Mihaela Tofan
Irina Bilan
Elena Cigu
(editors)

EUFIRE 2022

European Finance, Business and Regulation. Challenges of Post-Pandemic Recovery

EDITURA UNIVERSITĂȚII „ALEXANDRU IOAN CUZA” DIN IAȘI

Mihaela Tofan • Irina Bilan • Elena Cigu
(editors)

European Finance, Business and Regulation.
Challenges of Post-Pandemic Recovery

EUFIRE 2022

"With the support of the Erasmus+ Programme of the European Union"

Co-funded by the
Erasmus+ Programme
of the European Union

„This project has been funded with support from the European Commission. This publication reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein."

This volume is the result of the project Jean Monnet CHAIR European Financial Regulation, reference no. 574702-EPP-1-2016-1-RO-EPPJMO-CHAIR, supported by the Erasmus+ Programme of the European Union, and reunites a selection of the papers presented at the International Conference on „European Finance, Business and Regulation - EUFIRE 2022", organized at Alexandru Ioan Cuza University of Iasi, Faculty of Economics and Business Administration, in May 2022.

Scientific advisors:
Professor Ph.D. Alin Marius Andrieș
Associate Professor Ph.D. Cosmin Flavius Costaș

ISBN online: 978-606-714-720-9

700109 – Iaşi, str. Pinului, nr. 1A, tel./fax: (0232) 314947
http://www.editura.uaic.ro e-mail: editura@uaic.ro
Director: prof. univ. dr. Constantin Dram

Mihaela Tofan • Irina Bilan • Elena Cigu

(editors)

European Finance, Business and Regulation. Challenges of Post-Pandemic Recovery

---

EUFIRE 2022

EDITURA UNIVERSITĂŢII „ALEXANDRU IOAN CUZA” DIN IAŞI
2022

Mihaela TOFAN is full professor at Alexandru Ioan Cuza University of Iași, Faculty of Economics and Business Administration - Department of Finance, Money and Public Administration and litigant lawyer. She has a degree in legal sciences from the Law Faculty of Alexandru Ioan Cuza University of Iași (1999), PhD. in legal sciences from the University of Bucharest (2008) – Faculty of Law and habilitation in administrative science from Babeș-Bolyai University of Cluj-Napoca. She is Professor Jean Monnet, director of the Jean Monnet Chair European Financial Regulation EUFIRE (eufire.uaic.ro) and member of the Center of Excellence in European Studies, within Alexandru Ioan Cuza University of Iași. She is Fulbright alumni, Emile Noel Senior Fellow at the New York University School of Law (2019), ERASMUS professor and invited guest for research and teaching at universities in Italy, Turkey, Cyprus, Portugal, France, United Kingdom, Spain, Czech Republic, Poland, Ukraine, Republic of Moldova, Iceland, Israel, United States of America and Germany. She is the author, co-author and editor of 20 volumes and 65 articles in volumes and journals indexed in international databases. Her expertise areas are EU Law, tax harmonization and Business Law.

Irina BILAN holds a PhD. in Finance from the Faculty of Economics and Business Administration, Alexandru Ioan Cuza University of Iași. She is currently associate professor at the Department of Finance, Money and Public Administration, within the same faculty. Her area of expertise includes public finance, international finance, and money and banking systems. She performed research and documentation visits at Paris Dauphine University (France, 2010), University of Poitiers (France, 2015), University of Bolton (the United Kingdom, 2018), University of Zaragoza (Spain, 2018) and University of Michigan-Flint (the USA, 2019), and taught within the Erasmus programme in Italy, Turkey, Kazakhstan, Belgium, Spain, Morocco, Kyrgyzstan, Egypt, Croatia and Vietnam. She attended training programs on the subject of "Management of tertiary activities" (2011), "SAP, ERP and School Management" (2011-2012), "Didactics of teaching humanities" (2012), "Panel data econometrics" (2018). She published as an author or coauthor a book, several book chapters, and more than 70 papers in journals indexed in international databases or volumes of national and international conferences.

Elena CIGU, PhD. (in Finance), is associate professor at the Faculty of Economics and Business Administration of Alexandru Ioan Cuza University of Iași, Romania. She researches in the field of European studies since 2004, on local tax law, and in the field of Public Administration since 2004, on local administrative and financial autonomy in the EU countries. Her research involved a postdoctoral fellowship on financial autonomy and implications on the sustainable development of local communities in the knowledge society. She had research mobilities at the University of Bolton (the UK) and at the University of Parma (Italy). She authored and co-authored 10 books, along with over 40 articles published in journals indexed in international databases, 60 articles published in conference proceedings, and attended over 70 international conferences. She has experience in project management as director or member in several structural and research projects (such as Erasmus+, Erasmus Mundus, POSDRU, POCU, UEFCSDI, CEEX), in the organizing committee of 10 international conferences and in international teaching through Erasmus and Erasmus+ programmes. Her teaching activities have focused so far on local public finance and public administration.

TABLE OF CONTENTS

FINANCIAL FRAUDULENT REPORTING USING EXPENDITURE FOR CONSULTANCY SERVICES. ROMANIAN LAW AND JURISPRUDENCE

MIHAELA TOFAN
Alexandru Ioan Cuza University of Iași
Iași, Romania
mtofan@uaic.ro

Abstract
The financial fraudulent reporting includes the use of methods and mechanism to reduce the tax liability, diminishing the tax amount either by increasing the deductible expenses artificially or by cosmeticizing the non-deductible expenses into false deductible. The paper evaluates the tools used in practice to qualify the expenses incurred for the provision of consulting services used by companies, in the context of Romanian taxation and the trends manifested in international taxation. Considering the very diverse nature of the points of view expressed in relation to this subject, the present analysis carries out an evaluation from a theoretical and jurisprudential point of view of the arguments used to establish the (non)deductibility for this category of expenses. Identified solutions are presented in the context of the volatility of the regulations at the national level, noting the stability of the interpretations given in the solutions pronounced by the national courts, but also the edifying role of the interpretations made by the Court of Justice of the European Union, even when the pending litigation does not explicitly address the issue the tax treatment applied to the amounts spent as consultancy.
Keywords: *deductible expenses; consulting services; jurisprudence.*
JEL Classification: B34, K40

1. INTRODUCTION

From a fiscal point of view, the concept of deductible expenditure is strictly related to the calculation of the fiscal result, that is, to the fair identification of the amount to which the profit tax rate is applied to determine the payment amount to the state budget. It is implicit that, if a taxpayer incurs a large volume of expenses qualified as deductible, the profit/net income tax will be correspondingly reduced. This is the justification for the increased interest of business entrepreneurs in classifying as "deductible" for as many of the incurred expenses as possible.

On the contrary, for the collection of important sums to the state budget, the opposite behaviour is justified, namely the tendency to limit or exclude the deductibility of expenses that are not objectively justified in relation to the particularities of the respective business. In other words, establishing the

deductible nature of the expenses incurred by a taxpayer always requires a complex and thorough analysis, from both points of view highlighted above, by interpreting the relevant legal norms and with reference to the jurisprudential interpretations formulated in situations brought to judgment.

In accordance with the applicable legal provisions, not all expenses incurred by an entrepreneur are deductible from the calculation of the profit tax. Based on the European Union member countries sovereign right to rule taxation (Tofan, 2022), there are large differences in the fiscal treatment for the deductible expenses.

Because of the flexibility of the economic reality that we face, Romanian tax legislation is very volatile, including in this area that we are analysing, and the regulations in the Fiscal Code have redefined the general principle of deducting expenses. If until 2016, the deductibility is interpreted through the lens of the purpose pursued at the time of the respective expenditure, being the expenses incurred to obtain taxable income, after January 1, 2016, the condition of deductibility is considered fulfilled if these expenses are carried out for the purpose carrying out the activity of the respective entrepreneur (Tofan, 2016). The legislative amendment was justified by the need to clarify the application of the previous regulation, certain expenses being unnaturally excluded from the deduction. In other words, the new expanded definition would benefit taxpayers by ensuring uniform and simpler tax treatment in all possible cases.

In this context, our analysis aims to identify the fair ways of qualifying the deductibility of consulting expenses for the identification of taxable profit, in the case of taxpayers targeted by this tax treatment from the Romanian authorities. Methodologically, the work aims at an analysis from a theoretical perspective, but also from a jurisprudential point of view, considering the analysis of the points of view formulated in the solutions pronounced by the national courts and those pronounced relatively recently by the Court of Justice of the European Union. At the level of European jurisprudence, the subject is treated indirectly, there being no uniform provisions regarding the method of establishing fiscal obligations regarding the taxation of businesses. At the same time, the impact of the amendments adopted in the Fiscal Code of Romania, starting from January 2016, regarding the classification of consulting expenses made by enterprises, from the perspective of the objectives established at the time of the adoption of the legislative amendments, is evaluated.

The paper is organized starting from the analysis of the opinions expressed in the national doctrine on this subject (section 2), continues with the analysis of the qualification of the deductibility of consultancy expenses at the legislative level (section 3), but also jurisprudentially (section 4), and ends with highlighting the conclusions drawn from the research carried out (section 5), in the context of formulating some limits of the investigation carried out and some future directions of analysis.

2. STATE OF ART ON DEDUCTIBLE EXPENSES QUALIFICATION BY DOMESTIC LITERATURE

In the doctrine it is noted that tax systems allow a taxpayer to a certain extent to analyze the normative spectrum, most of the time by using a tax consultant, for different solutions to implement his economic and, implicitly, tax policy (Tanzi and Zee, 2001). Implicitly, when calculating the fiscal result, fiscal optimization aims to include the expenses made as widely as possible within the scope of deductible expenses, although not every expense highlighted in the taxpayer's accounting is implicitly also tax deductible (Burns and Krever, 1998; Costaș, 2021). At the same time, the digital economy is associated with major challenges for the international tax system and traditional tax laws are governing new ways of conducting business (Șaguna and Tofan, 2010) and current international tax law and its underlying principles "may not have kept pace with changes in global business practices" (Olbert and Spengel, 2017). Taxpayers use various methods and mechanisms to justify the deductibility of consulting expenses, a subject that is even more important in the case of related parties (OECD, 2014).

To reduce the tax burden (Costaș, 2019), the taxpayer is free to use all the levers deriving from the freedom of management:

- the right to reduce the tax burden, the taxpayer avoiding creating taxable matter; this means that each taxpayer benefits from the freedom to choose between making or not making a profit;
- the right to opt for the solution that generates the lowest tax, subject to its legality;
- the right to be wrong. It is accepted that, in business, every entrepreneur has the inalienable right to make mistakes, to get involved in inherent businesses resulting in losses, negative economic results, etc.

The use of these mechanism is strongly criticized by the fiscal authorities, strongly debated and motivated by the taxpayers and ultimately justified by the courts, among which the opinion presented by the Court of Justice of European union is mandatory for all European Union member countries and prevails in any subsequent litigation (CJEU, 2019).

Implicitly, the doctrine in the field shows that a taxpayer can contract any services that have a "connection" with the "purpose of the activities carried out", but the analysis is so coarse that it serves no purpose (Tofan, 2019a). At the same time, this margin of interpretation can also lead to new approaches from the tax authorities, because, along with the change in the definition of the general principle, the old provisions were also eliminated, including from the law enforcement norms that contained examples and clarifications that both control authorities and taxpayers used them in the analysis of management and consulting expenses (Coștaș, 2020). Management and consulting expenses have generated different interpretations and points of view for practitioners and

representatives of tax authorities, both based on the provisions in force until 2016 and on the side of the new provisions, with no uniform opinions or case solutions with interpretative value being outlined mandatory (Tofan, 2019b). At the same time, however, the interest of some clarifications is justified by the relatively frequent use of consulting services in the activities carried out in the current context, the paper contributing to the enrichment of the literature in the field.

3. MEANS TO ESTABLISH DEDUCTIBLE TREATMENT FOR CONSULTANCY EXPENSES FOOTNOTES

After the year 2016, the expenses for consulting services are not qualified as non-deductible, nor are they found with explicit provisions in the methodological rules for the application of the Fiscal Code (Lazăr, 2016). The only principle that must be respected is aimed at carrying out the economic activity, according to art. 25 para. (1) from Law no. 227 regarding the Fiscal Code and are based on supporting documents, according to Law no. 82/1991.

As mentioned before, the internal regulations regarding the principle of qualifying deductible expenses have undergone important changes, starting on January 1, 2016. In addition to the modification of the general principle of deductibility of expenses, two articles widely used in the practice of tax authorities have been removed, respectively art. 21 para. (4) lit. f) C. fiscal. regarding the supporting documents, drawn up in accordance with the formal accounting regulations, and art. 21 para. (4) lit. m), which, indirectly, also constituted the legal basis of the supporting rules for the deductibility of management, consulting, and service expenses, such as existence of the written contract, proof of execution, necessity of the purchased service, etc. (Bufan, 2016).

From a tax point of view, expenses can be deductible, partially deductible, or non-deductible (Tofan, 2016). The regulations of the Fiscal Code are corroborated with the provisions of the Fiscal Procedure Code, which provides, in art. 73, that the burden of proof to prove the fiscal situation rests with the taxpayer. Since, from an accounting point of view, the records are operated only based on supporting documents, a regulation that was not changed simultaneously with the changes included in the Fiscal Code, in 2016, the list of previously used documents, from an accounting point of view, remains valid.

This list includes supporting contracts for registered expenses, statements of works for service contracts, receipt minutes for joint venture contracts, work reports, feasibility studies, market studies or any other appropriate materials. Even if the tax legislation does not expressly provide for them, these documents should exist to justify the accounting records and, being at the disposal of the taxpayer who bears the burden of proof for establishing the tax situation, they will implicitly be used to prove the deductibility of expenses, including for the

qualification of services of consultancy generating expenses recorded in the company's accounting (Bufan, 2018).

According to art. 25 Fiscal Code, the difference between deductible and non-deductible expenses depends, first, on the objective pursued at the time of their realization. The rule included in the regulatory text provides that "expenses incurred for the purpose of carrying out the economic activity are considered deductible expenses". As a result of the specialization of the legal capacity for legal entities, the purpose of the economic activity carried out must be in accordance with the business object of the enterprise. A deductible expense for a company is not necessarily tax deductible for another legal entity, which has a completely different object of activity. According to the relevant literature in this field (Gurău, 2017), other categories of deductible expenses expressly mentioned in art. 25 Fiscal Code, which can justify, even indirectly, deductible expenses with consulting services, include:

- expenses incurred for safety and health at work, according to the law;
- the expenses incurred in order to comply with the compensation obligations provided for by the Government Emergency Ordinance no. 189/2002 regarding compensatory operations related to procurement contracts for defense needs, public order and national security, approved with amendments and additions by Law no. 354/2003, with subsequent amendments and additions;
- expenses incurred by economic operators with the evaluation/reevaluation of tangible fixed assets that belong to the public domain of the state or administrative-territorial units, received under administration/concession, as the case may be, expenses incurred at the request of the head of the institution holding the property right;
- the expenses incurred by economic operators with the registration in the land registers or real estate advertising registers, as the case may be, of the property rights of the state or administrative-territorial units over public goods received under administration/concession, as the case may be, expenses incurred at the request of the head of the institution owner of the property right;
- expenses incurred for the organization and development of professional and technical education, dual pre-university and university education, according to the legal regulations in the field of national education;
- advertising and publicity expenses incurred in order to popularize the company, products or services, as well as the costs associated with the production of the necessary materials for broadcasting advertising messages;
- transport and accommodation expenses in the country and abroad and for other natural persons, provided that the respective expenses are incurred in connection with works performed or services provided by

them, for the purpose of carrying out the economic activity of the taxpayer;
- expenses for marketing, market research, promotion on existing or new markets, participation in fairs and exhibitions, business missions, editing of own informative materials;
- the expenses incurred with the editing of publications that are recorded as returns during the taxable profit calculation period based on the supporting documents and within the limits of the quotas provided in the distribution contracts;
- expenses representing penalty interest, penalties and damages, established within the contracts concluded, in the course of the economic activity, with resident/non-resident persons, according to their registration.

Tax authorities will focus on scrutinizing (large) payments for consultancy by their taxpayers, but have in general little information (without a specific query) on the nature of the consultant's facilities on the premises of the client. In practice therefore, their attention is mostly drawn by cases where the presence of the consultant is obvious and important (Bruggen, 2010).

Regarding the partial deductibility of some expenses, the regime of regulations in the Fiscal Code is of strict interpretation and does not include direct references to expenses for consulting services, a hypothesis in which we consider that such a qualification does not need to be analysed (European Commission, 2014).

In relation to those consulting expenses that could be qualified as non-deductible, the Fiscal Code includes only one reference regarding consulting expenses, respectively art. 25 para. (4) lit. f), which refers to management, consulting, assistance, or other services of this nature, provided by a person located in a state with which Romania has not concluded a legal instrument, based on which an exchange of information can be carried out, and which are carried out because of transactions qualified as artificial. This regulation has a very narrow scope, limited only to artificial transactions.

We observe that in the current version of the regulations, the explanations previously included in the methodological rules for the application of the Fiscal Code regarding the conditions for qualifying consulting expenses as deductible expenses are missing.

These provisions established in point 48 that to deduct expenses for management services, consultancy, assistance or other services, the following conditions must be met cumulatively, as presented in Table 1.

Table 1. Conditions to determine deductible treatment for consultancy expenses

The imperative condition	Means of justification
the taxpayer must prove the necessity of making the expenses through the specifics of the activities carried out	the justification of the actual provision of services is carried out through: - work reports, - reception minutes - work reports, - feasibility studies, - market studies - any other appropriate materials;
the services must be provided, executed on the basis of a contract concluded between the parties or on the basis of any contractual form provided by law;	

Source: author analysis

Methodological Norms for Romanian taxation expressly established that: "For management services, consultancy and technical assistance provided by non-residents affiliated with the taxpayer, when analysing the transactions to determine the deductibility of expenses, the principles in the commentary to Article 9 regarding taxation of associated enterprises in the OECD Model Convention on taxes on income and taxes on capital (OECD, 2017). The analysis must consider:

(i) the parties involved;
(ii) the nature of the services provided;
(iii) the elements for the recognition of expenses and income based on supporting documents certifying the provision of these services."

Noting the strict and objective nature of the elements considered in these previously regulated conditions and considering the time span of more than 10 years in which they have been constantly used, some pertinent comments can be deduced for their use, if only as a tool of analysis still used to establish the objectively deductible character of consulting expenses. As in the previous regulation, the evidence that a taxpayer must present to justify the deductibility of consulting expenses is very diverse, depending on the type of economic activity that it carries out. Evaluation reports, activity sheets, conclusions of the analyses carried out, feasibility studies, work reports, work reports, feasibility studies, market studies or any other materials and possibly a reception report etc. are included. In relation to the price of consultancy services, the provisions of the current regulation on transfer pricing apply, in accordance with OECD recommendations.

It is easier to identify and administer the relevant evidence to support the deductibility of consulting services, assuming that those services were provided under contracts that include performance obligations (for example, carrying out a feasibility study).

As it was shown in the doctrine, the reality of the provision of the service must not be doubled by the justification or verification of the necessity by the fiscal body, because it would represent a violation of the principle of freedom of management of the economic agent (Bruggen, 2010). Businesses often choose to outsource services that were previously performed in-house. Just as the labor legislation considers the dismissals of these categories of personnel to be justified, implicitly, the fiscal legislation should allow, in these situations, the contracting of the respective services through external parties, including in the case of providing them as consulting services (ILO, 2016). Similarly, when, within affiliated groups of legal entities, certain services are provided in their entirety, the deductibility of expenses with consulting services by the parent company or by other companies in the group of companies that has the object of activity the respective activity performed.

The amount of these expenses, which must be supported by arguments specific to transfer prices, remains under discussion, as I stated above. Some services are considered ab initio as producing minor benefits for the affiliated company (or, in the language of the OECD Guidelines, low-value adding intra-group services), given the fact that they do not represent its field of activity (OECD, 2014). The nature of the services therefore becomes important to the benefit test. However, we appreciate that the nature of the services must remain a subsidiary criterion to the organizational structure, for example, since, even in the situation where their provision does not require the use of valuable intangible assets, they may still be indispensable to the functioning of the affiliates.

At the level of cross-border economic activities, for reasons of economic optimization, the groups end up sharing certain expenses within themselves, for example, for legal, fiscal or accounting consultancy services, management, IT, advertising and others. Such services, although in principle considered provided for the benefit of the group, may be deductible including at the level of affiliated companies, if they can prove the existence of a benefit of their own. The guidelines drawn up by the OECD and refer, in this case, to the notion of a "benefit test".

From a practical point of view, any analysis of this type has as its starting point the establishment of the effectiveness of service provision. In other words, we cannot talk about the existence of benefits, of commercial/economic improvements at the level of the affiliated enterprise, if the services are not actually provided. In the same sense, the Romanian legislator also regulates, which, in the Methodological Norms for the application of the Fiscal Code, expressly provides that "the mere existence of services within a group is not sufficient, because, as a general rule, independent persons only pay for the services that were provided in fact". There are several ways to prove the actual provision of services. An indication is the organizational structure of the affiliated company itself. Thus, it must be checked whether the affiliated entities,

intended to benefit from the services, have specialized compartments for the type of service. At the micro level, the situation of the lack of specialized personnel is the same. In addition, the actual provision of services must be supported by supporting documents such as *lato sensu* service contracts, invoices, activity reports, etc., of great importance in performing the test.

The benefits test is used to determine the remuneration of intra-group services in accordance with the market value principle. The taxpayer, as well as the competent tax authorities, must consider whether the independent persons would have contracted the respective services under the same conditions established by the affiliated persons, considering the rates used on the comparable market. To derogate from the rule of the most appropriate method, the Romanian legislator, in the Methodological Norms for the application of the Fiscal Code, establishes, as a method to be used in establishing the transfer price for intra-group services, in the absence of comparable tariffs, the cost-plus method (Tofan, 2016). Even if the deductibility of VAT and the deductibility of expenses for the provision of services are not confused, there are VAT regulations that provide support regarding the documents useful for justifying the deductibility of expenses with consulting services (Costaş, 2021).

Of course, the first supporting documents for such services are the invoice and the contract for the provision of that service. In the case of services that determine successive settlements or payments, such as construction-installation services, consulting, research, expertise and other similar services, such supporting documents are considered work situations, work reports, other similar documents based on which they are established the services performed or depending on the contractual provisions, on the date of their acceptance by the beneficiaries.

In the case of service contracts, in which the client has undertaken to pay lump sums as remuneration agreed between the parties, regardless of the volume and nature of the services provided in the period to which this remuneration refers, the services must be considered performed in the period to which the payment relates, regardless of whether the provider has provided services to its customer during this period. In the case of such contracts, the object of the provision of services is not the provision of well-defined services, but the fact of being available to the client to offer him the contracted services, the provision of services being performed by the provider by the very fact of being available to the client in the period established in the contract, regardless of the volume and nature of the services actually provided in the period to which this remuneration refers.

4. JURISPRUDENTIAL LANDMARKS I N CASES REGARDING THE DEDUCTIBILITY OF CONSULTING EXPENSES

Regarding the *modus operandi*, used by the fiscal bodies for issuing tax decisions for the period 2006-2008, the analysed national jurisprudence (Romanian High Court of Cassation and Justice, 2022) holds that the taxpayer's registration of tax deductible expenses registered in analytical account "Royalty expenses-logo use", was justified by accounting documents (invoices issued by a company in France, as an explanation for the services provided, with the payment of royalty services for the use of the name and the logo, respectively the logo and the insignia of the parent company). The fiscal inspection bodies found that the use of the name was a fact imposed by the will of the sole associate since its foundation, according to the company's articles of association. Moreover, it is noted that in the contract concluded between the parties regarding the use of the name and the logo, the French company ceded both the right to use the name and the logo on the documents drawn up, as well as the necessary assistance in order to protect the name, and the bodies of tax inspection found that the amounts paid by the company in Romania for the use of the logo were treated as non-deductible for tax purposes when calculating the profit tax for a period of three years, according to the tax record register, and subsequently their tax treatment was changed, in the sense of deducting these expenses. The company in question did not present arguments, not justifying that these expenses were necessary and related to income and, based on the existing affiliation relationship between the two companies, the tax inspection bodies established the non-deductibility of these expenses and calculated the company's tax on additional profit.

In relation to the allocation of consultancy expenses, the tax authorities have assessed that the appellant company did not present supporting documents for the expenses incurred, namely work statements, reception minutes, work reports, feasibility studies, market studies or any other materials corresponding, certifying that the services were actually provided. The lack of these documents, as well as the lack of details related to the invoiced amounts and their connection with the achievement of the company's benefits, determines the inclusion of the expenses in the category of non-deductible expenses for tax purposes. Different tax treatment of the expenses applied by the taxpayer itself has been interpreted as an implicit recognition of the fact that these expenses are not deductible. Moreover, since the contract for the provision of consulting services does not explicitly include the detailing of the services offered, but only their generic designation and the obligation to be paid in proportion to the share of the company's sales in Romania, within the group to the nominated client, the fiscal inspection bodies found that the company did not present sufficient documents for the necessary nature of the expenses incurred. The lack of details related to the establishment of the invoiced amounts and their connection with the

company's income, the expenses for the provision of consulting services for research and development are non-deductible expenses. Therefore, these amounts were treated as non-deductible when calculating the profit tax.

A special hypothesis is the provision of administration and management services (consulting, management) by a holding company. Such services have a certain specificity and are circumscribed, by way of example, to the following activities: stock exchange listing of the parent company, audit services at the level of the parent company and, in general, ancillary services to corporate governance. To the extent that such services are provided by a company precisely by virtue of its quality and its associate interest, they cannot be considered services that benefit the group, which is why they cannot justify an expense at the level of the affiliated company, but only an expense at the level of the holding company.

The High Court of Cassation and Justice established that, to be deductible when calculating the taxable profit, expenses for management services, consultancy, assistance, or other services must be based on a contract concluded between the parties, be actually provided and be necessary for their beneficiary in relation to the specifics of the activities carried out. In Decision no. 740 of February 22, 2018 (Romanian High Court of Cassation and Justice, 2018), the administrative and fiscal litigation section of the High Court of Cassation and Justice noted the general nature of the documents submitted to justify deductibility (consultancy contract regarding access to European structural and cohesion funds, accompanied by annexes, orders and of the related invoices, as well as the reception minutes), which, although they refer to the general object of the contract, do not reveal, in concrete terms, what these services consisted of, given that the procedure for accessing the structural funds has a complex character, and without presenting possible work reports related to the time allocated to each service, given that the invoices were issued for hours worked, and the orders related to the contract have in mind different activities, such as project preparation/development, documentation in order to realize the project, establishing partnerships, developing projects and elaboration project-completion".

In the solution handed down on March 17, 2021 (Romanian High Court of Cassation and Justice, 2021), the court considered the complexity of the transactions within the group, concluding that, without the support services, the company would not have been able to carry out its operational activity under the same conditions, and their contracting is an expression of the principle of freedom of management, a principle guaranteed by the Constitution. This explicit mention of the principle of freedom of management should, in our opinion, contribute to changing the approach of the tax inspection bodies regarding the deductibility of consulting services, and affiliation relationships

between companies should no longer be seen as the beginning of evidence for incurring liability tax of the taxpayer.

At the level of the relevant jurisprudence of the CJEU, we mention the interpretation given by the decision of the Court of Justice of the European Union, in case C-463/14, Asparuhovo Lake Investment Company OOD (CJEU, 2015). The court held that, including in the case of consulting, legal, accounting, expertise, maintenance, service, as well as in the case of other similar services, for which no work reports or other situations are drawn up on the basis of which the provider certifies services provided, but contracts are concluded between the companies involved, it is important to establish the correct tax treatment if the beneficiary actually used or how often he used the services of the provider.

5. CONCLUSIONS

In relation to the deductibility of expenses for consulting services, in the current regulation it is essential for the taxpayer to be able to prove with supporting documents the reality of the amounts used and the necessity of the contracted services.

In the application of the principle *ubi eadem ratio eadem solutio esse debet,* the same elements must be proven if the value of the consulting services is shared between affiliated companies. It is essential not only to have the contract justifying intra-group relations, but to prove that those expenses are allocated to the tax resident taxpayer in Romania, based on objectively identified criteria and in compliance with the transfer pricing provisions. We can conclude that, in the case of intra-group advertising services, the benefit test is doubled by a proportionality test, which exactly reflects the sharing of common expenses between related persons.

Justifiably, the practitioners in the field of tax law, but also the representatives of the concerned business entrepreneurs, considered the amendment of the regulations of the Fiscal Code regarding the deductibility of the expenses of consulting services as causing effects in favour of taxpayers, by increasing the degree of flexibility of the administered evidence and including all possible scenarios subject to the regulations in force.

In our opinion, the expansion of the scope of the principle of deductibility does not automatically imply the expansion of the scope of deductible expenses regarding consulting services, and practice reveals that the prudence with which some taxpayers act, using the same type of documents previously imposed by the rules in force, has the purpose of to limit the differences in the interpretation of concrete situations by the tax authorities in relation to the qualification of those expenses, in the opinion of the controlled taxpayer.

ACKNOWLEDGEMENTS

The author acknowledges financial support from the European Commission-Erasmus Plus Program, Jean Monnet Module Project no. ERASMUS-JMO-2021-HEI-TCH-RSCH-module (EUFACT - Implementation of the online course "Fraudulent Financial Reporting" in EU Universities).

References

1) Bruggen, van der E. (2010). *International Tax Aspects of Providing Consulting Services on the Premises of the Client*. [online] Available at https://www.dfdl.com/wp-content/uploads/2010/09/International_Tax_Aspects_of_Providing_Consulting_Services_on_the_Premises_of_the_Client_TNI_2001.pdf [Accessed 11.06.2022].
2) Bufan, R. (2016). *Tratat de drept fiscal,* vol. 1. București : Hamangiu Publishign House.
3) Bufan, R. (2018). *Deductibilitatea fiscală a cheltuielilor cu serviciile prestate de către terți*. [online] Available at: https://drept.uvt.ro/administrare/files/1481042436-radu-bufan-1.pdf [Accessed 21.05.2022].
4) Burns, L. and Krever, R. (1998). Taxation of Income from Business and Investment. In: V. Thuronyi, ed., *Tax Law Design and Drafting*. Washington: International Monetary Fund.
5) CJEU, (2015). *Judgment of the Court in Case C-463/14, Asparuhovo Lake Investment Company OOD.* [online] Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=166826&doclang=EN [Accessed 10.06.2022].
6) CJEU, (2019). *Fact sheet – the deduction of value added tax*. [online] Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-06/tra-doc-en-div-c-0000-2020-202000844-05_00.pdf [Accessed 18.06.2022].
7) Costaș, C. F. (2019). *Financial Law,* 2nd ed. Bucharest: Universul Juridic Publishing House.
8) Costaș, C. F. (2020). Evidence or tax relevant clues? Discussions on a possible preliminary question in tax field. *Cluj Tax Forum*, 2(2020), pp. 64-75.
9) Costaș, C. F. (2021). *Fiscal Law*, 3rd ed. București: Universul Juridic Publishing House.
10) European Commission, (2014). *Guide to Cost-Benefit Analysis of Investment Projects Economic appraisal tool for Cohesion Policy 2014-2020*. [online] Available at https://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/cba_guide.pdf [Accessed 19.05.2022].
11) Gurău, M. (2017). Studiu privind rezultatul contabil și rezultatul fiscal. *RFPC*, 7(8), pp. 49-60.
12) International Labour Organization ILO, (2016). *Non-stardard employment around the world - Understanding challenges, shaping prospects.* [online] Available at https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_534326.pdf [Accessed 10.04.2022].
13) Lazăr, I. (2016). *Public Finance Law. Vol. I - Budget Law*. Bucharest: Universul Juridic Publishing House.

14) OECD, (2014). *Addressing the Tax Challenges of the Digital Economy.* Paris: OECD Publishing.
15) OECD, (2017). *Model Tax Convention on Income and on Capital.* [online] Available at https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-full-version_9a5b369e-en, [Accessed 10.06.2022].
16) Olbert, M. and Spengel, C. (2017). International Taxation in the Digital Economy: Challenge Accepted? *World Tax Journal,* 9(1), pp. 3-44.
17) Romanian High Court of Cassation and Justice, (2018). *Decision no. 740 from 22nd of February 2018*. [online] Available at http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=146019#highlight=## [Accessed 10.06.2022].
18) Romanian High Court of Cassation and Justice, (2021). *Decision no. 1659 from the 17th of March 2021*. [online] Available at http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=183152#highlight=## [Accessed 16.06.2022].
19) Romanian High Court of Cassation and Justice, (2022). *Decision no. 764 from 31st of March 2022*. [online] Available at http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=190268#highlight=##%20cheltuieli%20consultanta [Accessed 10.06.2022].
20) Șaguna, D. D. and Tofan, M. (2010). *European financial and fiscal law*. Bucharest: CH Beck Publishing House.
21) Tanzi, V. and Zee, H. (2001). *Tax Policy for Developing Countries.* [online] Available at: https://www.imf.org/external/pubs/ft/issues/issues27/ [Accessed 20.05.2022].
22) Tofan, M. (2016). *Fiscal Law*. Bucuresti: C.H. Beck Publishing House.
23) Tofan, M. (2019a). The Integrated Tax Group for Profit Taxation: From the Example of Good Practices to a Future Regulation Proposal. *Cluj Tax Forum,* 1(2019), pp. 9-19.
24) Tofan, M. (2019b). *European financial law*. Iasi: Alexandru Ioan Cuza University of Iași Publishing House.
25) Tofan, M. (2022). *Tax Avoidance and European Law - Redesigning Sovereignty Through Multilateral Regulation*. London: Routledge.