and judge have the same purpose to recover the damage. However, they often face a situation where the natural or legal person guilty of the admitted evidence is insolvent. Most of the times, we are talking about dummy companies,

⁹ A. Gentimir, *Evoluția reglementării principiului prezumției de nevinovăție în legislația procesual penală română*, in "Analele Științifice" of "Al. I. Cuza" University of Iași, Tomul LIII, Științe Juridice, 2007, p. 49, on http://laws.uaic.ro/files/docs/articole/2007/Anale2007_art03AlinaGentimirEvolutiaReglementariiPrincipiuluiPrezumtiei.pdf, accessed on 9 November, 2017.

¹⁰ Gh. Mateuț, *Tratat de procedură penală partea generală*, Ed. C.H. Beck, Bucharest 2007, p. 166.

which do not actually have commercial activity, which have no inputs or outputs of goods, have no staff to perform the services, and whose legal administrators are either individuals who do not own goods on their behalf (sometimes homeless people) or in some cases even deceased people. Obviously, their work is performed by other people who usually act on behalf of the dummy company on the basis of a mandate contract. They also don't usually own goods that could cover the damage.

Thus, the criminal investigation bodies focus their attention on those legal entities that have entered into commercial relationships with the dummy companies. The criminal prosecution documents drawn up in various cases dealing with the offense of tax evasion reveal the incorrect reasoning, contrary to the principle of the presumption of innocence, which the criminal prosecution bodies have. Let us exemplify: if a *genuine company R* (with business activity, registered office, employees, with taxes paid to the state budget) records in its accounts invoices for the acquisition of products from the *company F* (which later turns out to be a *dummy company*) commits tax evasion crimes (in the form provided by Article 9, paragraph (1), letter (c) of Law 241 of 2005) for the mere fact that the company F has never entered such products.

Also, if company R concludes a service contract with company F and records the invoices for the payment of these services in the accounts, it also commits the tax evasion offense simply because company F did not have at that date any employee who could have provided the services in question.

Practically, it is based on the idea that R company (and its legal representative) was in bad faith, and recorded fictitious invoices only to increase spending and thus pay lower taxes to the state. The fact that those products actually existed and were also sold by R company is challenged in the indictment by statements such as "those products could have been bought on the black market, from anywhere." Regarding services, the argument that the works have been carried out and exist in reality is also being countered by the criminal prosecution body by arguing that those works could have been executed by R company itself, by its own employees, the paid invoices being only for increasing the expenses on the books.

In this context we cannot help asking ourselves whether we have returned to the inquisition period, when the accusation was based on the presumption of guilt of the person, followed by his attempt to bring up almost impossible evidence to prove his innocence.

If the principle of the presumption of innocence were to be respected, the criminal investigation bodies should start from the following premise: company R is in good faith received the goods from company F according to the waybill of the goods, and company F may have obtained it illegally. Starting from this premise, the criminal investigating authority should verify whether those goods actually entered the company, were received, and subsequently marketed or used in production. Only if there is evidence to the contrary, they could charge the company R.

In the second example, the criminal prosecution body should start from the premise that the company F provided the service, even with illegally-employed workers (which are common in practice). If the investigations proved that for the performance of the services, employees of R company have been used, as well as its equipments, then only company R should be charged.

But, starting from the reasoning that R company, real and solvable, is the author of the tax evasion offense, F being an accomplice by issuing fictitious invoices, the burden of proof is basically overturned. The company (its representative, respectively) must seek evidence to prove that the operation (either service or supply of goods) was real. The overturning of the burden of proof is actually a violation of the principle of the presumption of innocence. The person faced with an accusation must prove his innocence, although he is charged with allegations based on presumptions.

4. European vision on the issue

The aforementioned European Directive clearly provides in Article 6, entitled "The burden of proof" that Member States must ensure that the burden of proof in establishing the guilt of suspected and accused persons lies with the law enforcement bodies. Paragraph 2 of the same article states: "*Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person.*"

Recent jurisprudence of the Court of Justice of the European Union (CJEU), in judgments regarding requests for preliminary rulings initiated by the national courts, also gives us a clear answer to the issue of the prosecution of the natural or legal person entering into commercial relations with the dummy companies.

In a case¹¹ concerning the interpretation of the Common VAT Directive, the CJEU was referred to by Cluj Court of Appeal for a preliminary ruling on whether the Council Directive 2006/112 / EC of 28 November 2006 on the common system of value added tax overrides national legislation which provides that taxable persons for VAT purposes can not deduct that tax paid for the purchase of goods or services from other taxable persons who have been declared 'inactive.'

The Court has held that the questions referred essentially concern the balancing of the right to deduct, an essential element of the VAT mechanism, on one hand, and the fight against tax evasion, which is recognized and encouraged by Directive 2006/112, on the other hand. The Court has stated that, as the settled case-law has constantly provided, the right to deduct may be refused when it is established, in the light of objective evidence, that that right is fraudulently or abusively invoked. The Court has repeatedly held that the administration cannot

¹¹ CJUE. C-101/16, Paper Consult SRL vs. DRFP Cluj-Napoca and AJFP Bistrița-Năsăud, Judgment of 19 October, 2017 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=195735&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=1464012>, last accessed on 9 November, 2017.

require the taxable person to undertake complex and in-depth verifications of a supplier; thus, it has actually transferred the control measures into the responsibility of that administration. The Court pointed out that the Romanian legislation provides for an unchallengeable presumption of participation in tax fraud in respect of all taxable persons who enter into transactions subject to VAT with inactive economic operators. In the Court's view, such a national rule goes beyond what is necessary to achieve the objectives of ensuring the correct collection of VAT and the prevention of tax evasion.

The Court also decided in a case where the Polish tax authorities were concerned¹² (but the provisions also apply to Romania) that tax authorities can not deny the taxpayer the right to deduct value added tax (VAT) for transactions concluded with business partners that are inactive from the fiscal point of view. The Court's judges ruled that the precarious condition of the building in which the gas supplier had its registered office does not exclude that the economic activity could have taken place elsewhere than the registered office. Furthermore, the fact that it was impossible to establish contact with the representatives of that company in administrative proceedings does not allow, since those attempts to contact have taken place during a period before or after the deliveries referred to in the main proceedings, the automatic consideration of a non-existent economic activity at the date of the respective deliveries. The Court also pointed out that a failure by the supplier of goods to declare when he started his activity as a taxable person can not call in question the right of deduction of the recipient of the goods supplied in respect of the VAT paid on them.

An important argument of the judgment is that the impossibility of establishing the genuine supplier is not a ground for declining VAT deduction, *"except where it is established, on the basis of objective factors and without the taxable person being required to carry out checks which are not his responsibility, that that taxable person knew, or should have known, that that transaction was connected with VAT fraud, this being a matter for the referring court to determine."*¹³

Given the CJEU case-law¹⁴, which, although passed in tax matters, not criminal, provides the necessary elements for a rule of probation also in criminal matters, we consider it indisputable that, in the case of investigations of tax evasion, the burden of proof of fictitious transactions belongs to the state authorities. The mere fact that the company from which the investigated person has purchased goods is inactive does not lead to the declining of VAT deduction, not least to his indictment. A natural or legal person may not be required to carry out additional checks at the time of the conclusion of a transaction, which in fact would

¹² CJUE Judgement of 22 October 2015 in Case C-277/14, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=170302&doclang=RO>, last accessed on 9 November, 2017.

¹³ Point 53 of CJUE judgment.

¹⁴ See also Nicolae Ploșteanu, Iulia David, *The national implications of the ECJ Judgement in c-463/14 case concerning the taxation on supply of consulting services*, în „Curentul Juridic” no 2/2016, pp. 105-114.

require any person to collect pre-trial evidence in its defence in the event of a charge.

5. Instead of conclusions

Often, state bodies tend to tilt the balance in favour of the public interest, to the detriment of private interest. Recovery of damage to the state may be considered by some to be a sufficient justification for the state authorities to restrict or violate certain rights of the individual. But can the public interest justify violation of the basic principles of a criminal trial? Is the turning of the principle of the presumption of innocence into the principle of "presumption of guilt" somewhat grounded?

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