

CIRCUMVENTION OF DUTIES AND TAXES BY RESORTING TO NON-RESIDENT COMPANIES AS WAY OF DISGUIISING AN ACT OF FRAUD

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Abstract: *For a full and proper comprehension of the phenomenon of tax evasion at community or international level, it is necessary that the theoretical elements broached and detailed at large by the specialized literature by illustrious theoreticians, - to be practically applied to specific situation which could finally lead to the improvement of the practitioners in order to prevent and to fight this phenomenon harming the global economic environment. The studies performed to this end include, first of all, the analysis of the fraud method and mechanism by tax havens, by disguising an act of fraud under the umbrella of an apparent legalism, by combining the actions of tax evasion with other offences out of which the most frequent is smuggling, or by tactful avoidance of law concerning the public procurement from structural funds coming from the budget of the European Union.*

1. INTRODUCTION

This case study *meets in one single paper several methods to fraud the tax legislation, being a real case*, met by the author in her professional practice, when upon the request of a litigant (client) in order to ensure his defense, I did some deep research in order to establish, first of all, the legal regime applicable to the documents concluded by the opposing party and then, in order to choose the most proper defense of my client's interest.

It has to be mentioned the fact that on the date when taking the case and implicitly on the date when the author started to study the topic, she did not realize that she had to deal with a complex mechanism of tax evasion, a situation which became clearer as the study proposed advanced.

The cause resides in the conclusion of a service contract, hereinafter referred to as Contract of mobile data subscription, concluded between the client and Orange România SA, for a certain price and for a certain minimum contractual period of time.

As due to different reasons, the client did not pay the price agreed for a longer period of time, the services provided were ceased and subsequently, the client was sued for the payment of the outstanding amounts owed, as well as for the damages settled by the criminal clause inserted in the content of the contract, that being the moment when he requested specialized assistance in order to formulate a proper defense.

However, the action lodged to the court was not formulated on his name by the service provider – Orange România SA, but by another foreign legal entity, called SveaEkonomiCyprus Limited, a company established and organized in compliance with the legislation of Cyprus, which formulates the action on its own behalf (so not as representative of Orange România SA), being represented as manager of assets (a name used by action) by

SC Creditexpress Financial Services SRL, a Romanian legal entity and which is also represented by the company's manager, Janos Lepedus.

This fact is justified by the fact that a **contract of claims assignment** was signed by Orange România SA and SveaEkonomiCyprus Limited, a contract by which there were transferred the rights and obligations resulted from several contracts of mobile data subscription, among which the contract concluded with the client.

Furthermore, it is noted that an agency contract was signed between SveaEkonomiCyprus Limited and SC Creditexpress Financial Services SRL, by means of which the latter *was authorized to collect the claims*, and that for this purpose it is entitled to carry out all the legal necessary formalities.

As evidence, there were submitted to the case file the contract of mobile data subscription concluded between the client and Orange România SA, the framework contract of claims assignment between Orange România SA and SveaEkonomiCyprus Limited, an authentic power of attorney by which SveaEkonomiCyprus Limited authorizes SC Creditexpress Financial Services SRL for representation in the procedure of debt recovery, as well as Certificate of good standing issued by the Trade Register Office attached to Bucharest County Court concerning SC Creditexpress Financial Services SRL.

From the content of the Certificate of good standing issued by the Trade Register Office attached to Bucharest County Court concerning SC Creditexpress Financial Services SRL, it appears that Ceiadriatic Limited, with a rate of 99.07% (a company of Cypriot nationality, registered office situated in Cyprus) and Credit Express Group BV, with a rate of 0.93% (a company of a Dutch nationality, registered office located in Netherlands) are associates. The main activity of SC Creditexpress Financial Services SRL consists of – Activities of collection agencies and credit bureaus (offices) (NACE code 8291), at the same time other secondary activities are registered.

2) FACTORING

Studying the specialized doctrine and practice concerning the sale of claims, it is obvious that it is unanimously accepted the definition according to which the factoring operation represents the sale of credits to a company, at a reduced price, to a factor assuming then the credit risk of the debtors disposed.

Another definition given is the one according to which **Factoring** is the contract concluded between a party, named *adherent* and a bank company or a specialized financial institution, named *factor*, by which the latter ensures the financing, the pursuit of claims and the preservation against the credit risks, while the adherent gives up to the factor, as a sale, the claims arisen from the sale of goods or supply of services for third parties.

Generally, the **factoring operation is perceived as a sale of claims**, where the risk related to the payment of the claims to the debtors is entirely transferred to the factor, while the factor has no right of recourse in relation to the transferor if the payments are not made by the debtors.

In compliance with the provisions set out by art. 18 (1) letter b) of the Government Emergency Ordinance no. 99/2006 concerning the credit institutions and capital adequacy, with its subsequent amendments and completions – ***the factoring activity with or without recourse, is qualified as being a lending activity and thus, it is subject to the approval of the National Bank of Romania, under the conditions of the law.***

Analyzing the official Internet page of the National Bank of Romania, one notices there is a special section for the companies authorized to carry out factoring-type lending activities, but neither SC Creditexpress Financial Services SRL, nor SveaEkonomiCyprus were registered on this list.

Under these conditions, it became more than clear that even though SveaEkonomiCyprus Limited represented by SC Creditexpress Financial Services SRL *carries out factoring-type lending activities, none of these entities is authorized to this end.*

If we assumed that SveaEkonomiCyprus Limited was also authorized to carry out lending/factoring activities in Cyprus, the country where its main registered office is recorded, *it also had the obligation to notify the National Bank of Romania concerning the development of the lending activity on the Romanian territory*, pursuant to the provisions stipulated by article 18 letter b) – 1) of the Government Emergency Ordinance no. 99/2006 concerning the credit institutions and the capital adequacy, but according to the checks performed by the author, this notice was never submitted.

There has to be mentioned that the analysis of the official Internet page of the National Bank of Romania provides fair, complete and permanently updated information, based on the principle of transparency and prudential surveillance that was highlighted both by the Committee of Basel for the banking supervision and by the provisions of the European specific legislation (*Directive 2013/36/EU on acces to the activity of credit institutions and the prudential supervision of credit institutions and investment firms amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC*). Article 143 (1) of Directive 2013/36/EU stipulates the explicit publication requirements for the supervisory authorities from the Member States in order to ensure the uniform character and the comparability of the information published between the countries of the European Union.

For this purpose, the *European Banking Authority (EBA) developed a standard web structure of the publication requirements* addressed to the supervisory authorities from the Member States and elaborated the technical standards for the implementation of the publication requirements provided by article 143 (1), establishing the *format, the structure, the content and the date of the annual publication*. The mock-ups with information that are found in this section need to be identically implemented on the web page of each supervisory authority. The Internet page of EBA is an electronic register of the centralized data allowing to quickly compare all relevant pieces of information, while the Internet pages of the supervisory authorities shall supply exhaustive and detailed data, according to the requirements provided by Directive 2013/36/EU.

As the provisions of the special law (Government Emergency Ordinance no. 99/2006 on the credit institutions and capital adequacy) are restrictive, namely the development of the factoring-type activity impose the fulfillment of certain rigorous conditions and which are checked when accredited by the National Bank of Romania, - SveaEkonomiCyprus Limited represented by SC Creditexpress Financial Services SRL preferred to choose in favour of the general provisions of law in the matter of the contract of claim assignment (art. 1566 – 1592 of Law no. 287/2009 on Civil Code), provisions which are more permissive and do not imply that a special permit be obtained in order to conclude such documents.

But, *it is not allowed to opt in favor of a general law if there is a special law*, being construed not only as an abusive practice, but fundamentally an illegal one, therefore in the specific given care, SveaEkonomiCyprus Limited represented by SC Creditexpress Financial Services SRL cannot defend on the grounds that according to the parties' agreement, the contract of claims assignment was concluded under the conditions set out by the Civil Code.

The High Court of Cassation and Justice also pronounced in this respect, declaring that the removal from the application of the general law whenever there exists a special provision in a given matter, does not have to be explicit, being understood, as it is a direct consequence of the *specialiageneralibusderogant* principle. As a result of this principle, it is not allowed the parties' agreement which imposes the application of the general law, removing from application the special and more restrictive provision, considering the limits instituted by the provisions set out by art. 5 of the Civil Code, where the freedom to contract parties may be exerted. In this case, the parties of a sale-purchase agreement concluded during the privatisation procedure specified that the liability for eviction of the seller shall be entailed under the conditions of the common law – art. 1336 and the following of the Civil Code, and, in this case, the High Court decided that it is grounded the exception of action inadmissibility in establishing the liability for the eviction of the seller, due to the fact that, in this field, art. 32⁴ of the Government Emergency Ordinance no. 88/1997 comprises a special regulation of this guarantee obligation. (Decision no. 962 of 12th March 2014 pronounced on appeal by Civil Section II of the High Court of Cassation and Justice, as the object consisted of claims).

Hence, we notice a first contravention of the law committed by SveaEkonomiCyprus Limited, which by concealing (hiding) the factoring activity actually performed, by the conclusion of a contract of claims assignment founded on the provisions of the Civil Code, avoided the rigors of the provisions laid down under the Government Emergency Ordinance no. 99/2006 regarding the credit institutions and capital adequacy, while by articles 10 and 11 it is specified that in order to carry out the activity in Romania, each credit institution has to hold a permit according to the present emergency ordinance, that the National Bank of Romania settles by regulations and notifies the European Commission upon the conditions when it may grant the permit and the documentation that need to accompany the request for the permit, but also the fact that the National Bank of Romania cannot grant the permit to a credit institution, if it does not possess distinct own funds or a level of the initial capital at least equal to the minimum level established by regulations, which cannot be lower than the equivalent in lei of Euro 5 million.

Under these conditions, a first aspect necessary to take into account in this study, is that SveaEkonomiCyprus Limited represented by SC Creditexpress Financial Services SRL, ***by frauding the law, carries out an illegal activity on the territory of Romania***, and which pursuant to the provisions of article 410 of the Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy – ***represents an offence and it is punished with a prison sentence from 2 to 7 years***.

3) NON-RESIDENT COMPANY – ISSUE OF THE CORPORATE TAX OWED

In compliance with the provisions of the Fiscal Code – (Law no. 571/2003 regarding the Fiscal Code, in force on the date when it was analyzed, respectively the date when it was demanded that the client be compelled to pay the amounts specified by the action in 2015), article 115 (1) letter k) and article 116 (2) letter d) state that if a non-resident obtains income from services supplied in Romania, irrespective of their nature, the application of a tax rate of 16% is imposed (corporate tax), by withholding at source when the income payment and then transfer to the budget are made up to the 25th of the following month.

If the non-resident company submits a ***certificate of tax residence, there shall be applied the provisions of the Convention for the avoidance of double taxation signed between Romania and Cyprus*** (ratified by the Decree no. 261/1982, published in the Official Gazette of Romania no. 66/182, effective date 1st January 1983), a fact which shall make the income earned be subject of the regime provided by art.7 point 1 of this legal act. – The benefits of a

state enterprise of a contracting state are taxable only in that state, apart from the case when the enterprise performs activities in the other contracting state by a permanent establishment found in that state. If the enterprise carries out activities in this way, the benefits of the enterprise may be imposed in the other state, but only as long as they may be assigned to that permanent establishment.

With other words, if the non-resident company without a registered establishment in Romania, shall submit a certificate of tax residence issued by the authorities of Cyprus, then the *income earned in Roomania shall be taxed only in the state of residence*, i.e. Cyprus, while the income payer has no obligation.

Pursuant to the contract of claims assignment concluded between Orange România SA as assignor, on one hand, and SveaEkonomiCyprus Limited as assignor, on the other hand, it is shown that the object of the contract is represented by the assignment of claims represented by the amounts of money to be collected, respectively the payment obligations due and unfulfilled by the clients of the assignor together with their accessory liabilities, as they are pointed out by the service contracts concluded (point 1.1. of the contract).

Likewise, by the same contract it is underlined that the assignee engages himself to open a bank account for the collection of payments from debtors and to pass it on to them (point 8.4 of the contract), thus being able to collect directly the equivalent amount of the debits from the author's client.

As SveaEkonomiCyprus Limited shall cash in directly the debit owed by the client (resident physical person in Romania), without submitting a certificate of tax residence issued in the country of residence (Cyprus), it is crystal clear that this company shall cash in payments made in Romanai by circumventing the legal provisions stipulated by article 115 (1) letter k) and article 116 (2) letter d) of the Fiscal Code (old), his fact being a circumvention of the payment obligations of the corporate tax, being considered by the legislator an offence of *tax evasion*.

Thus, the company SveaEkonomiCyprus Limited not residing in Romania, carries out activities of tax evasion under the umbrella of a contract of claims assignment concluded apparently observin the legal provisions, but under the conditions when the debit would not have been assigned but collected by Orange România SA, then the latter would have been obliged to pay in Romania the corporate tax.

4) COLLECTION OF CLAIMS WITH VAT INCLUDED

By the contract of claims assignment, the assignor Orange România SA assigns its rights to collect the claims represented by the amounts of money to cash in, respectively the payment obligations due and not fulfilled by the assignor's clients together with their accessory obligations, as they are specified by the service contracts concluded (point 1.1 of the contract).

To this end, the assignor Orange România SA shall communicate to the assignee SveaEkonomiCyprus Limited all supporting documents for the claims assigned (point 7.1 of the contract), stating further that the amounts paid in order to settle the claims assigned, after the moment of assignment, *directly to the assignor's bank accounts, shall be transferred in the assignee's account* (point 7.5 of the contract), i.e. in other words, if the author's client shall pay the debit directly in the account of Orange România SA after the date when the claim assignment took place, then Orange România SA shall transfer the amount paid in the account of SveaEkonomiCyprus Limited.

By the action formulated and lodged to the court, SveaEkonomiCyprus Limited. demands that the author's client be compelled to pay the amounts owed by him based on the mobile data supply service contract, respectively the invoices issued monthly and unpaid, the delay penalties and damages for the early termination of the contract (before the expiry date of the contract provided by the contract of 24 months).

For this purpose, it is necessary to take into consideration that *the invoices issued monthly by the assignor Orange România SA include VAT*, while by the contract of claims assignment, the whole claim is passed to SveaEkonomiCyprus Limited, i.e. even the amounts of money representing the VAT, a fact that results without doubt even from the action formulated, namely, it is demanded that the author's client be compelled to pay the entire amount, so even the amounts representing the VAT.

We also mention that in accordance with the provisions of art. 137 of the Fiscal Code (old) – the penalties and damages owed for the total or partial non-fulfilment of the contractual obligations, if they are perceived over the prices or fees negotiated, as well as the interest perceived after the delivery or supply date, for delayed payments, - do not pertain to the tax base for VAT, so in the given specific case, the amounts of money consisting in VAT are only those calculated for the amounts owed each month for the services provided.

In compliance with the provisions of art. 153 (4) of the Fiscal Code (old) – *a taxable person who is not established in Romania, nor registered for VAT purposes, shall apply for the registration for VAT purposes to the competent tax authorities for operations carried out on Romanian territory* which entitle the tax deduction, while according to the provisions of art. 153(6) of the Fiscal Code, a taxable person established in Community, but not in Romania, but who has the obligation to register for VAT purposes in Romania, may fulfil this obligation by appointing a *tax representative*.

Still, the assignee company, SveaEkonomiCyprus Limited although carries out taxable operations on Romanian territory, being a taxable person pursuant to the provisions stipulated by art. 125 index 1 of the Fiscal Code, did not register for VAT purposes and did not appoint a tax representative in Romania.

By the fact that by the action lodged to the court it demands that the author's client be forced to pay the amounts of money representing the VAT, but also by the fact it assigned a claim containing VAT, - SveaEkonomiCyprus Limited is compelled to pay VAT in Romania (of course, after making the deductions permitted by the law), but instead of it, the *amounts that will be recovered are directly wired in the account of this company without paying VAT in Romania*, consequently SveaEkonomiCyprus Limited avoids the payment of VAT by breaking a legal obligation, being thus met the conditions of committing the act of tax evasion.

5) CONCLUSIONS

After the author's client did not observe the contractual obligations concluded with Orange România SA, concerning the payment of the monthly invoices for the services provided, the contract was terminated earlier, being applied to him including delay penalties and damages.

Subsequently, a contract of claims assignment was concluded by Orange România SA and SveaEkonomiCyprus Limited, a contract by which there were transferred the rights and obligations arisen from several mobile data subscription contracts, among which the contract concluded with the client, the latter being sued for the whole amount owed.

The *claim assignment is illegal* under the aspect of not observing art. 18 (1) letter b) by the Government Emergency Ordinance no. 99/2006 concerning the credit institutions and capital adequacy, related to the fact that SveaEkonomiCyprus Limited is not authorized by the National Bank of Romania, nor by the national bank from the country of residence, in order to carry out factoring activities, and which according to the provisions of article 410 of the same legal act – represents an offence and which is punished with prison sentence from 2 to 7 years.

Under the conditions when SveaEkonomiCyprus Limited cashes in directly from the debit owed by the client (a resident physical person in Romania), but without paying the tax on the income gained in Romania, or without submitting a certificate of tax residence issued by the country of residence (Cyprus), it means that this company perpetrates the *offence of tax evasion*.

Although the assignee company SveaEkonomiCyprus Limited carries out taxable operations in Romania, being a taxable person, *it did not register for VAT purposes and did not appoint a tax representative in Romania, still it collects Vat but it does not pay to the Romanian state the positive difference left after deduction*.

Of course, both the corporate tax and the VAT are calculated in case of the company SveaEkonomiCyprus Limited on the difference resulted from the price of assignment (price paid by Orange România SA) and the claim recovered.

The operations made by some companies registered in countries of the European Union with a reduced taxation, represents an option more and more used even by the resident persons in Romania, being called in the grey area of the economy as being an operation of *tax optimization*.

Situated in the north-east part of the Mediterranean Sea and south of Turkey, Cyprus is the largest island from the east of Mediterranean and, at the same time, the country occupying the third position in the top of the smallest EU countries, following Malta and Luxembourg. Cyprus adhered to EU as an island divided de facto, but its surface is totally a territory of the European Union.

The attractiveness of establishing a company registered in Cyprus *represents an optimal variant related to the fact that in this country the corporate tax is of only 12.5%, the dividends are not taxed, VAT is of 0% in case of the service deliveries to the Member States of the European Union*, (actually, most of the international transactions are exempted from VAT), no rules are set concerning the level of debt, the expenses are wholly deductible, the alienation of the securities are not taxed, etc.

But under the conditions when an activity is carried out in Romania by a non-resident company, by avoiding the imperative legal provisions and implicitly by evading the payment of the tax liabilities, *it does not represent a tax optimization, but an act of tax evasion*, committed under the umbrella of some apparently legal acts and contracts.

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