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ACCOUNTING DIFFICULTIES REGARDING FICTITIOUS OPERATIONS

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Abstract: *Fighting against tax evasion is well known at European and national authorities. This article draws attention to the limitations of the professional accountant in detecting fictitious operations. Accounting as a post-factum operation cannot bring objective assessments regarding the actual reality of an operation recorded in the received documents. Only from the simple examination of an invoice or other supporting documents prepared by the parties, does not result the elements of fact and the circumstances in which the operation took place, these being known only by the persons who issued or ordered the issuance of those documents.*

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Introduction

In the Romanian legislation in force, in art. 2 lit. f) of Law no. 241/2005, the fictitious operation was defined as representing the concealment of reality by creating the appearance of the existence of an operation that does not actually exist.

The Constitutional Court in the decision no. 673 / 17.11.2016 (paragraph 39), published in the Official Gazette of Romania, Part I, no. 193 / 20.03.2017, ruled that the phrase "*not based on real operations"* refers to those operations that do not correspond to the factual or legal reality, and "*fictitious operations*"

refers to those imaginary operations, non-existent in fact or unrelated to the taxpayer. Therefore, the registration of a fictitious operation involves the recording in the primary documents and in the accounting records, with fiscal relevance, of some expenses that were not actually made or that are higher than those made or for which there are no supporting documents, therefore non-existent. and legally but transposed in the written record.

Fictitious operations are performed either by falsely entering expenses in legal documents, in the sense that they were not based on supporting documents, or by recording false supporting documents for expenses, in the sense that those expenses were not made or were much smaller than those recorded.

The I.C.C.J. by the criminal decision no. 272 / 28.01.2013 (file no. 11664/121/2011 of the Criminal Section), stating that the fictitious operation may consist, inter alia, in expenses that did not exist in reality or that are higher than the real ones or expenses for which there are no supporting documents, but which are registered in the legal documents ", as well as by the criminal decision no. 1113 / 15.02.2005 (file no. 4306/2004 of the Criminal Section), in which he showed that "by registering expenses that are not based on real operations is meant the elaboration of false supporting documents for expenses that were not made or were lower than those recorded in the supporting documents, and based on these false supporting documents, unrealistic expenses are also incurred in the other accounting documents, with the consequence of decreasing the net income and, implicitly, the fiscal obligation to the state."

Starting from this hypothesis of expenses that are not based on real operations, in the sense shown above, the fiscal consequence would be that the documents in which they are recorded (eg invoices, bank account statements, receipts, etc.) would not you still meet the substantive conditions regarding the quality of supporting document, according to the law, and consequently, it would be necessary to include the total amount related to the taxable base to the category of non-deductible expenses regarding the calculation of profit / income tax and considering VAT as acquisitions. without the right to deduct (only the amounts considered by the taxable person, in question, as tax deductible, according to its accounting and tax records).

But what are the possibilities for the professional accountant to detect whether a supporting document, represented by the invoice issued for the provision of services, contains the record of a real or a fictitious operation?

1. The obligation to record the operations in supporting documents

According to the art. 6 of the Accounting Law no. 82/1991: "(1) Any economic-financial operation performed shall be recorded at the time of its performance

in a document underlying the accounting records, thus acquiring the quality of supporting document."

According to the art. 11 of the same law: "the possession, by any title, of material goods, securities, cash and other rights and obligations, as well as the performance of economic operations, without being registered in the accounting, are prohibited."

From the two legal provisions we note that any operation is recorded in a document and the respective document is subject to registration in accounting. If the documents are registered in the accounting registers, the supporting documents underlying the accounting entries shall be the responsibility of the persons who drew them up, endorsed and approved them, as well as of those who registered them in the accounts, on the art. 6 paragraph 2 of Law No. 81/1990.

But, in accounting it is forbidden to register (in accounting documents or other legal documents), expenses that are not based on real operations or register other fictitious operations (art. 9 paragraph (1) letter c) of Law no. 241/2005 for the prevention and combating of tax evasion, with subsequent amendments and completions). It follows, in conjunction, that although they may meet the formal legal requirements to meet the status of supporting document, documents recording unrealistic transactions or expenditure not based on actual transactions will hold the responsibility for those persons who drafted, endorsed and approved as well as those who registered them in the accounts, as the case may be the subject of analysis from the perspective of committing an offense (classification that belongs exclusively to the competent judicial bodies).

Here are the provisions on the fulfillment of the following requirements to have the status of a legal supporting document:

- Mention of the parties participating in the economic-financial operation (when applicable);
- The content of the economic and financial operation and, when necessary, the legal basis for it;
- Quantitative and value data related to the economic and financial operation performed, as the case may be;
- Name and surname, as well as the signatures of the persons responsible for carrying out the economic-financial operation, of the persons with preventive financial control attributions and of the persons entitled to approve the respective operations.

All the above legal requirements refer to the effective operation.

So, under the condition of validation that the documents in question record expenses based on the performance of real economic and financial operations (aspect that exceeds the competences of the professional accountant), then they can meet the substantive legal conditions regarding the quality of supporting document. If, although all the information elements of a document are completed, fulfilling the formal conditions, if the operations entered in them do not prove to have been carried out, then the expenses recorded in the accounts are not based on a supporting document (expenses recorded without being based on a supporting document prepared according to law). In this case, the expenses recorded in the documents are not deductible in the calculation of taxes and fees due to the general consolidated budget, being recorded without being based on an economic and financial operation.

But what does the quality of a legally prepared supporting document mean?

2. The legal quality of supporting document

The supporting documents are grouped into distinct categories in relation to the object of the economic-financial operation performed by the taxpayer, their form and content being established, as appropriate, by the provisions of tax legislation (Fiscal Code), or the provisions of accounting legislation (e.g., OMEF no. 3512 / 2008 and OMFP No. 2226/2006).

The relevant provisions of the Fiscal Code, the Fiscal Procedure Code and the Accounting Law (including its subsequent normative acts), distinguish between:

i) “primary documents or primary evidence documents” which record and certify the reality of economic operations. The main primary supporting document with this role is the invoice, regulated after 01.01.2007, exclusively by the Fiscal Code, and defined as the document in which any patrimonial operation is recorded at the moment of its performance and which is the basis of accounting records (for situations in which the preparation of the invoice is mandatory and not optional);

ii) “accounting documents or synthesis / centralizing documents” represented by the accounting records with the role of “centralizing” the primary documents and the operations recorded in them, regulated by the Accounting Law and the subsequent normative acts. The preparation of accounting records involves highlighting the operation in a system of registers, forms and financial-accounting documents related to each other, which serve for the chronological and systematic recording in accounting of economic and financial operations performed during the financial year.

In general terms, the main document intended for the registration of an economic and financial operation in accounting is the invoice. The legal regime of the invoice is regulated from the date of accession to the EU, exclusively by the provisions of art. 155 of the Fiscal Code approved by Law 571/2003, expressly developed by the provisions of point 15 of ANNEX 1 - Methodological norms for preparation and use of financial-accounting documents approved by OMEF no. 3512/2008:

"The invoice is drawn up and used in accordance with the provisions of the Fiscal Code.

For supplies of goods or services for which taxable persons are exempt without the right to deduct value added tax and are not required to draw up invoices, in accordance with the provisions of the Tax Code and the methodological rules for its application, economic operations are recorded. based on contracts concluded between the parties and financial-accounting or banking documents certifying those operations, such as: notice accompanying the goods, receipt, payment / receipt order, bank account statement, accounting note, etc., as appropriate."

It follows from the provisions of the above-mentioned accounting law that: the economic operations in which it is necessary to draw up an invoice are recorded in the accounts only based on the invoice. Only for the operations for which there is no obligation to draw up the invoice, other supporting documents are required (such us the notice of preparation of the goods, the receipt). The consequence of this unequivocal and uninterpretable method of regulation is that the invoice, and only the invoice, is required in the matter of supporting documents for purchasing operations, which is obviously in line with the VAT Directive on the role of the invoice in deducting VAT. In the same sense is the national jurisprudence (of the ICCJ - High Court of Cassation and Justice), as well as the CJEU- Court of Justice of the European Union.

Decision no. 1017 of March 26, 2009 appealed by the Commercial Section of the High Court of Cassation and Justice: The judges of the High Court of Cassation and Justice considered (in the content having as object the ascertainment of the absolute nullity of an invoice) that, based on the provisions of the Accounting Law no. 82/1991 and of art. 46 of the Commercial Code (according to Law no. 71/2011 for the implementation of the new Civil Code, the provisions of art. 46 of the Commercial Code are still applicable in relations between professionals until the date of entry into force of the new Code of Civil Procedure), **the invoice has only the quality of a supporting document underlying the records in the accounts of the supplier or the buyer and is a means of proof of the operation performed**.

According to CJEU jurisprudence, the invoice is a document certifying the completion of a transaction between two traders, containing transaction data (transaction date, object of the transaction, volume and value of the transaction) and information about participants (name, address, tax identification code), and the lack the elements of the invoice referred to by the inspection bodies cannot constitute a sufficient and essential element in the exercise of the right to deduct, and it is necessary to take into account all the relevant aspects of the case in that regard.

Council Directive 2010/45 / EU on invoicing states in recital 10 that "**Invoices must reflect actual deliveries.**" The Directive recognizes the obligation for invoices to accurately reflect the actual supply of goods and the actual provision of services, and therefore requires that the authenticity of the origin, the integrity of the contents and the legibility of the invoices be ensured from the time they are issued until the end of their storage period. This can be done through management controls, which provide a reliable audit trail between invoice and delivery and guarantee the identity of the supplier or issuer of the invoice (authenticity of origin), that the VAT details (content of the invoice required by the VAT Directive) of on the invoice are unchanged (integrity of the content) and that the invoice is legible.

In conclusion, the invoice is a primary justifying document, legally regulated by art. 155 Invoicing from the Fiscal Code, to which art. 2, letter d) of Law no. 241/2005 also refer. Considering that, after drawing up a supporting document, the taxpayer has the obligation to proceed with the registration of the respective document in the accounting records (this involves highlighting the operation in a system of registers, forms, and related accounting documents, which serve for chronological recording and systematic accounting of economic and financial operations carried out during the financial year). Considering that, at art. 80-81 of the Fiscal Procedure Code (old Fiscal Procedure Code approved by Government Ordinance no. 92 / 2003, rep.), The taxpayer's obligation to keep accounting records is established and based on primary documents and the obligation to submit tax returns. It results from the previously performed analysis, that the mandatory elements and other requirements provided for the documents regulated by OMEF no. 3512/2008, issued in application of the Accounting Law, does NOT refer to the invoice, but exclusively to financial-accounting documents, the invoice being regulated by a special law (Fiscal Code).

We conclude that: The documents underlying the records in the accounting records can acquire the quality of supporting document only in cases where they provide all the information provided in the legal norms in force.

3. European views on combating fraud, tax evasion and possible abuse

From the point of view of VAT, when, although the existence of invoices and their related payments is ascertained, if the substantive conditions regarding the performance of the operation are not met (e.g.: if the acquisitions are fictitious / not based on real operations), then the transactions are not carried out with payment, respectively if the amounts paid do not match the supply of goods or services, the transactions are not for consideration, and consequently, the transactions entered in the invoices would no longer fall within the scope of VAT, failing to meet cumulatively the legal conditions to be taxable transactions. In that regard, the proceedings of CJUE in Case C-285/10 Campsa Estaciones de Servicio SA v. Administration, paragraph 25, show that, in that regard, the possibility of classifying a transaction as a 'onerous transaction' within the meaning of Article 2 of the Sixth Directive implies only the existence of a direct link between the supply of goods or the provision of services and a consideration actually received by the taxable person. Thus, the payment of a sum of money remains without consideration if the purchases are fictitious.

Regarding the limitation of the right of deduction, the CJEU confirms the principle of the right of deduction, which makes the exceptions to be strictly interpreted and applied, according to the provisions of the VAT Directive, properly transposed in the Romanian Fiscal Code. However, it must be borne in mind that, in fact, the fight against fraud, tax evasion and possible abuse is an objective recognized and encouraged by Directive 2006/112 (see, inter alia, Halifax and Others, paragraph 71, Judgment of 7 December 2010, R ., C 285/09, Rep., P. I 12605, paragraph 36, and Case C-504/10 Tanoarch [2011] ECR I-10853, paragraph 50).

In that regard, the Court has already held that litigants cannot fraudulently or abusively rely on the rules of European Union law (see case C-32/03 Fini H [2005] ECR I-0000). I 1599, paragraph 32, and Halifax and Others, paragraph 68, and Kittel and Recolta Recycling, paragraph 54). Consequently, it is for the national authorities and courts to refuse the advantage of the right to deduct if, in the light of objective factors, it has been established that that right has been alleged fraudulently or abusively (see, to that effect, the judgments cited above. , paragraphs 33 and 34, and Kittel and Recolta Recycling, paragraph 55, and Case C 414/10 Véleclair [2012] ECR I-0000.

Furthermore, it must be pointed out that Article 21 (1) (c) of the Sixth Directive provides that **any person who mentions VAT on an invoice or other document serving as an invoice is liable to pay the tax.** Specifically, those persons are payers of that VAT on an invoice independently of any obligation

to pay because of a transaction subject to VAT (see, to that effect, Judgment of 13 December 1989, Genius, 342/87, Rec., P. 4227, paragraph 19, Judgment of 19 September 2000, Schmeink & Cofreth and Strobel, C 454/98, Rec., P. I 6973, paragraph 53, and Reemtsma Cigarettenfabriken, C 35/05, Rep., P. I 2425, paragraph 23).

The Court has ruled that, to ensure the neutrality of VAT, it is for the Member States to provide, in their domestic legal order, for the possibility of correcting any invoiced tax without being due, provided that the issuer of the invoice demonstrates good faith (see, to that effect, Genius 342/87, judgment of 13 December 1989). Thus, if the operations are susceptible to tax fraud / evasion, the exclusion of loss of income to the state budget is ensured by the obligation to apply a non-deductible treatment to the Beneficiary-buyer, and compliance with the principle of fiscal neutrality is ensured by the buyer's right to obtain from his supplier the refund of amounts paid for the delivery of goods / services which were not finally performed (see by analogy Judgment of 31 January 2013, LVK, C 643/11, EU: C: 2013: 55, paragraph 48, and Judgment of 13 March 2014, FIRIN, C 107/13, EU: C: 2014: 151, paragraph 55).

Moreover, regarding cases of VAT invoiced without being due to the lack of a taxable transaction, the Court has ruled that, of course, the principles of neutrality and effectiveness do not preclude, in principle, national legislation under which only the supplier may claim from tax authorities. competent authorities to reimburse the amounts which he has paid to them in error as VAT, and it is for the purchaser to bring an action against the supplier to obtain, in turn, the reimbursement of the amounts paid, including VAT. (See, to that effect, Reemtsma Cigarettenfabriken, C 35/05, EU: C: 2007: 167, paragraphs 39, 41 and 42). Specifically, the tax declaration of operations in cases of tax fraud / evasion, by both partners of a transaction, requires that, in order to comply with the deduction regime, the formal and substantive conditions of operations, and without prejudice to the principle of tax neutrality, the beneficiary to apply non-deductible tax treatment to transactions which he knew or should have known were not actually carried out, the supplier having, on the one hand, the possibility to exercise at any time the right to regularize, in the mirror, those transactions , and on the other hand, the obligation to reimburse the amounts received from the beneficiary (including VAT), which in this case are constituted as undue payments.

In this context, no confusion should be made between fictitious expenses / which are not based on real operations that have a non-deductible assimilated character, by not respecting the general substantive conditions regarding the actual realization of the operations, and non-deductible expenses, within the express provisions of the non-admission of the deductibility

provided by the Fiscal Code, only the first ones falling under the incidence of the criminal offense, but even in this situation, the tax return of operations by both participants (including the regularization of operations) excludes any loss of revenue to the general consolidated budget, if the elimination of the deductibility exercise to the Beneficiary is ensured, regardless of the exercise of the right to recover amounts paid (although they were undue) to the Supplier and independent of the fiscal behavior of the Supplier. In this regard, the CJEU rules that the supplier can act in good faith and can eliminate in a timely manner any possibility of loss of revenue to the state budget, in which case, he opposes the refusal of the right of regularization of the supplier, who has a right of restitution. of the tax paid in the accounts of the general consolidated budget and refunding the amounts collected, not owed by the Beneficiary, will ensure the effectiveness of the principle of tax neutrality. In this way, the principle of fiscal neutrality, enacted in its case law by the Court of Justice of the European Union, which opposes the refusal to deduct taxes in cases where the partners of a commercial chain highlight and declare their taxable operations, in which case there is no risk of loss. of tax revenue for that Member State, regardless of the factual reality of the transactions carried out in a transparent manner, but only if, in relation to the existence of objective elements, the beneficiary did not know or should not have known that the transactions are vitiated by fraud.

Conclusion

In conclusion, the professional accountant cannot assess the actual reality of an operation only by simply examining an invoice or other supporting documents prepared by the supporting parties. The facts and circumstances in which the operation took place are known only by the issuers, or the persons who ordered the issuance of such documents. In this sense, the possibility to correct any invoiced operation knowing that it did not take place, belongs to both the issuer and the beneficiary, if they demonstrate good faith.

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