

CRIMINAL LIABILITY OF THE LEGAL PERSON

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ABSTRACT: *If we consider that in the past, the fact that “societas delinquere non potest” (the companies can not commit criminal offenses) was held true, the time and the evolution of things have shown the opposite, namely “societas delinquere potest” (the companies can commit criminal offenses).*

Moreover, the criminal law intended, and still does, to demonstrate that “societas delinquere potest et punire potest” (the companies can commit criminal offenses and thus they can be punished).

The current Romanian legislation, doctrine and jurisprudence have shown that the criminal liability of the legal persons is no longer a theory of fiction, being on the contrary, an independent institution under the criminal law, with all the opinions and controversies raised by the enforcement of legal norms in this matter.

KEY WORDS: *legal person, criminal liability, natural person, criminal offence, guilt, penalty, preventive measures*

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1. It was rightly stated that the *idea of legal liability*, including the criminal liability related to corporations, public and private associations, legal or moral persons, crossed throughout history, having, indeed, connotations specific for each era and offering a generous and exciting theme of controversies and subtleties to the exegetes which even now arouses interest.

It was noted, in this regard, the tendency of the legislative authorities of different States towards the consecration of the legal persons' criminal liability.

It was also an obvious incentive to the repudiation of the principle *societas delinquere non potest*. The approach to follow this advice was long and arduous (Antoniou, 1996).

The institution of the legal persons' criminal liability was framed by a Romanian author within the legal fiction, fiction which, starting from the ancient concept according to which “the art is a false truth and imitates nature” would not do anything but imitate the nature *fictio argo mimitatur naturam; ergo fictio habet locum, ubi potest habere locum veritas*.

2. *In Romania*, the market economy and the emergence of a large number of legal entities in all branches of national economy have created favorable conditions for committing serious acts in the desire to obtain a higher profit and at any cost.

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The representatives of the legal entity, on behalf of and with the funds provided by it, have committed and still do serious violations of the legal regime established in the trade matter, in the tax, customs, construction, environmental, securities and other fields, thus causing extensive damage to the national economy and population.

Even there are measures like prosecution for the representatives of these Companies, there is a danger of repeating the deeds under another title or with other executives, administrators or with other Board of Directors. Such realities have caused a strong echo in the Romanian criminal doctrine and caused some mutations in the way of conceiving the criminal liability of legal entities (Antoniu, 1996).

All these facts have led to the consecration of the legal persons' criminal liability by the Romanian legislator, with the emergence of Law no. 278/2006 and once with its distinct regulation in the Criminal Code and in the Criminal Procedure Code.

The regulations within the substantive criminal law intended to evolve from this first legislative measure up to treating the criminal liability of the legal entities as a separate institution, found in the wording of the current Criminal Code – Title VI, Article 135-151¹.

The special procedure of prosecuting the legal person is separately regulated also in the current Criminal Procedure Code, in the wording of Title IV, chapter II, Articles 489-503.

We shall not insist on the ways of regulations adopted by the Romanian legislator regarding this institution as the subject is very ample covered in the legal literature, reason for which we shall treat this institution in the light of certain views expressed in the doctrine and of certain examples of the Romanian case law which are destined to highlight whether the statutory rules are adequate or not to the social realities of our country.

3. *In terms of doctrine*, the legal persons' criminal liability was addressed by reference to a couple of theories, namely the theory of indirect liability, by ricochet (by *reflection*) and the theory of direct liability (*primary*) (Guiu, 2011).

In terms of the first theory, the criminal liability of legal persons is an indirect liability, for the deed of another person, representing a reflection of the unlawful acts committed, intentionally or negligently, by the individuals who have the status of representatives for the legal persons.

This theory, inspired by English law, respectively by the identification theory (the theory of *alter ego* as it identifies the representative with the legal person, considering that its objective and subjective manifestation is an objective and subjective manifestation of the legal entity itself) has a drawback, namely, the legal liability may be entailed only if the person who committed the wrongful act has been identified, the person that will be assessed for the existence of guilt respectively for the existence of intention or negligence. *According to the second theory*, the criminal liability of the legal person is a direct liability for its own deed. This theory would be more effective (given that, unlike the first theory, which, for example, makes extremely difficult the identification of the responsible

¹ According to Article 136 Criminal Code, the penalties applied to legal entities are main and complementary (1); The main punishment is the fine (2); Complementary punishments are: a) dissolution of the legal person; b) suspension of activity or any activity of the legal person for a period of 3 months to 3 years; c) closure of some activities of the legal person for a period from 3 months to 3 years; d) the prohibition to participate in public procurement procedures for a period from 1 to 3 years; e) placing the legal person under judicial supervision; f) posting or publication of the decision of conviction (3).

individuals in cases of large companies), as it engages the criminal liability of legal entities whenever an offense has been committed, regardless the fact that the individual who committed the wrongful act was found guilty or not.

Neither this theory is protected from criticism because, since the subjective element of the crime is assessed in relation to a specific individual, it follows that in case the perpetrator has not been identified, the existence of the subjective element would eventually be assessed in relation with another individual and that, accordingly, the criminal liability of legal persons will intervene for another offence.

In other words, the essential *difference* between the two theories lies in the way they conceive so-called *corporate crimes*, for which the criminal liability of legal persons occurs. According to the thesis of liability by ricochet, the corporate crime is identified with the criminal activity (of authorship, incitement or complicity) used by the representative of the legal person; whereas, according to the thesis of direct liability, the corporation crime appears as an autonomous illicit deed consisting either of an activity of instigation or complicity of the manager to the offense committed by his representative or of the manager's negligence, but which is imputed to the legal person as a "vice of management" or as a "control deficiency" (Guiu, 2011).

4. For the engagement of criminal liability for the legal persons, which is otherwise also the subject of the criminal action, to be achieved in terms of good conditions in what concerns the criminal proceedings, the preventive measures that can be ordered for legal entities were introduced and regulated by the legislature². Their purpose and functionality is to prevent or eliminate the circumstances that hinder the deployment of the criminal process in good terms, including the prevention of new crimes.

One of the problems raised in the Romanian doctrine on preventive measures for legal entities has been linked to the question whether the legal person has freedom and whether the preventive measures target the rights and maybe the freedoms of any legal person. It was considered, related to this issue, that it is undeniable that the legal person may have an economic, social, legal conduct etc., in which it has and shall exercise its rights, duties and freedoms (Dabu & Borza, 2007).

According to Article 40 and 45 of the Constitution, "*free access of persons to an economic activity (economic freedom), free enterprise, the right of association and their exercise under the law shall be guaranteed.*" The Constitutional legislature makes no distinction between the natural and legal persons. As a result, we can speak of a certain freedom of the legal person and rights within the limits set by law.

A legal person has also other kind of freedoms and rights compared to the natural person and obviously, the penalties and the preventive measures should differ. For example, the criminal charge of a legal entity results in an abatement of the heritage of a legal person, causing a restriction of its activity, with all its implications on the shareholders and owners of shares, including on its ability to commit offenses.

² According to Article 493 *Criminal Procedure Code*, the preventive measures that can be taken against a legal person are: a) prohibition of initiation or, where appropriate, suspension of the procedure of dissolution or liquidation of the legal entity; b) prohibition of initiation or, where appropriate, suspension of the merger, division or capital reduction of the legal entity, started before or during the prosecution; c) prohibition of certain asset transactions likely to involve the reduction of the assets or the insolvency of the legal person; d) prohibition on the conclusion of certain legal documents, set out by the judicial body; e) prohibiting the ongoing activities of that kind by which the offense was committed.

If this involves generally mitigation in the rights and freedoms of a legal person, the case law proved that the suspension or withdrawal of certain rights and freedoms are necessary in terms strictly provided by law (rights which have been or may be used to commit an offence).

Accordingly, the preventive measures applicable to the legal person created by the Romanian legislature aims:

- preventing the avoidance of the criminal liability by the legal person, from the state of relapse etc. through activities of dissolution, liquidation, merger, division, or fraudulent acts or property transfers,
- reducing the possibility of committing a new offences,
- ensuring the proper conduct of criminal proceedings.

5. The *Romanian jurisprudence* has enshrined the existence of both *theories* and their sustainability, with situations where either the criminal liability of legal persons was entailed related to the criminal liability of individuals who represent it, or this liability has been engaged independently.

Moreover, also the *preventive measures* taken by the Romanian legislature have proven their effectiveness in judicial case law.

6. *According to the first theory*, we illustrate the case of a legal person, a trading company, which was prosecuted for an offense of tax evasion, along with its legal representatives.

By the *Indictment no. 58/P/2010*, the National Anticorruption Directorate - Tirgu Mures Territorial Service – has notified the County Court – Criminal Division with the judgment of a case with the object of an offence of tax evasion committed by a legal person and by its two legal representatives³.

The wording of the indictment held that the defendants' deeds, SC *D. R. SRL Reghin*, M.V. and C.V. (the latter holding the positions as administrators and associates of the legal entity SC *D. R. SRL Reghin*) who, by

- failing to obtain up to 30 April 2008 the classification of positions and tariff code of the finished products manufactured and sold (provided by Government Decision 1579/19 December 2007, for the amendment and supplementation of the Government Decision 44/2004),

- failing to obtain up to 31 January 2009 the tariff classification of the finished products produced and sold (according to the Government Decision 1618/04 December 2008, for the amendment of Government Decision 44/2004 section 67),

- sending deficient and inconsistent documents to the Customs and Tariff Bureau, have determined improper maintenance of *de facto* tariff classification as intermediate products for alcoholic beverages traded during 1 May 2008-31 December 2009 by the Company and therefore the payment of excise at a much lower level, resulting in a loss to the *general government consolidated budget* amounting to 25,726,661 lei, the equivalent of 6,484,569 EUR, meets the constitutive elements of the offense of *tax evasion (hiding the goods or the taxable source in order to achieve the avoidance of tax obligations)*, deed provided and punished by Article 9 paragraph 1 letter a) and paragraph 3 of the Law no. 241/2005.

³ Unpublished document; The Criminal File and the related Indictment were submitted for judgment to the Mures County Court on 5 July 2013.

Specifically, the defendant Company SC *D. R.* SRL Reghin, with a Tax Warehouse Authorization since 2003, issued for consumption (produced and marketed) as follows:

- the period 1 May 2008 – 31 December 2008 the amount of 5,005,447.30 liters of alcoholic beverages, products declared by the Company (through its representatives) “*intermediate drinks*”;

- during the period 1 January 2009 – 31 December 2009, the amount of 6,377,210.30 liters of alcohol beverages, products declared by the Company (through its representative) “*intermediate drinks*”.

In the absence of a tariff classification, intentionally unattained, the Company paid excise duty depending on the types of drinks in the of Tax Warehouse Authorization, at a much reduced level respectively for “*intermediate drinks*” (at a level of 51.08 EUR/hl finished product until 31 March 2009 and 65 EUR/hl produced after that date), declared to be produced in the warehouse; reported to beverages actually produced in the warehouse (respectively alcohol beverages) the tax that defendants should have paid was 750 EUR/hl pure alcohol.

7. On the other hand, *according to the second theory*, the case law presented cases where the criminal liability of legal persons was entailed separately, without being involved in that certain case the criminal liability of any individual.

Thus, the *criminal judgment no. 139 of 05 April 2012* of the County Court Harghita ordered in the Case no. 2520/96/2011 (file formed after the referral of the court by the National Anticorruption Directorate – Tirgu Mures Territorial Service by the indictment⁴ no. 19/P/2011 of 28 September 2011) the conviction of several legal entities to the punishment of a criminal fine, withholding the perpetration of the following crimes:

1. The deed of the defendant SC “*H. & R. & R.*” SRL Casinul Nou, county of Harghita, consisting of

a) in order to deprive the Decision no. 2478051 of 25 June 2009 of any effects, decision issued by the Agency for Payments and Intervention of Agriculture – Harghita County Center and to facilitate the obtaining by the C.N.-Compossessorate Association of the amounts related to 2009 from A.P.I.A. Harghita County Center (Agency for Payments and Intervention of Agriculture), the defendant concluded the fictitious lease contract no. 52 of 9 March 2009 attesting in unreal ways that he leased an area of land belonging to C.N.-Compossessorate Association, presented the contract along with other documents to A.P.I.A. Harghita, obtained the amount of 30,790.81 lei for the subsidy related to 2009 for these lands (according to the address located at leaf 159 of the File) and transferred these amounts of money to the account of the C.N.-Compossessorate Association,

b) in order to deprive Decision no. 2478051 of 25 June 2009 of any effects, issued by the Agency for Payments and Intervention for Agriculture – Harghita County Center and to facilitate the obtaining of the C.N.-Compossessorate Association of the amounts pertaining to 2010 from A.P.I.A. Harghita County Center, the defendant concluded the fictitious lease contract no. 563 of 1 March 2010 attesting in unreal ways that he leased an area of land belonging to C.N.-Compossessorate Association, presented this contract along with other documents to A.P.I.A. Harghita, trying to obtain amounts of money as

⁴ Unpublished document; The Criminal File and the related Indictment were submitted for judgment to the Harghita County Court on 28 September 2011.

subsidy for 2010 for these land in order to transfer these amounts in the account of the C.N.-Compossessorate Association, establishes the offenses of

- *The act of using or presenting false, inaccurate or incomplete documents or statements in bad faith, where this has resulted in the granting of undue funds from the general budget of the European Union or the budgets administered by it or on its behalf, through repeated actions (2 material acts), provided by Article 181 (1) of Law no. 78/2000 with the application of Article 41 paragraph 2 of the Criminal Code and*

- *forgery of documents under private signature, through repeated actions (2 material acts), provided by Article 290 (1) of the Criminal Code with the application of Article 41 paragraph 2 of the Criminal Code,*

With the application of Article 33 letter a) of the Criminal Code.

2. The deed of the defendant SC "T.-D." SRL Casinul Nou, Plaiesii de Jos Commune, county of Harghita, consisting in

a) in order to deprive the Decision no. 2478051 of 25 June 2009 of effects, decision issued by the Agency for Payments and Intervention for Agriculture – Harghita County Center and to facilitate the obtaining by the C.N.-Compossessorate Association of the amounts related to 2009 from A.P.I.A. Harghita County Center, the defendant concluded the fictitious lease contract no. 53 of 9 March 2009 attesting in unreal ways that he leased an area of land belonging to C.N.-Compossessorate Association, presented this contract along with other documents to A.P.I.A. Harghita, obtained the sum of 15,597.95 lei as subsidy for 2009 for these lands (according to the address located at tab 159 of the File) and transferred the amounts of money to the account C.N.-Compossessorate Association,

b) in order to deprive the Decision no. 2478051 of 25 June 2009 of effects, issued by the Agency for Payments and Intervention for Agriculture – Harghita County Center and to facilitate the obtaining by the C.N.-Compossessorate Association of the amounts for 2010 from A.P.I.A. Harghita County Center, the defendant concluded the fictitious lease contract no. 512 of 22 February 2010 attesting in unreal ways that he leased an area of land belonging to C.N.-Compossessorate Association, presented this contract along with other documents to A.P.I.A. Harghita, trying to obtain amounts of money as subsidy related to 2010 for these lands to transfer these amounts in the account of the C.N.-Compossessorate Association, establishes the offenses of

- *The act of using or presenting false, inaccurate or incomplete documents or statements in bad faith, where this has resulted in the granting of undue funds from the general budget of the European Union or the budgets administered by it or on its behalf, through repeated actions(2 material acts), provided by Article 181 (1) of Law no. 78/2000 with the application of Article 41 paragraph 2 of the Criminal Code and*

- *forgery of documents under private signature, through repeated actions (2 material acts), provided by Article 290 (1) of the Criminal Code with the application of Article 41 paragraph 2 of the Criminal Code, with the application of Article 33 letter a) of the Criminal Code.*

3. The deed of the defendant SC "Z.-C.A." SRL Casinul Nou, county of Harghita, consisting in

a) in order to deprive the Decision no. 2478051 of 25 June 2009 of effects, decision issued by the Agency for Payments and Intervention for Agriculture – Harghita County Center and to facilitate the obtaining by the C.N.-Compossessorate Association of the amounts for 2009 from A.P.I.A. Harghita County Center, the defendant concluded the

fictitious lease contract no. 51 of 6 March 2009 attesting in unreal ways that he leased an area of land belonging to C.N.-Compossessorate Association, presented the contract along with other documents A.P.I.A. Harghita, obtained the sum of 17,665.28 lei as subsidy for 2009 for these lands (according to the address located at leaf 159 of the File) and transferred these amounts to the account of the C.N.-Compossessorate Association

b) in order to deprive the Decision no. 2478051 of 25 June 2009 of effects, decision issued by the Agency for Payments and Intervention for Agriculture – Harghita County Center and to facilitate the obtaining by the C.N.-Compossessorate Association of the amounts related to 2010 from A.P.I.A. Harghita County Center, the defendant concluded the fictitious lease contract no. 490 of 19 February 2010 attesting in unreal ways that he leased an area of land belonging to C.N.-Compossessorate Association, presented this contract along with other documents to A.P.I.A. Harghita, trying to obtain amounts of money as subsidy for 2010 for these lands in order to transfer these amounts to the account of the C.N.-Compossessorate Association establishes the offenses of

- *The act of using or presenting false, inaccurate or incomplete documents or statements in bad faith, where this has resulted in the granting of undue funds from the general budget of the European Union or the budgets administered by it or on its behalf, through repeated actions (2 material acts), provided by Article 181 (1) of Law no. 78/2000 with the application of Article 41 paragraph 2 of the Criminal Code and*

- *forgery of documents under private signature, through repeated actions (2 material acts), provided by Article 290 (1) of the Criminal Code with the application of Article 41 paragraph 2 of the Criminal Code, with the application of Article 33 letter a) of the Criminal Code.*

4. The deed of the defendant C.N.-Compossessorate Association Plăieșii de Jos Casinul Nou, county of Harghita, consisting in the fact that

a) it received the amounts of money acquired as subsidy for 2009 from A.P.I.A. Harghita, by

- SC "H.&R.&R." SRL Casinul Nou, County of Harghita,
- SC "T.-D." SRL Casinul Nou, Plaiesii de Jos Commune, county of Harghita
- SC "Z.-C.A." SRL Casinul Nou, county of Harghita,

being aware that these Companies submitted inaccurate documentation to A.P.I.A. Harghita and used these amounts of money to achieve their own interests,

b) During the period 2009 - 2010, it concluded a number of 6 contracts with

- SC "H.&R.&R." SRL Casinul Nou, county of Harghita (2 contracts),
- SC "T.-D." SRL Casinul Nou, Plaiesii de Jos commune, county of Harghita (2

contracts) and

- SC "Z.-C.A." SRL Casinul Nou, county of Harghita (2 contracts) by which the defendant attested in unreal ways that he leased the land making the subject of those contracts with these three companies, those contracts being subsequently used to obtain unfair European funds

establishes the offenses of

- *acquisition, possession or use of property, knowing that such property is derived from criminal activities, offense provided by Article 23 (1) letter c) of Law no. 656/2002 - republished and forgery of documents under private signature, through repeated actions (6 material acts), provided by Article 290 (1) of the Criminal Code with the application of*

Article 41 paragraph 2 of the Criminal Code, with the application of Article 33 letter a) of the Criminal Code.

The damage caused to the Agency for Payments and Intervention for Agriculture in Harghita County Center by the deeds above amounted to 72,157.38 lei.

By the criminal Decision no. 79/A of 26.10.2012, Tirgu Mures Court of Appeal upheld the criminal judgment and by the criminal Decision no. 1776/2013 from 24 May 2013, the High Court of Cassation and Justice ordered the rejection of the appeals submitted, and thus *the judgment remained final.*

8. The utility and effectiveness of the preventive measures is also apparent from the following example regarding another criminal case investigated at the National Anticorruption Directorate - Tirgu Mures Territorial Service.

By the *indictment no. 51/P/2012*, the National Anticorruption Directorate - Tirgu Mures Territorial Service referred a case to the County Court – Criminal Division, a case covering the perpetration of several crimes of tax evasion by a legal person and by its legal representatives⁵.

1. The deeds of the defendant SC *E.P.I. SRL Tirgu Mures*, who during 1 January 2008 - 31 March 2011, under the same criminal intent submitted VAT returns, statements 394 and 390 and declared purchases from partners who did not report deliveries thereof, some of them being inactive or non-registered for VAT, thus obtaining unrighteously from the *general government consolidated budget* Value Added Tax amounting to 7,209,002 lei, meet the establishing elements for the offense of *establishing in bad faith by the taxpayer of taxes or contributions, resulting in obtaining, without right, sums of money as reimbursements or refunds from the general government consolidated budget or compensations due to the general government consolidated budget, deed provided and punished by Article 8 paragraph 1 of Law no. 241/2005, with the application of Article 41 paragraph 2 Criminal Code (12 material acts, relating to quarterly VAT returns).*

2. The deeds of the defendant SC *E.P.I. SRL Tirgu Mures*, who, during 1 January 2007-31 March 2011, under the same criminal intent omitted highlighting the supplies and services to the customers of the Company and withdrew amounts money in cash by its proxy, with no evidence that the amounts will be used in the interests of the Company and with the purpose of obtaining income, facts that damaged the *general government consolidated budget* with the amount of 421,501 RON, of which 195,528 lei VAT and 225,973 lei tax on dividends meet the establishing elements for the offense of *tax evasion (omission to highlight the business operations performed and the revenues in the accounting documents or in other legal documents), deed provided. and punished by Article 9 paragraph 1 letter b) and paragraph 3 of Law no. 241/2005, for the application of Article 41 paragraph 2 Criminal Code (243 material acts or delivery operations to 9 Companies and 234 cash withdrawal operations).*

3. The deeds of the defendant SC *E.P.I. SRL Tirgu Mures*, who during 1 January 2007-31 March 2011, under the same criminal intent,

determined, by its representatives, the witnesses, U.C., F.A.R., E.M. and an unidentified accountant to highlight deductible expenses without founding these

⁵ Document not published; The Criminal File and the related Indictment were submitted for judgment to the Mures County Court on 27 June 2013.

operations on real facts, facts that created a damage to the consolidated state budget in the amount of **5,726,345 lei** income tax

meet the establishing elements for the offense of

improper incitement to tax evasion (highlighting charges that are not based on real transactions or highlighting other fictitious operations in the accounting documents or in other legal documents, in order to escape the tax obligations), deed provided and punished by Article 9 paragraph 1 letter c) and paragraph 3 of Law no. 241/2005 for the application of Article 41 paragraph 2 Criminal Code (20 material acts, related to Companies on which the highlights were carried out).

The application of Article 33 letter a) of the Criminal Code is retained, the facts being committed under the real concurrence of offenses.

1. The deeds of the defendant M.C., who, during 22 January 2009-10 June 2010, under the same criminal intent, in the capacity of administrator of SC *E.P.I.* S.R.L., established in bad faith collected VAT returns, which were not granted the right to deduction and established in bad faith collected VAT related to intra-Community deliveries declared for which the exemption was not justified, the receivable VAT being submitted personally or through the witnesses U.C. and F.A.R., thus obtaining unrighteously from the general government consolidated budget, VAT amounting to 4,712,041 lei, meet the establishing elements for the offense of *establishing in bad faith by the taxpayer of taxes or contributions, resulting in obtaining, without right, sums of money as reimbursements or refunds from the general government consolidated budget or compensations due to the general government consolidated budget, deed provided and punished by Article 8 paragraph 1 of Law no. 241/2005, with the application of Article 41 paragraph 2 Criminal Code (6 material acts, relating to quarterly VAT returns).*

2. The deeds of the defendant M.C. who during 22 January 2009-10 June 2010, under the same criminal intent, in the capacity of administrator of SC *E.P.I.* SRL omitted highlighting the deliveries of goods and services to the customers of the Company and withdrew from the Company amounts for which there was no proof of being used in the Company's interest, deeds that resulted in loss for the general government consolidated budget amounting to 129,512 lei, of which 114,846 lei VAT collected on the undeclared deliveries by the Company and 14,666 lei tax on dividends meet the establishing elements for the offense of *tax evasion (omission to highlight the business operations performed and the revenues in the accounting documents or in other legal documents), deed provided. and punished by Article 9 paragraph 1 letter b) and paragraph 3 of Law no. 241/2005, for the application of Article 41 paragraph 2 Criminal Code (37 material acts or delivery operations to 7 Companies and 30 cash withdrawal transactions).*

3. The deeds of the defendant M.C. who, during 22 January 2009-10 June 2010, under the same criminal intent, in the capacity of administrator of SC *E.P.I.* SRL, determined, the witnesses, U.C., F.A.R., and an unidentified accountant to highlight deductible expenses without founding these operations on real facts, facts that created a damage to the general government consolidated budget in the amount of 4,266,532 lei income tax, meet the establishing elements for the offense of *improper incitement to tax evasion (highlighting charges that are not based on real transactions or highlighting other fictitious operations in the accounting documents or in other legal documents, in order to escape the tax obligations), deed provided and punished by Article 31 paragraph 2 Criminal Code in connection with Article 9 paragraph 1 letter c) and paragraph 3 of Law*

no. 241/2005 for the application of Article 41 paragraph 2 Criminal Code (6 material acts, related to Companies on which the highlights were carried out).

The application of Article 33 letter a) of the Criminal Code is retained, the deeds being committed under the real concurrence of offenses.

1. The deeds of the defendant B.V.G., who, during 11 June 2010-31 March 2011, under the same criminal intent, in the capacity of *de jure* administrator of SC E.P.I. S.R.L., along with the defendant N.J. (*de facto* administrator of the company) have established in bad faith VAT returns, which were not granted the right to deduction and established in bad faith VAT collected on intra-Community declared deliveries for which the exemption was not justified, the receivable VAT being submitted by the witness E.M., thus obtaining unrighteously from the general government consolidated budget VAT amounting to 2,492,901 lei, meet the establishing elements for the offense of *establishing in bad faith by the taxpayer of taxes or contributions, resulting in obtaining, without right, sums of money as reimbursements or refunds from the general government consolidated budget or compensations due to the general government consolidated budget, deed provided and punished by Article 8 paragraph 1 of Law no. 241/2005, with the application of Article 41 paragraph 2 Criminal Code (2 acts materials related to quarterly VAT returns).*

2. The deeds of the defendant B.V.G., who, in the period 11 June 2010-31 March 2011, under the same criminal intent, in the capacity of *de jure* administrator of SC E.P.I. SRL, along with the defendant N.J. (*de facto* administrator of the Company) failed to highlight the delivery of goods and services to the Company's customers and withdrew from the Company (by using the witness F.O.) amounts for which there was no proof of being used in the Company's interest, deeds that resulted in loss for the general government consolidated budget amounting to 291.989 lei, of which 80,682 lei VAT collected on the undeclared deliveries by the Company and 211,307 lei tax on dividends, meet the establishing elements for the offense of *tax evasion (omission to highlight the business operations performed and the revenues in the accounting documents or in other legal documents), deed provided. and punished by Article 9 paragraph 1 letter b) and paragraph 3 of Law no. 241/2005, for the application of Article 41 paragraph 2 Criminal Code (206 material acts or delivery operations towards two Companies and 204 cash withdrawal transactions).*

3. The deeds of the defendant B.V.G., who, during 11 June 2010-31 March 2011, under the same criminal intent, in the capacity of *de jure* administrator of SC E.P.I. SRL, along with the defendant N.J. (*de facto* administrator of the Company)

determined, the witness, E.M. to highlight deductible expenses without founding these operations on real facts, facts that created a damage to the general government consolidated budget in the amount of 1,453,958 lei representing income tax, meet the establishing elements for the offense of *improper incitement to tax evasion (highlighting charges that are not based on real transactions or highlighting other fictitious operations in the accounting documents or in other legal documents, in order to escape the tax obligations), deed provided and punished by Article 31 paragraph 2 in connection with Article 9 paragraph 1 letter c) and paragraph 2 of Law no. 241/2005 for the application of Article 41 paragraph 2 Criminal Code (9 material acts, related to Companies on which the highlights were carried out).*

The application of Article 33 letter a) of the Criminal Code is retained, the facts being committed under the real concurrence of offenses.

1. The deeds of the defendant N.J., who during 22 January 2009-10 June 2010, under the same criminal resolution, as *de facto* administrator of SC E.P.I. SRL, determined the defendant M.C., by submitting VAT returns, to establish in bad faith VAT returns, which were not granted the right to deduction and to establish in bad faith VAT collected related to intra-Community declared deliveries for which the exemption was not justified and between 11 June 2010-31 March 2011 together with the defendant B.V.G. established in bad faith VAT returns, which were not granted the right to deduction and established in bad faith VAT collected related to intra-Community declared deliveries for which the exemption was not justified, the submitting of VAT returns being achieved by the witness E.M., thus obtaining unrighteously from the general government consolidated budget VAT amounting to 7,204,942 lei, meet the establishing elements for the offense of *establishing in bad faith by the taxpayer of taxes or contributions, resulting in obtaining, without right, sums of money as reimbursements or refunds from the general government consolidated budget or compensations due to the general government consolidated budget, deed provided and punished by Article 8 paragraph 1 of Law no. 241/2005, with the application of Article 41 paragraph 2 Criminal Code (8 material acts, relating to quarterly VAT returns).*

2. The deeds of the defendant N.J., which under same criminal intent, between 22 January 2009-10 June 2010, as *de facto* administrator of SC E.P.I. SRL, determined, the defendant, M.C. to omit highlighting the deliveries and services to the customers of the Company, and the defendant M.C. to withdraw from the Company amounts for which there was no proof for their use in the interest of the Company, and between 11 June 2010-31 March 2011, in the capacity of a *de facto* administrator of SC E.P.I. SRL, together with the accused B.V.G. (as *de jure* administrator of the Company) failed highlighting the delivery of goods and services to the customers of the Company and determined the defendant B.V.G. to withdraw from the Company (by witness F.O.) amounts for which there was no proof for being used in the Company's interest, deeds that created a loss to the general government consolidated budget amounting to 421,501 lei, consisting of: 195,528 lei VAT and 225,973 lei tax on dividends, meet the establishing elements for the offense of *tax evasion (omission to highlight the business operations performed and the revenues in the accounting documents or in other legal documents), deed provided. and punished by Article 9 paragraph 1 letter b) and paragraph 3 of Law no. 241/2005, for the application of Article 41 paragraph 2 Criminal Code (243 material acts or delivery operations to 9 Companies and 234 cash withdrawal operations).*

3. The deeds of the defendant N.J., which under same criminal intent, between 22 January 2009-10 June 2010, as *de facto* administrator of SC E.P.I. SRL, along with the defendant M.C. determined the witnesses U.C., F.A.R. and an unidentified accountant to highlight, guilt-free, deductible expenses without founding these operations on real operations, and during 11 June 2010-31 March 2011, as *de facto* administrator of SC E.P.I. SRL, together with the defendant B.V.G. (*de jure* administrator of the Company), determined the witness E.M. to highlight without guilt deductible expenses, these operations without being based on real operations, deeds that entailed a loss in the general government consolidated budget amounting to 5,726,345 lei representing income tax, meet the establishing elements for the offense of *improper incitement to tax evasion*

(highlighting charges that are not based on real transactions or highlighting other fictitious operations in the accounting documents or in other legal documents, in order to escape the tax obligations), deed provided and punished by Article 31 paragraph 2 Criminal Code in connection with Article 9 paragraph 1 letter c) and paragraph 3 of Law no. 241/2005 for the application of Article 41 paragraph 2 Criminal Code (15 material acts, related to Companies on which the highlights were carried out).

The application of Article 33 letter a) of the Criminal Code is retained, the facts being committed under the real concurrence of offenses and also of Article 37 letters a) and b) of the Criminal Code, the deeds being committed in a state of post-relapse or post-sentence repetition of a crime.

The total loss caused to the general government consolidated budget is in the amount of 13,356,848 lei.

The case is interesting in the light of the preventive measures taken during the prosecution, respectively that of suspending the procedure of dissolution of the legal person. Thus, following a request made by the National Anticorruption Directorate - Tirgu Mures Territorial Service, the County Court-Criminal Division ordered by the Criminal Conclusion no. 26/C of 2 April 2013, under the Article 479⁵ paragraph 4 Criminal Procedure Code, in conjunction with Article 479¹ paragraph 1 letter a) Criminal Procedure Code, with Article 143 Criminal Procedure Code and with Article 191 paragraph 1 of the Criminal Code, for the defendant S.C. E.P.I. SRL (legally represented by the liquidator C.A.M.) the preventive measure of suspending the liquidation proceedings initiated by the Judgment no. 19 of 10 January 2012 issued by the Specialized County Court – Mures, in the Case no. 1240/1371/2012, for a period of 60 days starting with 2 April 2013⁶.

The Court reasoned that under the conditions in which the simplified procedure of insolvency was opened against the accused being found in a status of bankruptcy (being dissolved as of right), we can foresee that in the next stage it will follow, most likely, the liquidation of the Company and its deletion from the ORC, in which it disappears as a legal entity and thus criminal liability is prevented. As such, the only way to avoid this impediment is exactly by ordering the preventive measure requested, meaning that this measure will prevent the disappearance of the accused and therefore, the criminal proceedings initiated against the accused will be completed. Obviously, holding liable the legal persons shall not prevent holding liable the natural persons who acted on behalf or in the interest of the legal entity.

9. *In conclusion*, we cannot assess whether one of the theories mentioned is superior to the other because at least in the examples shown, the Romanian jurisprudence has shown that both theories are applicable. It is true that these theories are not protected from criticism, however, based on the facts and the evidence available in each case, one of these theories proves its worth.

Concurrently, the preventive measures have proved their effectiveness, at least in the presented example. It seems at least paradoxical for a preventive measure to consist in “keeping alive” the legal person when it comes to dissolution, liquidation etc., because at least apparently, it seems rather an aid measure offered by the judicial bodies.

⁶ Unpublished documents; The ordered preventive measure has been extended being applicable also currently, a pending criminal case at the Mures County Court- Criminal Division

Since the legal representative aims exactly for the legal person to disappear, as by default its criminal liability would also disappear, such a preventive measure demonstrates its effectiveness.

Therefore we can state with certainty, from the arguments presented above, that, if in the past “*societas delinquere non potest*” (the Companies could not commit criminal offenses), currently “*societas delinquere potest*” (the Companies can commit criminal offenses) and more than that, “*societas delinquere potest et punire potest*” (the Companies can commit criminal offenses and thus they can be punished).

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