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About intellectual forgery in romanian accounting law

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30. April 2009

Online at <http://mpra.ub.uni-muenchen.de/14970/>

MPRA Paper No. 14970, posted 4. May 2009 00:39 UTC

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Abstract

Although it is the only criminal offence stipulated by accounting law, forgery foreseen by article 43 of Accounting Law no. 82/1991, republished, represents a special variant of the criminal offence foreseen by article 289 of the Criminal Code, and, in this context, we discuss about a text conjuncture and not about a conjuncture of criminal offences. The provisions of the Criminal Code will be mentioned only as regards the applicable penalty (6 months to 5 years). Article 43 contains an incrimination specific to the area covered by the special law, and the description of the elements of criminal offence is complete.

Keywords: *accounting, intellectual false, true and fair view, crime*

Introduction

According to article 43 of Accounting Law no. 82/1991, republished, "*intentional carrying out of inaccurate entries, as well as intentional omission of accounting records, resulting in misrepresentation of revenues, expenses, financial results and assets and liabilities elements reflected in the balance sheet, shall constitute the crime of intellectual forgery and shall be punished according to law.*"

1. General framework of accounting regulations

According to article 1 of the law, trading companies, national companies, independent administrations, national research and development institutes and other legal entities with lucrative purposes shall have the obligation to organise and conduct own accounting systems, respectively financial accounting and management accounting, adjusted to their specific activity.

Understanding the content of the only criminal offence included in the law presumes knowledge of regulations regarding management and organisation of accounting.¹

Accounting, as an activity specialised in measurement, evaluation, knowledge, management and control of assets, liabilities and equity, as well as of results obtained from the activity of legal entities and individuals referred to in article 1, has to ensure chronological and systematic recording, processing, publishing and preservation of information on their financial position, financial performance and cash-flows, both for their internal requirements and in the relations with present and potential investors, financial and commercial creditors, clients, public institutions and other suppliers.

Thus, it can be concluded that, in fact, accounting is an information system, respectively a set of techniques and methods that allow obtaining and presentation of a certain image about a company, an institution or a business. Clearly, this image should reflect reality as well as possible, because this system allows us not only knowledge of past or present situations, but also to determine future approximate evolution of events that are being dealt with. Presentation of a false image might have catastrophic consequences.

With regard to the users of accounting information, the first user is exactly the entity that organises, respectively keeps accounting records. We speak about a privileged user that has access to all accounting information. Besides these internal information needs, the information system is tailored and shaped to meet the needs and requirements of external users: shareholders and associates, clients, suppliers, banks and other financial institutions, employees and anyone

¹ Petre Dungan - *Comentariu teoretic și practic privind infracțiunile prevăzute în unele legi speciale*. Intergraf Printing House, Reșița, 2001, pages 145-146.

interested in the company's state and development. With regard to shareholders, Company Law no. 31/1990 established their right to information. Some authors have considered this right to be absolute. It is obvious that these external users will not have access to all accounting information, and information disclosure must be selective in order not to harm the company's interests.

Another user of accounting information is the state. The state used to be the main user of accounting information, especially when companies were owned by the state or where the state was the main shareholder. This would be one of the causes, and the second one is the fact that tax and accounting rules are set by the same body, respectively the Ministry of Public Finance. However, the state needs information mainly for tax, statistical and social control purposes.

After establishing the users of accounting information, we should take into account the form of accounting information. Thus, any financial transaction shall be recorded when performed, in a document underlying accounting records, thus acquiring the quality of justifying document. Therefore, accounting records must be kept chronologically and systematically. Justifying documents underlying accounting records bind the responsibility of the persons who prepared, endorsed and approved them, as well as of those who registered them in accounting.

The official documents for presenting the financial situation of entities listed under article 1 are the annual financial statements, which should provide a true and fair image of their financial position, financial performance, cash-flows and other information related to developed activity. Thus, under the provisions of Accounting Law no. 82/1991, republished, the responsibility for the organisation and maintenance of accounting books falls to the administrator, credit officer or another person who has the duty to administrate the assets, as the case. These persons usually organise and conduct accounting in separate departments, headed by the economic director, chief accountant or another person empowered to perform this function. These persons should have superior economic studies and together with the subordinated personnel they organise and operate accounting records.²

2. Forgery— general information

Forgery represents a particular and extremely varied category of criminal offences within the wide scope of socially dangerous actions. Forgery seriously impacts on truth and trust, which should result from documents in order to shape and conduct interpersonal relationships. Thus, criminal law considered that in order to protect social relationships, and to ensure normal development of these relationships, it is necessary to incriminate the actions that alter the truth, create a serious risk or harm the mentioned relationships.³

Forgery involves alteration of truth. Such alterations refer to certain elements, such as things which are granted by law the qualification and, implicitly, the function to serve as evidence of truth, which is expressed or certified by values such as coins, stamps, documents, debit titles or seals, labelling instruments.⁴ By incriminating acts that constitute forgery, criminal law understood to protect the social relationships, which could be jeopardized or injured by such actions.

As common legal subject, forgery refers to social relationships regarding public trust in authenticity of things with probative attributes, that is the truth that they should legally express or testify.

We would like to highlight, that there is no forgery when the falsified thing does not serve as evidence, and the action might possibly represent deceive.⁵ In terms of concept, forgery implies reference to a certain truth presumed to be proven, but which in reality is altered by committing forgery. A forged coin circulates, because apparently it is considered to express the truth. An

² Costică Voicu, Alexandru Boroș - *Dreptul penal al afacerilor*, C. H. Beck Printing House, Bucharest, 2006, page 173.

³ Octavian Pop - *Falsul material în înscrisuri oficiale și falsul intelectual*, Mirton Printing House, Timișoara 2003, page 72.

⁴ Vintilă Dongoroz și colectiv - *Explicații teoretice ale Codului penal român, partea specială*, Academia Română București Printing House, 1972, page 357.

⁵ For example, truth regarding the value of a coin dropped out of circulation does not represent forgery, because in this case the coin no longer has evidence function.

object bearing a false labelling sign of a valuable material is accepted as valid, as apparently it is presumed to express the truth. Where there is no truth to be presumed as proven, there can be no crime of forgery, but a useless criminal act or a putative act.

With regard to forgery, it may be total or partial. Forgery represents actual falsification, but also some derived acts which, due to their link to the first category, were regulated in the same chapter. Derived acts are other actions than those involving actual falsification.⁶ Regardless whether we speak about actual falsification or derived actions, they are marked by the fact that they produce a state of danger for the protected social value, respectively public confidence in authenticity of coins, stamps or other values, labelling or authentication instruments, documents.

Generally speaking, forgery represents dangerous criminal offences, respectively the socially dangerous result is exteriorised in a state of danger to the protected social values. Being dangerous criminal offences, the causal link usually results from the action's materiality. If the law also requires a certain result, causal link will be determined for each case.

3. Characterisation of intellectual forgery provided by accounting law

The criminal offence's legal subject consists of the social relationships regarding authenticity and accuracy of accounting records. In other words, the legal subject consists of the social relationships that ensure authenticity and trust that must exist with respect to the content of official accounting documents which any company or public institution, organisation, as well as any other legal entity is operating with.

The material subject consists of official accounting documents against which the offender exerts his action or omission. Doctrine has claimed that these documents are not required to be official documents, as article 289 of the Criminal Code refers only to the sanction provided in this article. Article 43 of Accounting Law no. 82/1991, republished, represents a stand-alone incrimination, and the description of its constituents is complete.⁷

The active subject is the representative of independent administrations, private companies, public institutions, cooperatives and other legal entities that have the capacity of traders and the obligation to organise and conduct own bookkeeping. Passive subject will be the legal entity or individual whose interests have been harmed as a result of intellectual forgery.

The material element comprises two alternatives: performing inaccurate entries or omitting accounting entries. Literature and jurisprudence raised the problem of the link between criminal offences provided by article 43 of Accounting Law no. 82/1991, republished, and criminal offence provided by article 9 paragraph 1 letter b) of Law no. 241/2005 on tax evasion. The solutions given are both in the sense of criminal offence conjuncture and in the sense that the criminal offence provided by article 43 Accounting Law no. 82/1991, republished, is absorbed in the complex criminal offence provided by Law no. 241/2005 on tax evasion.

It has been considered that full or partial omission of evidencing in accounting documents or in other legal documents of business operations performed or realised revenues, or evidencing expenses which are not based on real operations, or evidencing of other fictive operations, represent complex tax evasion provided by article 9 paragraph 1 letters b) and c) of Law no. 241/2005 on tax evasion, which also covers intellectual forgery provided by article 43 of Accounting Law no. 82/1991, republished, in relation with article 289 of the Criminal Code.

In order to sustain this opinion, courts have stated that by comparing the two incriminating texts one can observe that forgery, either by altering a document, or by omission, is part of the objective side of tax evasion, because, initially, by incriminating actions that fall under article 43, the regulator aimed to create sanctions to replace the lack of legislation on tax evasion, a problem

⁶ Examples of derived actions: putting into circulation or possession for the purpose of putting into circulation of forged coins or values, manufacture or possession of instruments or materials to be used for forgery of coins or values, use of forged authentication or labelling instruments, use of forged documents.

⁷ Laura Codruța Lascu (Kövesi) – *Accounting Law. Intellectual Forgery*, Criminal Law Magazine, no. 4/2001 pages 129-130.

that was covered by Law no. 87/1994 on tax evasion, which is why the above-mentioned provisions remain without application grounds, being absorbed by the new incrimination.

Another opinion states that full or partial omission of evidencing in accounting records or in other legal documents of business operations performed or realised revenues, or evidencing expenses which are not based on real operations, or evidencing of other fictive operations, represent complex tax evasion provided by article 9 paragraph 1 letters b) and c) and intellectual forgery provided by article 43 of Accounting Law no. 82/1991, republished, in relation with article 289 of the Criminal Code, in actual conjuncture.

In order to sustain this opinion, courts have stated that, when incorrect or inaccurate entries in accounting documents affect the financial statements, resulting in a decrease of tax liabilities, there is not just a text conjuncture, but also a real conjuncture of criminal offences, because the action that marks the objective side of the two criminal offences includes different immediate material consequences, and we cannot speak about the same action, because immediate consequence consists in misstatement of revenues, expenses, financial results, as well as assets and liabilities items reflected in the financial statements, and causal link has to be demonstrated because mere falsification of accounting records does not lead *de plano* to the immediate consequence specific for this criminal offence.⁸

Regardless of the presentation of the material element of the objective side, in order to have a criminal offence, the offender should commit the action with direct or indirect intent. In order to accentuate this, the regulator uses the expression "intentional".

Attempt is not incriminated. The consumed action is punished with the sanction provided by article 289 of the Criminal Code (imprisonment from 6 months to 5 years), referred to in article 43 of Accounting Law no. 82/1991, republished. We should also mention that, if the material element of examined criminal offence is executed partially or fully, but the specific consequence does not take place, the action represents intellectual forgery provided by article 289 of the Criminal Code. Consequently, conjuncture of criminal offences is excluded whenever we speak about the same material element and the same immediate consequence.

4. Qualified criminal offence provided by article 43 of Accounting Law

The criminal offence provided by article 43 of Accounting Law no. 82/1991, republished, represents a special variant of intellectual forgery mentioned in article 289 of the Criminal Code.

Literature has shown that the text of article 43 does not contain a criminal incriminating provision, as it only describes a professional behaviour, contrary to the law. Such behaviour represents intellectual forgery sanctioned under the Criminal Code. It is a "warning text" for persons working in accounting, who are warned herewith that in case of intentional omissions to perform certain accounting operations or if these are performed maliciously, they will bear the rigors of criminal law.

There is a question about how the regulator deals in article 43 with the issue whether the mentioned rule represents a standard or a reference?

If we claim that the rule provided by article 43 represents a reference, we should accept the conclusion that the rule referred to, respectively the one provided by article 289 of the Criminal Code, is incorporated into the provisions of article 43, so that any change of article 289 would not affect the reference rule.

On the other hand, if we claim that the provisions of article 43 represent the standard, the rule referred to, respectively the completing rule (article 289 of the Criminal Code), only completes the content of the standard rule, and any change of the completing rule will be reflected on the standard.

We sustain the opinion of criminal law experts, such as Gheorghe Voinea or Vintilă Dongoroz, respectively that arguments presented by the first opinion are more convincing. Doctrine has claimed that article 43 contains an incrimination specific to the field governed by the

⁸ Mihai Adrian Hotca, Maxim Dobrinoiu, *Infracțiuni prevăzute în legii speciale*, C.H. Beck Printing House, Bucharest 2008, page 383

special law, and the description of constituents of the criminal offence is complete. The assimilation made by the ruler with intellectual forgery provided by the Criminal Code serves only for application of punishment limits provided by article 289 of the Criminal Code (6 months to 5 years), that are considered to properly express the degree of social danger of the criminal offence, which the ruler did not want to repeat in the incrimination under article 43 of Accounting Law no. 82/1991, republished.⁹

This conclusion is in agreement with how criminal doctrine has explained the features of the reference rule, as well as with the more recent opinions of other authors. By characterising as such the rule of the special law, we should notice the consequences of this characterisation, in the sense that the reference rule absorbed the borrowed rule, in the form and with the sanction provided at the date when the reference rule came into force (27 December 1991), so that subsequent amendments to the criminal law with implications on the borrowed rule will not affect in any way the provisions of article 43 of Accounting Law no. 82/1991, republished.

Conclusions

As a general conclusion, we can assert that, although the text provided at article 43 is intended to warn those who violate the law on criminal consequences, which is the role of all criminal laws, it may not lead to the assumption that we are not in front of an incriminating criminal provision of a special law.

There are other conclusions as well. Thus, whenever both constituent and common law elements of special criminal offence are met, there is no conjuncture of criminal offences, but only a conjuncture of texts, and the action will be classified under article 43 of Accounting Law no. 82/1991, republished, with reference to article 289 paragraph 1 of the Criminal Code, as regards the applicable punishment (imprisonment from 6 months to 5 years).

When the requirements of article 289 of the Criminal Code are not met (e.g. when the action was not committed by a clerk, as defined in article 147 of the Criminal Code), but the constituents of special criminal offence are met, the criminal offence provided by article 43 of Accounting Law no. 82/1991, republished, with reference to article 289 of the Criminal Code, will be maintained, but only as regards the applicable penalty.

Although we speak about forged accounting records, in case the material consequence required by article 43 of Accounting Law no. 82/1991, republished, did not happen, or the action remained in a stage of attempt, the special criminal offence will not be maintained, but only the common law criminal offence, in its consumed form or tentative, as appropriate, to the extent that the requirements of article 289 paragraphs 1 or 2 of the Criminal Code are met.

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⁹ Gheorghe Voinea – *Forgery in accounting records*, Criminal Law Magazine no. 2/1999, page 106-107.

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