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ScienceDirect

Procedia Economics and Finance 16 (2014) 498 – 505

Procedia Economics and Finance

www.elsevier.com/locate/procedia

21st International Economic Conference 2014, IECS 2014, 16-17 May 2014, Sibiu, Romania

Dysfunctionalities of Faulty Fiscal Inspections for Tax Payers: The Case of Detachment for Work Reasons

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Abstract

This article does not merely suggest a short comparison between two completely opposed opinions, that of the fiscal inspectors and that of the specialists (accountants, accounting experts, fiscal consultants) that are hired and/or are contract-bounded staff of a commercial entity, regarding the fiscal status of detachment (an aspect that is regulated by internal and international normative acts). It intends, therefore, to be an analysis on the danger of dysfunctionalities of a fiscal inspection on the activity of the tax payers (or simply put the abridged interpretation of the legislation, in order to attract large amounts of money to the state budget by any means), in order to perturb, block, or even bankrupt them. For this, this article will present a real case in order to explain the above-mentioned situation.

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Keywords: fiscal inspection; accounting expert; detachment; double taxation.

Research Methodology

We have focused our research in this paper on the analysis and systematisation of the literature written in this field, as well as on the rules governing international detachment published at the national and international level.

In order to conduct our study, we have used different research methods in our analysis. We have applied a qualitative analysis, and focused on the method of comparison by presenting an analogy between the opinions of the fiscal inspectors and of the experts (the authors of this paper). Also, we have used the synthesis in what drawing

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Selection and/or peer-review under responsibility of Scientific Committe of IECS 2014
doi:10.1016/S2212-5671(14)00830-2

conclusions and offering solutions were concerned, in order to explain and assess the situation we found. Nonetheless, we have used the method of documenting ourselves by analysing the rules regarding the activity of detachment that were published nationally and internationally, and then completing our study by consulting different works published by specialists in this field in our country or abroad.

Introduction

The fiscal inspection refers to verifying the legality and compliance of fiscal declarations (tax returns), the correctness and accuracy in complying with the obligations by the tax payers, but also to the compliance with the provisions of the fiscal and accounting legislations, checking and determining the tax basis, identifying the differences in liabilities to be paid and the related accessories (Title VII from the Fiscal Procedure Code of Romania, published in 2003, amended in 2007, p. 47).

When conducting a fiscal inspection or entering accounting information in the system of an economic entity, a special attention should be given to the field of interest and work of the respective entity. A rather different situation emerges in the case of commercial entities that deal with a cross border field of activity as at least two legislative systems must be taken into account: that of the state of residence and that of the state where the work is conducted. In such cases, the accounting investigators (internal or external) must refer to the European legislation applicable overall, but also to the specific norms applicable within a certain state. In order to avoid double taxation of an employee and employer in terms of social security contributions and income taxes, a certain attention must be given to the principle of 'lex loci laboris' and the manner in which this is applied and taken into consideration in the fiscal documents of an economic society.

Since the free movement of people for work related and other reasons is one of the pillars of the European Communities, at the level of the European Union a considerable interest was given to the coordination of the national social security systems in order to protect both employees and employers and to avoid grave fiscal issues within companies and member states' economies. The two important normative acts that apply today are: Regulation (EC) no. 883/2004 of the European Parliament and the Council on the coordination of social security systems (drawing on the previous Regulation (EC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community), and the Regulation (EC) No 987/2009 of the European Parliament and of the Council laying down the procedure for Implementing Regulation (EC) No 883/2004 on the coordination of social security systems respectively, in order to clarify the rights and duties an employee and employer have in the country of residence and in the country of work detachment.

However, despite the elaboration and implementation of such regulations, there are still certain aspects that require further legislative explanation or leave a narrow space for subjective interpretation in what cross border activities are concerned. Also, the principles of non-discrimination and equal treatment must be respected regardless of the workplace where an employee is posted (Jorens, Y., Roberts, S., 2010, p. 11). In order to avoid double taxation on behalf of a tax payer (individual worker or commercial entity), a good coordination of the national social security systems is recommended, based on four main principles: only one legislation applicable; equality of treatment; aggregation of the insurance, residence, or work periods; and export of work benefits (Coordination of Social Security Systems in the European Union, 2011, p. 2).

According to the EU legislation, therefore, a person conducting a paid work (employed or self-employed) can be subjected to the social security system of only one member state, generally the state where this person concludes a work contract and conducts its main activities (i.e. where the society where the person is employed has its headquarters), if not otherwise provided (Cremers, J., 2010, pp. 14-15). Regulation (EC) no. 883/2004 provides in Articles 12-13 and Regulation (EC) no. 978/2009 provides in Articles 6 and 14 the clarification to which state's legislation a worker employed in one state and then subsequently posted in another member state, is subjected to. However, the aspects that can create a debate emerge from the expression 'where the worker conducts a substantial part of his/her activity' as it creates confusion on which legislation applies, that of the state of residence of the society's headquarters or that of the state where the employee works/is detached. In order to solve the problems

occurred in this situation, certain arrangements can be made between employers and here is where the A1 certificate is applicable in order to clarify to which state the detached employee pays social contributions. Another aspect that creates divergence is that of the transport and accommodation allowances paid by an employer to a worker posted in another state and how are these expenses entered in the accounting documents of the economic entity.

In the following pages we present an analysis on a situation discovered in Romania following a fiscal inspection where the application of the legislation in a case which involves the detachment of workers to another member state of the EU has given way to different interpretations. The opinion expressed by the external fiscal inspectors made used of an abridged interpretation of the legislation, whereas the internal auditors and fiscal experts hired by the commercial entity under investigation found other results by applying the same national and European legislation.

Case Study

The object for contradictions was represented by the entries in the accounting documents of SC MERIDIAN SRL of allowances for detachment granted to the staff detached to the workplace registered in Germany.

The actual situation of the commercial entity is the following:

SC MERIDIAN SRL, with the fiscal headquarter in Romania, county X, city A, registered at the Trade Register Office (Oficiul Registrului Comerţului) at no. J/32/15…/1998, Fiscal Identification Code (CIF) RO 9955…, represented by its administrator, M. N.:

1. Conducts activities of providing services in Germany in the field of meat processing, for beneficiaries from the foreign state on the basis of contracts for the supply of services;

2. In order to fulfil this trade contracts, the society MERIDIAN SRL sends a part of its employees in Germany. In what the staff sent abroad is concerned, MERIDIAN SRL has concluded:

- an individual work contract registered at the Territorial Labour Inspectorate (Inspectoratul Teritorial de Muncă);
- a contract for detachment abroad;
- a certificate concerning applicable legislation – Form A1.

We mention that the employees sent abroad were paid by MERIDIAN SRL the following remuneration:

- the monthly base wage, in accordance with the Individual Work Contract, for which payrolls had been drawn and the afferent fiscal obligations (income tax, social contributions, commission of the Territorial Labour Inspectorate) were calculated, declared, and paid;
- an amount paid in Euro for covering travel and accommodation expenses, as well as a detachment allowance (in accordance with the contract for detachment and the collective work contract that applies here).

We mention also that for the staff employed and sent to work in Germany, SC MERIDIAN SRL obtained from the National House of Pensions and Other Social Insurance Rights the A1 certificate concerning applicable legislation regarding social security that attests the fact that the personnel sent abroad has no obligation to pay contributions in another state.

Following the fiscal inspection conducted at MERIDIAN SRL, the personnel from the Authorities of Fiscal Inspection found it impossible to establish a fiscal situation, creating thus a problem (that it cannot solve) that they name a “Fiscal Issue” and that they submit to the National Agency for Fiscal Administration (ANAF) in order to be solved.

The opinion presented by the officials from MERIDIAN SRL – the staff hired in the financial-accounting department of the society and the experts contracted by it in order to assist with the fiscal inspection based on the right to receive specialised assistance (Costea, I. M., 2009, p. 74) – was different than the opinion of the fiscal inspectors (presented as a Fiscal Issue). The specialised assistance is regulated by Article 106 of the Fiscal Procedure Code: “The tax payers subjected to a fiscal inspection have the right to benefit from specialised or juridical assistance on the entire duration of its conducting.”

In the table below we present a comparative study between the two opinions, supported by documents, as well as internal and international legislation in the fiscal, accounting, and social fields.

Table 1.

Aspects reported by the fiscal inspection as a "fiscal issue" regarding the detachment of employees in Germany	The opinion regarding detachment of the internal auditor
A. The fiscal inspectors make a reference to the contracts for the supply of services in Germany in the field of meat processing for beneficiaries from the foreign state: the contracts specify different contractual clauses such as the price for the services of meat processing (EUR/kg processed).	A. The contract that is referred is an "Additional Convention" concluded between MERIDIAN SRL and its foreign partner commercial societies, a convention that concerns a minimum hourly wage of 7.50 EUR that the German societies imposed to MERIDIAN SRL. **THAT IS NOT A WORK CONTRACT!!! We discuss contracts for the supply of services in the field of meat processing concluded between commercial societies!**
B. **Regarding the actual situation presented, the fiscal inspection body considers that the amounts of money that MERIDIAN SRL pays its employees sent abroad cannot be fiscally treated as detachment/delegation allowances, since:** **1. the activity conducted by the staff sent to Germany is the same as their activity from Romania (supply of services in the meat industry) and therefore does not fit within the conditions for paying the subsistence allowance imposed by Article 1 of the Government Decision no. 518/1995 (H.G. 518/1995). Also, the amounts paid to the employees sent to Germany cannot be treated as allowances since:** - the employees are sent abroad for periods longer than 120 days, which is the maximum period that a person can be detached according to Article 44, Paragraph 1, of the Romanian Law no. 53/2003 concerning the Labour Code; - the employer ensures the transport of its employees (to Germany, and the transport to and from their workplace), and the amounts paid to the employees are given on the basis of payrolls drawn in Germany depending on the hours they have worked (work productivity), while the provisions from Article 5, Paragraph 1, of Law no. 53/2003 mentions that the allowance is granted "in order to cover subsistence, daily expenses, as well as the cost of transportation within the area of work"; - the employees have not been paid fixed amount/month, but variable sums based on payrolls drawn in Germany depending on the hours they have worked (work productivity), and in this sense the income taxes from the wages was withheld and paid in Germany, and therefore were treated by the society verified in this country as wage incomes. In this way, the amount paid to the employees sent to Germany cannot be treated in one way in Germany and in another in Romania;	B. The employees from MERIDIAN SRL are detached in Germany on the basis of "Contracts for detachment abroad" that are attached to the work contracts. For the activity they conduct, the detached employees receive the following benefits: 1. the monthly base wage, according to the Individual Work Contract, for which payrolls were drawn, and afferent fiscal obligations (income taxes, social contributions, commission of the Territorial Labour Inspectorate) were calculated, declared, and paid. - an amount paid in Euro for covering travel and accommodation expenses, as well as a detachment allowance (in accordance with the contract for detachment and the collective work contract that applies). **The fiscal inspection makes reference to the normative acts on the basis of which the detachment was done and remunerated:** **The GOVERNMENT DECISION no. 518 from July 10, 1995 (G.D. 518/1995, *amended*):** ART. 1. The provisions of this decision apply to the personnel sent abroad to carry out temporary missions that can represent: a) official visits, negotiations, consultations, or the conclusion of conventions, agreements, and other such understandings; b) participation in fairs and expositions; market prospecting; economic and technical-scientific cooperation; contracting and other actions derived from executing trade agreements; etc. ART. 17. (1) It is recommended that economic agents, other than the ones mentioned in Art. 16, Par. (1), as well as philanthropic institutions, associations, and others, apply the provisions of this decision accordingly. (2) in the situation in which the legal businesses mentioned in Par. (1) give supplementary benefits, the expenses made in this sense, that are taken into account when calculating the deductible returns, cannot surpass the ones entitled to the personnel, in the limits and conditions established by this decision. **The fiscal inspectors refer to the fact that "the activity conducted by the staff sent to Germany is the same with their activity from Romania (supply of services in the meat industry) and does not fit within the conditions for subsistence allowance payment imposed by Article 1 of G.D. 518/1995" (we have mentioned above the aspects in cause from the G.D. 518/1995), or for detachment according to Law no. 53/2003 concerning the Labour Code.** **Law no. 53/2003 provides the following:** **Art. 43 (2). Delegation represents the temporary exercise by an employee, by the disposition of the employer, of certain undertakings or tasks according to his work competences, outside of his workplace.** **Art. 44 (2). The delegated employee has the right to be paid transport and accommodation expenses, as well as a delegation allowance, in the conditions provided by the law or the collective**

	work contract applicable. Art. 45. Detachment is the act by which the workplace is changed temporary, by the disposition of the employer, to another employer, in order to execute some works in his interest. **Exceptionally, by detachment the character of the work can also be changed, but only with the written agreement of the employee.** Art. 46. (1) The detachment can be disposed on a time period of maximum a year. (2) Exceptionally, the detachment period can be extended from objective reasons that impose the presence of the employee at the employer where the detachment was disposed, with the written agreement of both parts, every six months. (3) The employee can refuse the detachment disposed by his employer only exceptionally and for strong personal reasons. (4) The detached employee has the right to be paid transport and accommodation expenses, as well as a detachment allowance, in the conditions provided by the law or the collective work contract applicable. Art. 47. (1) The rights entitled to the detached employee are granted by the employer where the detachment was disposed. **(2) On the duration of the detachment, the employee benefits from the rights that are most favourable to him, either the rights granted by the employer who disposed the detachment, or the rights granted by the employer where he is detached.** (3) The employer that disposes the detachment has the obligation to take all the necessary measures so that the employer where the detachment was disposed completely and timely fulfils all of his obligations towards the detached employee. (4) If the employer where the detachment was disposed does not completely and timely fulfil all of his obligations towards the detached employee, these are to be fulfilled by the employer who disposed the detachment. (5) In the case when there is a divergence between the two employers or none of the two fulfils their obligations according to Par. (1) and (2), the detached employee has the right to return to his workplace at the employer that had detached him, to sue any of the two employers, and request the enforcement of the unfulfilled obligations. According to Art. 55, Par. 4, Letter g of the Romanian Law no. 571/2003 concerning the Fiscal Code, and its subsequent amendments: "(4) The following sums are not included in the wages and are not taxable in the sense of income tax: […] g) the sums received by the employees for covering transport and accommodation expenses, the subsistence received on the duration of delegation and detachment in another place, in the country or abroad, in the interest of their work. Are exempted from this provisions the sums granted by legal persons without a patrimonial purpose and by other entities that do not pay return taxes over the limit of 2.5 times the subsistence granted to the employees from public institutions". These aspects are detailed in the specialised works of renowned fiscal specialists from the country (Biriş G., 2012, pp. 95-96). Also, according to Art. 296 (15), general exceptions from the Fiscal Code refer to the sums relating to transport, accommodation, and subsistence expenses (up to the limit of 2.5 times the subsistence granted to employees from public institutions) that are not taxable in terms of mandatory social contributions (Biriş G., Pătroi D., 2011, pp. 23-24). - the aspects relating to the entry in account 641 "Expenses with staff wages": For this aspect, the society put at the disposal of the hired external experts, as well as of the fiscal inspectors the Report of the internal auditor that observed the fact that the person responsible with

	accounting had erroneously entered the detachments in account 641 "Expenses with staff wages" and not in the special account 625 "Expenses of detachment". The internal auditor recommended the entry of the rights entitled to the employees on the basis of the contracts for detachment under the title of "detachment allowance" and "accommodation support" in distinct analytic accounts (i.e. 625.01 "Expenses for detachment in Germany" and 625.02 "Expenses for accommodation support in Germany") by cancelling from the entries in account 641 "Expenses with staff wages" of those amounts that strictly represent the detachment allowance and the accommodation support offered when in Germany. The cancelling is done by means of account 473.01 "Accounting of operations pending clarification relating to the sums offered in Germany under the title detachment and accommodation support". The auditor had at their disposal, as justifying documents, the centralised lists regarding these rights for the entire year 2012. These lists were compared by the auditor with the "payrolls" drawn monthly in the distinct account that totalised the employees' revenues both in Romania and in Germany in what the wages and detachment rights are concerned, taken on months and work points. It was recommended that the following accounting notes are operated in the accounting of MERIDIAN SRL in December 2012: **1. cancelling the amounts related to detachment and accommodation support expenses from account 641:** **641 = 473.01 - 4,149,415.66 EUR** **2. registering in the accounts corresponding to detachment:** **625.01 = 473.01 4,087,405.66 EUR** **625.02 = 473.01 62,010.00 EUR** **This recommendation was applied at the end of the 2012 year.** **Even in the context of this error, the overall problem remains the same since the juridical and fiscal status of detachments is different than that of wages.**
- the expenses related to the amounts paid in Germany are monthly entered in accounting as foreign exchanges from Romania related to the permanent headquarters from abroad, in account 641, "Expenses with staff wages".	2. Also in the case of reference to the single Collective Work Contract no. 2895/2006 (valid between 2008-2012), the fiscal inspectors do not take it as a whole, citing only Article 46 "in case that the detachment is for more than 30 consecutive days, an allowance equal to 50% of the daily base wage is paid instead of the daily allowance". But the same contract contains in Article 47 that: "The persons detached maintain all the rights they had at the date of detachment, except those regarding work hygiene and safety, even if at the workplace where they are detached these are not present. If in the places where they are detached the equivalent rights have a greater level or supplementary rights apply, the persons detached benefit from them, including all the rights regarding work safety and hygiene that correspond to the new workplace. An important aspect that was not taken into account is that there is no collective contract in the economic domain that regulates the activity conducted in the field of meat processing.
2. On the duration of the staff's detachment in Germany with the purpose of supplying service in order to accomplish the framework contracts concluded by MERIDIAN SRL, the amounts paid to the staff does not fit under detachment allowances since, according to the provisions of Article 46 of the single Collective Work Contract no. 2895/2006 (valid between 2008-2012) "in case that the detachment is for more than 30 consecutive days, an allowance equal to 50% of the daily base wage is paid instead of the daily allowance", and the amount paid to every employee varied and exceeded the regulated value. In the same sense, the last two aspects presented above (when	

the allowance is analysed) are also given as arguments.	

Taking into account the aspects presented above, according to the normative acts referred (Government Decision no. 518 from July 10, 1995 regarding certain rights and duties of the Romanian personnel sent abroad for undertaking temporary missions, with subsequent completions and modifications; Law no. 53/2003 concerning the Labour Code; Law no. 571/2003 concerning the Fiscal Code) the experts consider that MERIDIAN SRL has granted the benefits for detachment in the conditions imposed by the mentioned legislation and the problems reported derive from the truncated interpretation of the legislation by the fiscal inspectors. To support this affirmation, the data presented in the above table shows how much from the legislation was taken into consideration by the fiscal inspectors by comparison to all the articles from the legislation that refer to this "fiscal issue".

Moreover, beside the aspects presented by the comparison we made above, the fiscal inspectors overlook the applicable European legislation. That is: Regulation (EC) no. 883/2004 and Regulation (EC) no. 978/2009, according to which the persons are subjected to the social security legislation of only one member state. Article 11 of the latter Regulation sets the general guidelines following this principle that persons must be subjected to the legislation of only one member state.

Thus, the general rule imposes that the person that conducts a paid activity in a member state must be subjected to the legislation of that respective member state. The Regulation sets in Article 12 the special rule, that exempts from the general one, that states in the case of detachment that the person that conducts a paid activity in a member state for an employer that normally conducts their activity in respective state, and that is subsequently detached by that employer in another member state for work reasons, continues to be subjected to the legislation of the first member state, on the condition that the planned activity does not exceed 24 months and that another person was not sent to substitute the person in question.

In the case of detachment, the detached employee will, according to the European legislation, conducts his work activities in the interest of the employer that had detached him, as he continues to be employed by him. In such a situation, the individual work contract is not suspended, as all the rights regarding wages and detachment (detachment allowance, allowance for accommodation expenses) will be granted by the employer that disposes the detachment and the employee remains subordinated to him. As a consequence to the situation in which the detachment exceeds 24 months or the employer is sent to replace another person, the social security legislation that applies is that of the state where the workplace is. For the detached employee to remain subjected to the social security legislation from the state that disposed the detachment, Form A1 is required, as this is a declaration regarding the applicable legislation and it is useful to justify the payment of contributions abroad.

Conclusions

The case presented in this paper is not a fictional one, but a real one in which the name of the society was changed and the fiscal body that conducted the inspection was simply named fiscal inspection in order to respect the professional secrecy.

Acting in the manner presented above by applying abridged legislation, the fiscal inspectors finished their inspection by drawing a decision to impose containing amounts that exceed the limit of understanding of a tax payer that operates on the market for over 10 years, has approximately 800 employees (from which over 500 detached in Germany), and pays income taxes in Romania of over 2 million Euros yearly. The tax payer had, of course, appealed to the courts and his case is currently pending solution.

The problem that the expert (as one of the authors of this paper) raises refers to some necessary questions in this field: Why is there in Romania a fiscal legislation that permits numerous interpretations? Why do the employees of the Fiscal Authority not show a true professionalism in their work, preferring to choose only the solution that leads to over-taxation?

Who has to gain in Romania or in Europe from the overloading of income taxes with amounts that we think will never be collected but will only distort the budgetary previsions?

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