DOI: 10.47743/eufire-2024-1-24

RETROACTIVITY OF TAX LAW AND SPECIAL CONFISCATION – PROPOSALS OF THE ROMANIAN LEGISLATOR, IN ONE SHOT, FOR RESIZING POSITIVE TAXATION?

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Abstract
Out of a desire to collect additional budget revenue, our legislator has abandoned the classic line and prefers a futuristic trend, operating innovatively. Thus, at the end of 2023, he decided to bring together in a single tax institution two major, sensitive and inexplicable problems of positive law: the retroactive application of stricter legal rules, more unfavorable to the private debtor, and the question of special confiscation in a tax offence that does not naturally and legally allow this, disguised in a tax decision for additional tax obligations and the avalanche of related tax accessories. However, in the obvious absence of a legal basis, these legislative initiatives tend to evaporate before they produce genuine legal effects.
Keynotes: *income tax; tax decision; confiscation; retroactivity; legality.*
JEL Classification: K34, K40.

1. INTENTION TO INCREASE BUDGET COLLECTION BETRAYED BY REGULATORY IMPULSES

All the changes formally made at the end of 2023 and coming into force on 1 January 2023, as well as those due to come into force on 1 July 2024, mark, in verbal and non-verbal language, a trend towards higher tax rates, the establishment of restrictive tax regimes, and an increase in the tax burden on taxpayers, whether they are individuals or legal entities.

Thus, even if we are aware that one of the ways in which the state intervenes in economic life is by "taking over part of the income of economic agents" (Costaș and Tofan, 2023) it is sufficient to highlight some of the substantial changes that will have a strong impact on the economic and social environment in the next period of time: the updating of the conditions relating to micro-enterprises, the increase of the ceiling to 60 gross minimum wages per country in the area of CASS, the increase of the VAT rate from 5% to 9% for certain supplies, including the supply of housing, the increase, not surprisingly, of excise duties for alcohol and alcoholic products, the introduction of the special tax of 0.3% for individuals who have residential buildings with a value

greater than 2.500.000 lei, or cars registered in Romania whose value exceeds 375.000 lei. Beyond the introduction of new variations in income tax, the increase in tax rates is a symbolic and traditional expression of the lack of regulatory inspiration and the tightness of the budget deficit.

2. THE GENERAL SPECIFICITY OF THE ACTION OF LEGAL RULES OVER TIME

It is well known that time flows continuously, in one direction, on the "axis" past - present - future. Time is not just a philosophical, physical or astronomical concept, from a legal point of view, time has its values. Thus, the law applies „in a time" or „in time", the intention being to show that on the axis or „arrow" of time, the legal cursor can be fixed at „n" moments in time. The initial moment in time is the moment of entry into force, which may differ from the moment of publication of the legal act. For example, as a rule, laws enter into force three days after their publication in the Official Gazette and emergency ordinances on the date of their publication in the Official Gazette. From the moment of entry into force, the legal act will naturally, logically and legally apply only for the future.

An infallible benchmark for the application of the law over time is the provisions of para. (2) of Article 15 of the Romanian Constitution, according to which the law applies only to the future, except for more favorable criminal or misdemeanor laws". Thus, the only exception to retroactivity allowed is the criminal or misdemeanor law which is more favorable to the accused or offender. The rationale is simple, the purpose of setting the principle of the application of the law for the future is to ensure that the addressees of the law are aware of it and comply accordingly before acting.

Compliance with a law that did not exist in the form it was intended to be applied at the time of the offence is not only unlawful but also absurd and even impossible. The normative command and the compliance requirements it impose must be possible, not just logical.

3. THE SPECIFICS OF TAX PROCEDURAL RULES AND THE ACTION OF TAX RULES IN RELATION TO FACTUAL SITUATIONS

According to the provisions of Art. 117 of the Fiscal Code. on the definition and taxation of income the source of which has not been identified: „Any income established by the tax authorities, under the terms of the Tax Procedure Code, the source of which has not been identified shall be taxed at a rate of 16% applied to the adjusted tax base. The tax authorities will determine the amount of tax and ancillary charges in the tax decision".

From 1 July 2024, the text of Art. 117 of the Fiscal Code. shall be amended in part and shall become final as follows: „Any income ascertained by the tax

authorities under the terms of the Code of Tax Procedure, the source of which has not been identified, shall be taxed at a rate of 70% applied to the adjusted tax base. The tax authorities will determine the amount of tax and ancillary charges in the tax decision". So the only change concerns the tax rate, which increases from 16% to 70%.

What is worrying, beyond the escalation of the legal rate in this way, is the provision introducing the change into the legal order and setting the scope of the new legal provisions. In accordance with the provisions of Article VII para. 1 letter b) of Act No. 296/2023, the provisions of item 13 shall enter into force as of 1 July 2024 and shall apply to tax decisions issued by the tax authorities as of the same date.

According to tax procedural provisions, tax decisions are issued in 3 situations: at the end of the documentary verification procedure, at the end of the tax inspection or at the end of the verification of the personal tax situation. The latter procedure is naturally in line with the hypothesis envisaged by the legislator by increasing the tax rate for the taxation of income whose source has not been identified.

Essentially, the verification of the personal tax situation by the central tax body is intended to provide an overall check of the personal tax situation of the individual from an income tax perspective. After the risk analysis is carried out by the tax body, in order to establish the risk for individuals of non-compliance in the declaration of taxable income as a significant difference between the estimated income in the risk analysis and the income declared by the individual and/or the payer for the same taxable period, and if it results in a difference of more than 10% of the declared income, but not less than 50,000 lei, individuals are to be notified in order to suggest them the possibility to correct their declarations and tax situation in advance.

According to the provisions of paragraph (4) of Article 138 of the Tax Code: „Personal tax situation means the totality of rights and obligations of a patrimonial nature, cash flows and other elements likely to determine the real tax situation of the individual during the period under review".

Verified person is obliged to submit a declaration of assets and income within the legal deadline, if requested to do so by the personal tax verification notice. This declaration of assets and liabilities is a complex one and provides an overview of the assets and liabilities of the person concerned during the period subject to verification.

To determine the income obtained by the individual during the period under audit, the central tax body shall use indirect methods of determining income, approved by order of the President of the A.N.A.F. Thus, according to Article 22 of Order no. 675/2018 of 15 March 2018 on the approval of indirect methods of determining income and the procedure for their application, the selection of indirect methods of determining income shall be made according to their specific

requirements, the tax situation of the individual under audit and the nature of the information or documents available. The 3 methods provided for by Order No 675/2018 are: a) the method of source and use of funds; b) the cash flow method and c) the net worth method.

Obviously, if the application of the methods leads to the conclusion that additional taxation is necessary, which must be substantiated by the report prepared by the tax authority, the tax decision will be issued in accordance with the provisions of Article 146 of the Tax Code. Issuance of the taxation decision is also imminent in the situation described in para. (3) of art. 146 C.pr.fisc. when „it is found that the tax returns, documents and information submitted during the verification procedure are incorrect, incomplete, false or if the verified individual refuses, during the same procedure, to submit the documents for verification or they are not submitted within the legal deadline or the person evades the verification by any other means".

Clearly, the verification of the personal tax situation is always for a retroactive period and never for a future or even present period to justify the application of the new 70% tax rate for the present. Moreover, a mere formal reference to the present is insufficient, given that, for example, the individual's assets include assets acquired 10 or 15 years ago.

4. CAN THE NEW 70% PERSONAL INCOME TAX LAW BE APPLIED TO SITUATIONS BEFORE 1 JULY 2024?

A new tax rate means a „new law" and this conclusion is verifiable everywhere in positive law: in criminal matters, a new penalty is equivalent to a new law, with a modification of the penalty regime (Streteanu, 2003) in civil matters, a new limitation period is equivalent to a new law and so on.

To discuss a legal rule in general and a fiscal rule in particular, it is sufficient to have a different (new) regulatory element. The change in the tax rate is probably the most convenient element of tax regulation, the benchmark, symbol and axe of the pejorative taxation promoted by the „plundering state". (Costaș and Puț, 2023)

The requirements of *vacatio-legis* and predictability of regulation have been partially met by the new regulatory interventions. Thus, even though a period of six months is allowed between publication in the Official Gazette and entry into force [Article 4(1) of the Tax Code], the provisions of Article 4(1) remain unapplied. 2 of Art. 4 of the Tax Code concerning the entry into force only from the first 1 January after the expiry of the 6 months, if we are dealing with an increase in existing taxes, duties or social contributions.

The application of the new tax law, as it has been configured and as it will enter into force on 1 July 2024, to past factual situations is unconstitutional. There is no plausible explanation for justifying the application of the tax rate for any day prior to the entry into force of the text of Article 117 of the Fiscal Code.

The mere justification of the substantive law resort - the necessity of taxation (in other limits, infinitely increased) does not justify the substantiation and reference to a procedural law resort - the issuing of the tax decision. Even if the tax decision is issued after 1 July 2024, it concerns a factual situation prior to the date on which the new tax law came into force.

Moreover, why set a procedural benchmark in the application of a substantive law provision when this way of reporting does not safeguard the retroactive and unconstitutional application of the tax rule? Probably also as a sample of the legal deconstruction that the state is preparing (Veitch, Christodoulidis and Goldoni, 2018), the bizarreness generated would be quite incomprehensible. For example, but without limitation, two checks on the personal tax situation start at the same time, but one is completed on 30 June 2024 and the other on 1 July 2024 with two tax decisions. The difference between them is only a few hours, but in reality it is 54% of the tax base, as a debit and obviously as a projection of at least double tax accessories. And the examples could go on exponentially and symbolically and mathematically.

Therefore, in our view, the application of the new tax rules should only apply for the future, i.e. for the situation of unidentified source assets in question after 1 July 2024, regardless of when the tax decision is issued. The principle of *tempus regit actum* or factum cannot be overridden solely by the unilateral manifestation of the legislator's will. Even the legislature is bound by the principles of law and the legal rules in force. The increase of certain rates in the field of income tax (e.g. in the case of dividends) or in the field of VAT (e.g. the reorganized reduced rates) does not overturn the principles of the action of the legal rule over time, but follows and is effectively valued, independently of the moment of the issuing of a tax decision in one of the three forms of tax control which allow it. (Costaș, 2016)

5. ARE WE DEALING WITH A SPECIAL FORFEITURE IN TAX ORDER?

Tax crime is different from criminal law, at least in terms of the principles of reference, the normative regulation (Betegon *et al.,* 1997), the function pursued, the nature and severity of the sanction. However, the question that naturally arises is whether it is possible to introduce an institution like the special confiscation in criminal matters in tax matters, „by will or not by will", „by word or by thought".

According to the provisions of Article 112 of the Criminal Code: „(1) Are subject to special confiscation:

(a) property produced by the commission of an offence under criminal law;

(b) property which has been used in any way, or intended to be used, in the commission of an offence under criminal law, if it belongs to the

offender or if, belonging to another person, the offender knew the purpose of its use;

(c) property used, immediately after the commission of the offence, to ensure the escape of the offender or the preservation of the benefit or product obtained, if it belongs to the offender or if it belongs to another person who knew the purpose for which it was to be used;

(d) property which has been given in order to induce the commission of a criminal offence or to reward the offender;

(e) property acquired through the commission of an act provided for by criminal law, if it is not returned to the injured party and in so far as it does not serve to compensate the injured party;

(f) property the possession of which is prohibited by criminal law.

In the case referred to in paragraph 1, the following shall apply (1) (b) and (c), if the value of the property subject to confiscation is clearly disproportionate to the nature and gravity of the offence, partial confiscation shall be ordered, by monetary equivalent, considering the damage caused or likely to be caused and the contribution of the property to it. If the property was produced, modified or adapted for the purpose of committing the offence provided for by the criminal law, it shall be confiscated in its entirety".

The question is legitimate, because if the legal effects of special confiscation are 100%, the effects of the 70% tax on the income of individuals with unidentifiable source are more serious than that, although in an elementary logic they could not be more serious than 100%. But, adding interests and penalties: 0.02 late interest, 0.01 late penalties, 0.08 non-declaration penalties, for a reasonable period of 2 or more years, we will exceed 100%. Although the institution of special confiscation operates only in criminal matters, in cases and under conditions which are limited and expressly laid down by law, it can also be found with the same legal implications in legal matters in which it is not normally used.

Moreover, if the value of the goods subject to confiscation is clearly disproportionate to the nature and gravity of the offence, the confiscation operates in part, by means of a proportional monetary equivalent, the income tax cannot operate in a nuanced manner, as the 70% tax rate and the subsequent accessory charges almost inevitably exceed the value of the goods concerned, which makes it a more severe institution in terms of legal consequences. In our opinion, even if the legislator did not intend to implement special confiscation in tax matters, because it neither substantiated nor affirmed it, the legal effects produced by increasing the rate to 70% exceed the purposes intended by the criminal legislator through special confiscation, which again appears inadmissible.

6. ILLUSIONS, DISAPPOINTMENTS AND CONCLUSIONS

The illusion of major and immediate tax collection will not overcome its condition *in concreto*. The disillusionment will be not only of the legislator who will be aware of this reality, but also of the taxpayers who no longer hoped for a compliant, objective and value-balanced administration of their subjective rights in the normative-fiscal field.

The conclusion is that our legislator has proved once again that he is in a hurry. In his desire to ensure a significant increase in collection, he has decided to lump together in one and the same tax institution two major, sensitive and inexplicable problems of positive law: the retroactive application of stricter legal rules that are more unfavorable to the private individual and the issue of special extra-criminal confiscation, disguised in a tax decision for additional tax obligations and related tax accessories.

The need for legal substantiation is indispensable to any change in the regulatory paradigm, just as any legislative change must be calibrated in such a way as to avoid harming other established legal institutions and to avoid irreparably damaging the rights and interests of the persons concerned. Without these two elements, the legal norm gives way to arbitrariness and ambiguity and loses its normative authority.

References

1) Betegon, J., Gascon, M., De Paramo, J.R. amd Prieto, L. (1997). *Lecciones de Teoria del Derecho*, Madrid: McGraw-Hill.
2) Costaș, C.F. and Tofan, M. (2023). *Drept financiar*, București: Ed. Universul Juridic.
3) Costaș, C.F. and Puț, S.I. (2023). *Drept fiscal*, București; Universul Juridic.
4) Costaș, C.F. (2016). *Codul de procedură fiscală. Comentariu pe articole*, București: Ed. Solomon.
5) Streteanu, F. (2003). *Drept penal. Partea generală 1*, Bucuresti: Ed. Rosetti.
6) Veitch, S., Christodoulidis, E. and Goldoni, M. (2018). *Jurisprudence. Themes and concepts*, 3rd Edition. Abingdon, Oxon: Routledge.