

THE VALUE ADDED TAX AND THE EVASION CHAIN OF INTRA-COMMUNITARIAN VAT

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The relationship IRS – taxpayer runs the risk of turning into a psychological war in which, however, given the positions held, the IRS is by far on a favorable footing. Between the apparently excessively formal position held by the IRS, which seems to conceal behind the laws, and the sometimes forced interpretation of the laws, by the taxpayer, there are the courts of law, also disturbed by the legislative changes which appear to have entered a perpetual motion.

The objective of the fiscal administration regarding the value added tax is to combat tax evasion and fraud. It is very important to combat evasion in the VAT field because it represents the indirect tax of the largest share in the consolidated general budget. VAT evasion represents the intention of not paying the tax, withholding or not declaring it, or requesting its refund which would not be fit, due to the exaggeration of the deductible amount of the VAT. The essential aim of the IRS inspector is to verify the correctness of the declared amount of the value added tax. It should also be observed whether the incorrectness is deliberate or whether it was due to misunderstanding, carelessness or the ignorance of the payer. In all cases judgment is necessary, as for the cases of negligence the amount to be paid must be corrected and accompanied by applying fines and / or penalties, and in the cases of intended fraud legal actions are to be applied in order to obtain a conviction. Deceitful deductions represent other methods for tax evasion and are undertaken based on fake invoices, invoices often used several times for deduction, or invoices related to purchases that have never been made. Thus there are examples of economic agents who have practiced the right to deduct the VAT due to the acquisition of goods which consisted in the property of other economic agents. In other cases noticed was the deduction of VAT on goods or services that were not included in the activities of the economic agent who purchased them. Registration errors seem innocent, but they occur frequently and have a high value; for example, some economic agents do not calculate the Value Added Tax at the receipt of advanced payments from customers but when the goods are delivered.

Keywords Value added tax, intra-communitarian acquisitions, IRS inspector, deduction, taxpayer

JEL Classification G2, H2, H3

I. Introduction

The value added tax represents the revenue of the state budget, included in the category of indirect taxes, which apply to the operations regarding delivery of tangible assets, transfer of property regarding fixed assets, the import of goods, supply of services, as well as the corresponding operations.

The tax becomes applicable when the legal conditions are set, necessary for the retention of the tax.

The value added tax becomes payable when the IRS becomes legally entitled, at a certain time, to require payment by the persons liable for tax payment, even if the payment may be delayed. The action becomes applicable usually on the date the goods or services are supplied, unless otherwise provided by law.

For imported goods subject to customs duties, agricultural duties and other similar communitarian charges, established as a result of a common policy, the VAT becomes applicable when noticed and the respective communitarian taxes are due.

If imported goods are not subject to communitarian taxes previously foreseen, the VAT would become applicable when due if imported goods were subject to such taxes.

If, when imported, the goods are subject to a special customs regime, the tax becomes applicable on the date these cease to be subject to such a regime.

The tax becomes applicable on the date the goods or services are delivered, in accordance with the exceptions provided in the Fiscal Code of Romania, namely:

- on the date when the invoice is issued, before the date when the tax becomes applicable;
- on the date the deposit is cashed, for advance payments made prior to the date when the tax becomes applicable. Exempted from these provisions are deposits cashed for the payment of import and the VAT for import, as well as any advance payments made for operations exempted from tax payment or not subject to be taxed. The advance payments are considered to be the partial or full payment of the value of goods and services, performed before the supply thereof;
- on the date of cash withdrawal, for supplies of goods or services, performed by automatic vending machines, gaming or other similar machines.

In the case of an *intra-communitarian acquisition* of goods, the tax becomes applicable on the due date for applying tax on the delivery of similar goods, in the Member State where the acquisition is performed, and the tax becomes applicable on the date the invoice is issued to the person performing the acquisition, taking into consideration the entire value of the goods supplied, but not later than the fifteenth day of the month following the month in which the tax became applicable.

The taxable amount for the import of goods is made up of the goods' value at customs, determined in accordance with the customs legislation in force, plus any taxes, fees and other charges due abroad, as well as those due following the imports to Romania, except for value added tax to be levied.

The taxable amount includes incidental expenses such as commissions and packing costs, insurance costs, transportation costs, incurred up to the first destination of goods in Romania, if these expenses were not included in the taxable amount. The first destination point for the goods is considered the destination indicated in the transportation document or any other document accompanying the goods, when they when these enter Romania, or, in the absence of such documents, the first place for unloading the goods in Romania will be considered.

The taxable amount for the import of goods does not include the following:

- Rebates, discounts and other price decreases granted by suppliers directly to customers on the day the tax is due;
- Amounts representing damages, determined by final and irrevocable court decisions, penalties and other amounts requested for the total or partial failure regarding the fulfillment of contractual obligations, in case these are set as additional to prices and / or rates which have already been negotiated on and established. Any amounts which, in fact, represent the value of goods delivered or services rendered, are not to be excluded from the taxable amount;
- Interests received after the delivery date, for late payments;

- The value of packaging and encasing exchanged between suppliers and customers, with no billing.

For the intra-communitarian acquisitions of goods the taxable amount is determined based on the same elements used to determine the taxable amount for the delivery of the same goods within the country.

If the elements used to determine the taxable amount for an import of goods are related to in foreign currency, the exchange rate is determined according to the communitarian provisions governing the calculation of value at customs.

When the elements used to determine the value at customs are set in a currency other than the national one the exchange into lei of the value at customs is to be performed according to the exchange rate recorded in the last but one Wednesday of the respective month and published on that same day. The exchange rate recorded during the last but one Wednesday of the month is used during the next month if it not replaced by an exchange rate determined according to Art.72 of the tax code. If the exchange rate is not registered on the last but one Wednesday or, if it is registered but it has not been published on that certain day, the exchange rate which was last recorded and published in the previous 14 days is to be considered the official exchange rate and registered for that respective Wednesday .

If the exchange rate recorded on the last Wednesday of the month and published on that particular day differs by 5% or over the exchange rate set according to Art. 71 to enter into force next month, the exchange rate replaces the latter one starting with the first Wednesday of the respective month. If within a certain period of application, the exchange rate registered on a Wednesday and announced on that same day differs by 5% or more compared to the rate refered to in this chapter, it is to replace the latter one and enter into force the following Wednesday. The replacing exchange rate remains in effect for the rperiod of time left of the current month, if it is not to be replaced.

If the customs authority accepts, at the request of the declarant, to provide or submit later on some details regarding the declaration on the free circulation of goods, in the form of a global statement, either periodic or reawarding, the use of a single rate may be set for the exchange into lei of the regarded elements used to determine the value at customs, given the case when they appear in currencies other than the national one. In this case, the rate used is the one which is valid on the first day of the period covered by the respective customs declaration.

If the elements used to determine the taxable base of a transaction, other than the import of goods, are set in foreign currency, the exchange rate to be applied would be the most recent exchange rate announced by the National Bank of Romania or the exchange rate related to by the bank hosting the settlements, according to the date by which the taxing of the transaction in question is to be performed and due.

II. The evasion chain of the intra-communitarian VAT

According to our opinion there is a clear split between the economic and the legal background relating to the deductibility of VAT and its form, a break which should be resolved by allotting priority to the form over the essence.

The stake of the issue in question is all the greater as the data missing from the justificative documents appear to deprive them of legal effects, so that together with the non-deductibility of VAT, there may also occur issues related to the non-deductibility of expenditure related to the calculation of the tax on profit *“non-deductible expenses registered in the bookkeeping, which are not based on a justificative document according to the law”*.

We believe that this manner of settlement is the source of conflict between the IRS and taxpayers in what concerns the VAT deductibility issue, and consequently the deductibility of expenses related to the tax on profit.

Questioning a rational solution based on the economic reality, we have to consider, in fact, issues related to the IRS power to ascertain facts or to assess the impact of the lack of some information which should be included in the justificative documents.

If we refer only to the minimal content of the documents, we may note that the legislator himself is not constant in this direction, as even some justificative documents signed by the legislator do not meet minimum content requirements. For example, the VAT paid at customs is justified on the basis of a customs declaration or a document issued by the customs authority (regularization decision), documents which contain the essential data regarding the transaction (the contracting parties, the taxable amount, the tax value, etc.), but do not contain other elements such as the tax regime applied by the vendor.

As we already mentioned, we fully agree that these documents contain relevant data and, moreover, are validated by the customs authority.

Consequently, the lack of evidence precludes the strict interpretation and enforcement of tax provisions, and in the opposite direction, their certification by the customs authority confirms the effectiveness of the payment which is subsequently required to be refunded (deductible), thus making the double taxation impossible.

The inadequacies among legal provisions can be outlined in other areas. Thus, if the Tax Code establishes a priori by its content the quality of justificative document for the documents supporting the underlying transactions, the Law of Accounting confers that particular status only after the document was entered in the bookkeeping (Article 6: *Any undergone economic-financial transaction is recorded at the time of its development by a document underlying the accounting records thus acquiring the quality of justificative documentation*).

We do not want to allow priority to either of the two regulations, but we must point out that the “tax status” of a society is based, as a starting point, on the “bookkeeping status” (the tax control itself based on the bookkeeping status, on information resulted from the bookkeeping).

In this regard, a striking example is the purchase of fuel; this is because the tax receipts issued by the cash register do not contain all the elements required as mandatory for justifying the deduction right, moreover in the case of the receipts due to purchases from individuals.

Their registration in accounting (proof of entry of goods into inventory, according to sect. A para. 2 of methodological rules of OMFP. 1.850/2004) confers these registrations the status of documentary evidence, according to the Law of Accounting.

It is more than obvious that the presence of these non-unitary provisions led to an inconsistent practice of the IRS – and of the courts - which has always swung between the core of the problem and its shape.

III. Conclusions

We may note that the activity of both the IRS and the law courts (especially the high-rank ones) has steadily pursued the formal application of the laws, without applying the assessment capacity which they were provided with by law.

The justification of such behavior is even more incomprehensible in the case of the law courts, particularly in the case of the High Court of Cassation and Justice, which, as we have noticed, does not apply a minimal consideration of the violation of neutrality and the avoidance of double taxation those situations where the evidence fully demonstrates compliance with the basic conditions of the deduction.

The effects of such practices transcend from the VAT towards the tax on profit, so that, if the conditioned period of time the taxpayers are able to regulate the deductible tax through the VAT deduction, this is no longer possible in the case of tax on profit.

On the other hand, the invoice - if we refer only to this justificative document - along with the start of contract execution, in terms of commercial and civil regulations would replace the lack of

a written contract. Per a contrario (when something is stated and the contrary is denied), except for the cases expressly prohibited by law (e.g. real estate sale), the invoice may be regarded as the contract between the parties. On hand such a practice, both tax authorities and the courts do nothing but disassociate the justificative value of the invoice as supporting evidence regarding the authenticity of the analyzed commercial transaction.

Specifically, we find that the invoice may replace the justificative document to collect VAT (the VAT rejected at repayment becomes collected tax with the related obligation to pay) or for including in the accounts of a non-deductible expense, but can not justify the right to deduct both of deductible VAT and the expense involved.

In fact we talked about tax neutrality and the avoidance of double taxation and the result would be the following: *the tax authorities may calculate taxes using the documents (even fictional ones, as we noted in the previous examples) which do not act as supporting documents, these not having the same value when it comes to the return of sums the taxpayers are deprived of as a result of applying implicit sanction due to lack of observance regarding formal requirements.*

Such an activity is even more serious if the missing elements of the documents that do not meet the formal requirements of the law refer to the beneficiary (the person audited by IRS). These shortcomings, in the presence of fair practice, should be allowed to be supplemented even during the inspection.

We must not forget that the probative value of commercial bills is complemented by other evidence, which together show the state of fact of the controlled transactions.

For example, O.M.E.F. no. 2.421/2007 states that justification of exempted actions with possibility of deduction will be based on the documents presented in the Instructions included in the Annex to the Order. One such example is the justification for the exemption with deductibility in the case of intra-communitarian supplies, based on the following documents:

- The invoice must contain the information referred to in art.155 par. (5) of the Tax Code, as amended and supplemented, and must also include the registration code for VAT purposes assigned for the buyer in another Member State;
- The document certifying that the goods were transported from Romania to another Member State;
- And, where appropriate, any other documents, such as: contract / order of sale / purchase, insurance documents.

Another example is the tax norm by which taxpayers are required that they should declare twice a year to the tax authorities all domestic deliveries and acquisitions by submitting the procurement no. 394, with the possibility of a cross-check from the IRS. Such a cross-check can be done even at European level through the VIES and INTRASTAT statements so that, by reasonable efforts, the IRS may lead to those transactions which are not covered by the right of deduction.

Without insisting on such additional evidence, we consider that in what VAT is concerned there is an aggregate mechanism for tracking the actions undertaken through the documents which have to be submitted by the taxpayers (log of sales / purchases, the VAT deduction).

Actually, the discussion on justificatory documentation and their completion with other data results finally in ascertaining whether tax authorities do or do not have a say in determining the tax status quo.

A first piece of legislation that gives the IRS such a right is exactly art.11, para. (1) of the Tax Code, according to which “in determining the amount of tax or fee (...) tax authorities may not consider a transaction that has no economic purpose or may recommit the form of a transaction to reflect the economic substance of the transaction”.

In addition to recognizing a right to assess the tax status of the analyzed transactions, in terms of this provision in the Tax Code, the doctrine reveals that the legislator has indicated the

framework, even within the Code, of the principle regarding the prevalence of the economic character over the legal one.

The right of assessment is accompanied also by the correlative obligation which is stated in Art. 6 of the Tax Procedure Code (Ordinance no. 92/2003) according to which the tax authority is directed towards assessment, within its powers and duties, of the *relevance of tax status and towards adopting the solution according to the law, based on the complete findings on all the clear circumstances involved*.

In addition, Art.7 para. (3) of the same legal document provides that “the fiscal authority is required to examine the facts objectively, as well as to advise taxpayers on filing of returns and other documents, in order to correct statements and documents, whenever appropriate”.

In conclusion, we believe that tax control authorities can and must take into account all those factors which may lead to the proper settling of a state of fact, and if the lack of an item in a document can be complemented by other relevant evidence and by a reasonable effort, the refusal to recognize the right of deduction can be interpreted as a breach of legal obligations.

The prevalence of substance over form regarding the communitarian performance, resulted also from the Decision V/2007 of the High Court of Cassation and Justice, is clearly in contradiction with European law and practice, so it is difficult to understand its content, given that, when issued, Romania was already an EU Member State, so the Decisions of the European Court of Justice were binding.

Moreover, we note that since the date of accession, the Tax Code has been amended, and that regarding the VAT deductibility no significant changes were made in order to adjust to the communitarian court decisions.

Using the principle of fiscal neutrality, the European Court of Justice ascertains in its decisions that, in applying the common system of VAT on transactions of goods and services, the tax is proportional to the price of goods and services, regardless of the number of transactions that occur before the stage when the tax is definitely collected. Basically, it can be ascertained that the collected tax varies depending on the applicable share and on the value of goods and services traded.

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