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COMBATING THE CRIMINAL OFFENSE OF TAX EVASION AS A KEY FACTOR IN THE FIGHT AGAINST THE “GREY” ECONOMY

Abstract

Tax liability, the interest of the social community in order to finance its vital interests, represents a legal obligation and the most important source of budget revenue. Taxpayers, feeling this obligation as a burden on their own economic position, change their economic decisions, which commit criminal acts against the economy, have a negative effect on the economy and harm the social community, affecting the amount of financing of public goods and common needs. The purpose of the article is to highlight the importance of prevention and criminal law repression in order to suppress the criminal offense of tax evasion, and all in the interest of the social community, its economic stability and the economy, by analyzing the form of threats to the fiscal system of violation of tax regulations. To that end, the first part of the article deals with the economic impact of tax evasion, the normative framework of tax evasion and their application in practice, and the second part provides a comparative overview of the causes of tax evasion and measures to combat it. The conclusion of the paper contains de lege ferenda proposals for combating tax evasion, through an institutional, legal and socio-economic framework.

Key words: tax evasion, tax liability, economic crimes, suppression measures, prevention

JEL classification: K140, K1, G190

СУЗБИЈАЊЕ КРИВИЧНОГ ДЕЛА ПОРЕСКЕ УТАЈЕ КАО КЉУЧНИ ФАКТОР У БОРБИ ПРОТИВ “СИВЕ” ЕКОНОМИЈЕ

Апстракт

Пореска обавеза, интерес друштвене заједнице у циљу финансирања њених виталних интереса, представља законску обавезу и најважнији извор прихода буџета. Порески обвезници, осећајући ову обавезу као терет сопственог економског положаја, мењају своје економске одлуке чиме чине кривична дела против привреде, дају негативан ефекат у привреди и штете друштвеној заједници утичући на износ финансирања јавних добара и заједничких потреба. Сврха чланка је да се анализом облика угрожавања

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фискалног система кршења пореских прописа истакне значај превенције и кривичноправне репресије у циљу сузбијања кривичног дела пореска утаја, а све у интересу друштвене заједнице, њене економске стабилности и привреде. У том циљу у чланку су првом делу применом анализе и статистичког методе обрађени економски утицај пореске утаје, нормативни оквири пореске утаје и њихова примена у пракси, а у другом делу је дат упоредни преглед узрока пореске утаје и мера за њено сузбијање. Закључак рада садржи предлоге де леге ференда за сузбијање пореске утаје, кроз институционални, правни и социо-економски оквир.

Кључне речи: пореска утаја, пореска обавеза, привредна кривична дела, порески деликти, узроци и мере, финансијски интерес

Introduction

The fiscal system (tax and customs system) in addition to the system of public revenues and expenditures represents a financing system, which can be violated by tax evasion and other economic crimes. Since the harmful consequences of tax evasion and other tax crimes are not immediately visible or transparent, taxation, i.e. tax liability and tax evasion, represent a sensitive and important issue which the author approaches in the article from an economic and legal perspective. Tax evasion, the most difficult form of tax evasion, viewed as socially dangerous and legally prohibited behavior, which harms the interest of the social community (Ђerek, 2003), requires special attention and discussion by experts. For this reason, the article pays special attention to the normative framework of the Republic of Serbia and the presence of tax evasion in practice.

We should not ignore the fact that tax evasion produces harmful consequences for the country's fiscal system (Јовашевић, 2018), but also the interests of individuals through the financing of public needs. Although the modus operandi of taxpayers who generate income in an illegal manner deserves social condemnation, this does not diminish the fact that the economic power of the taxpayer has increased through the realization of tax offenses and the criminal offense of tax evasion. "Despite the fact that public goods are financed with taxes, a number of taxpayers resort to behaviors that have characteristics of tax avoidance (tax evasion)" (Димић, 2021, 79), which is one of the reasons for the importance of studying such phenomena.

The impact of tax evasion on the economic system

The reason for the increasing attention paid today to the problem of tax evasion (Ј. Шимиовић, Роговић Луговић, Синдори, 2007) and thus to the gray economy, lies primarily in the possibility of serious consequences for the formation of an appropriate economic policy (Ловринчевић, Марић, Микулић, 2006). The high level of tax evasion and the low level of processing of this part leads to the achievement of lower state revenues compared to the planned, when the state can choose between reducing expenditures or abandoning the financing of a public good, or to increase tax obligations in order to achieve the

planned financing. In the case of an increase in tax liabilities, the state directly affects the economic strength of “conscientious” taxpayers, reduces competitiveness, increases costs and creates the possibility for the growth of the gray economy. In theory, we come across the opinion that illegal evasion is one of the key examples of the existence of the gray economy (Matković, 2007).

The most important and most elaborate part of the fiscal system is the tax system, where taxes make up the majority of public revenue, or rather 95% of the republic’s budget. The purpose of taxes, direct public revenue, is to cover the financial needs of the state and achieve economic and social goals. The same can be achieved through literacy and financial education (Milićević et al. & Jovanović, 2022) as prerequisites for using financial opportunities (Barjaktarević Rakočević, Rakić, Ignjatović, Stevanović, 2021). First of all, with a successful tax policy, we can alleviate the macroeconomic imbalance, i.e. reduce the foreign trade deficit, tax evasion and gray economy (Gogić, 2020).

The OECD proclaims the clear definition of tax evasion as a criminal offense and the undertaking of repressive policy measures (OECD, 2017, p. 16) in order to suppress economic crime and tax crimes, given that previous research has shown large losses for state budgets due to the commission of these crimes.

Normative framework of tax evasion in the Republic of Serbia

The legal determination of tax obligations preceded the standardization of tax evasion. We still find the obligation to pay taxes in ancient civilizations (Karličić, 2015), and the provisions about it in the form of payment of imperial income (Novaković, 1870) are found in Dušan’s Code (Dušan’s Code 1349 and 1354). In order to ensure smooth functioning of tax payment, the same obligation is regulated by the Constitution (Article 91 of the Constitution of the RS), according to which tax payment is based on the ability to pay principle. Normation of tax evasion as a criminal offense is left to criminal legislation, with the fact that individual tax offenses are determined by tax legislation. In the period after the dissolution of the SFRY, the act of tax evasion was stipulated by tax regulations and was called “tax avoidance” (Article 172 of the Law on Tax Procedure and Tax Administration: hereinafter ZPPPA). The regulation of this offense is returned to the criminal legislation and classified as a group of criminal offenses against the country’s economy, with the adoption of the Criminal Code in 2005. The goal of prescribing criminal offenses against the economy is to protect the economic system and its functioning (Jovanović, 2022. 249). Tax evasion is a basic fiscal crime in our legal system, systematized as a crime against the economy (Jovanović, 2022, p. 251). Unlike the legal definition of tax evasion in the Republic of Serbia, in some countries this offense is a tax offense, not a criminal offense. There are also differences in the incrimination of the act and the prescribed criminal sanctions.

“Tax evasion is by its very nature a blanket criminal offense, because the provision prescribing it refers to other norms, primarily tax legislation” (Risimović, 2016). It follows that in order to prove the act of tax evasion, we need to consult other regulations that do not belong to the field of criminal law (Mrvić, Petrović, 2018). The act of the criminal offense of tax evasion can be the act of committing, not reporting or omitting, and it is carried out as one of three forms of total or partial avoidance of paying taxes,

contributions or other prescribed duties: 1) providing false information about acquired income, about objects or other facts that are from influencing the determination of such obligations 2) non-declaration of acquired income, i.e. objects or other facts that influence the determination of such obligations, for which reporting is mandatory and 3) concealment of data related to the determination of said obligations, in another way (Article 225, paragraph 1 of the Criminal Code). The obligation to fulfill some of the mentioned actions is determined by the tax law, and it is prescribed for natural and legal persons (Article 12. ZPPPA). Their legal representatives can also be found as perpetrators of tax evasion (Art. 15 ZPPPA). With such a determination of the taxpayer, we reach possible perpetrators of tax evasion.

The condition for the incrimination of this offense as a criminal offense is the amount of the obligation whose payment is avoided, and according to positive regulations, if the amount exceeds a million dinars, it is a criminal offense, while in the case of an obligation below this amount, the offense is a misdemeanor for which misdemeanor penalties and protective measures are provided. The amount of the tax liability affects the distinction between the basic and two more serious forms of the crime, and thus the amount of the criminal sanction. The legislator prescribes a cumulative prison sentence and a fine, which emphasizes the lucrative nature of tax crimes (Kulić, Milošević, 2011, p.323). By imposing these sanctions, special prevention is achieved - influencing the perpetrators not to commit this criminal act in the future. Guilt is one of the mandatory elements of a criminal offense, in terms of culpability, premeditation is required (Jovanović, 2022, p 252). The intention is sufficient in itself, and it is not necessary for the existence of the act to achieve the goal. The absence of the intention to partially or completely avoid the payment of taxes, contributions or other duties does not mean the fulfillment of the subjective element of tax evasion, and therefore there will be no criminal offense of tax evasion (Škulić, Delibašić, 2018. p 71).

The Criminal Code does not provide for a time limit for the execution of this act. The position of the Supreme Court of Cassation was accepted that judicial practice applies a period of one fiscal or calendar year when avoiding payment of income tax, while for value added tax it applies three months. This leads us to assume a lower number of prosecutions of taxpayers for tax evasion because more taxpayers will be below the limit if the fiscal year is taken into account. The inadmissibility of the possibility of collecting unpaid tax for several accounting periods by judicial practice leads to the impossibility of fulfilling the objective condition of incrimination in case of exceeding the prescribed limit. All this leads us to the conclusion that numerous perpetrators of tax evasion will not be prosecuted.

In addition to legal tax avoidance (eng. tax avoidance), tax law science also knows illegal tax evasion (eng. tax evasion) (Lovčević, 1975), which is recognized by tax law and sanctioned by criminal law. The Law on Tax Procedure and Tax Administration prescribes the determination of the tax liability by the Tax Administration using the parification method, in the event that the opposite way was realized income, ie acquired property (Article 9 paragraph 3 ZPPPA). Illegally acquired income due to the taxpayer engaging in unregistered activities will be qualified as other income and taxed at a rate of 20% (Article 85 of the Law on Personal Income Tax). Income obtained by committing a criminal offense is taxed, and property benefits are confiscated in criminal proceedings. This brings us to the issue of criminal law protection of taxes that charge illegally obtained

income through the criminal offense of tax evasion. By amending the provision that excludes the term “legally” acquired income, the problem of the opinion that illegally acquired income cannot be taxed was solved, and the Tax Administration was enabled to tax illegal income. Previously, judicial practice was faced with a paradoxical situation (Đokić, 2016. p. 748) in which the defendant would have to be freed from the accusation if he proved that the income, in relation to which the tax was to be determined, was illegally acquired (Decision of the Court of Appeal in Belgrade KŽ1 1289/2014).

This does not mean that the permissibility of taxing illegal income means its legalization, which leads to the goal of the principle of facticity - to discourage unscrupulous taxpayers from abusing legal solutions to unacceptable tax evasion. Observing judicial practice, the principle of factuality could contribute to the criminal law protection of public revenues in Serbia if its more frequent application were present in judicial practice.

Application of the normative framework in practice

In Serbia, in the period from 2007 to 2010, 384 people were convicted of the crime of tax evasion, of which 133 people were sentenced to prison terms (RZS Bulletin, 2007-2010). Based on the analysis of the data on the number of people convicted of tax evasion, we conclude that a small number of people were sentenced to prison compared to the total number of people convicted. This leads us to the conclusion that in the mentioned period the penal policy is mild. What represents the problem of this period is the wrong qualification of criminal acts.

Table 1: Reported adults by criminal offense, 2002–2011. year, Source: RGZ Bulletin, 2011.

year	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Criminal acts against the economy	2957	3221	3397	3347	2868	3333	2939	2767	2461	1814
Tax evasion	938	1132	1051	712	715	734	649	967	777	574

Analyzing statistical data for the period from 2011 to 2020, and in connection with the number of registered adults according to the group of criminal offenses - economic crimes and the criminal offense of tax evasion that belongs to this group, we see: 1) a tendency of growth until 2014, and then decrease in the number of reported criminal offenses against the economy, except in 2016 and 2) fluctuations in the number of reported criminal offenses of tax evasion, with the highest number recorded in 2012 and the lowest in 2020.

Table 2: Accused and convicted adults by criminal offense, Source: Bulletins of the RGZ, 2012-2020. year

year	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Criminal acts against the economy - accusation	1499	1589	2240	2748	2570	2375	2015	1683	1345	1166
Tax evasion - accusation	449	499	705	788	778	643	551	417	392	326
Tax evasion - condemnation	262	246	290	400	449	419	392	266	274	194

Looking at the number of accused people in the period from 2011 to 2020 for criminal offenses against the economy and an individual offense - tax evasion, we see a recorded increase until 2014 and then a decrease until 2020. In relation to the number of indictments for the crime of tax evasion, the number of convictions is proportionally close to the increase or decrease, so in 2014 the highest number of indictments was recorded - 788, and in 2015 the highest number of convictions - 449. The lowest number of indictments and convictions was recorded in 2020. The causes have not been precisely determined, so it is assumed that the tax discipline of taxpayers was strengthened in 2020.

In 2011, 999 people were convicted of crimes against the economy, of which 520 were employed, which indicates the fact that the economic power of an individual, which is taken into account in the tax system for determining tax obligations and benefits, does not play a decisive role in its influence on the commission of crimes.

In 2011, out of 262 people convicted for the criminal offense of tax evasion, 212 people were given a suspended sentence, 2 people were found guilty and acquitted, and 16 people were given an explicit fine, which indicates mild sanctions in judicial practice. In 2012, compared to the previous year, there was stricter punishment by determining the prison sentence for 54 people, with the fact that only 2 people were sentenced to prison for a duration of 3-5 years. In 2015, 340 people and in 2016, 950 people were sentenced with a suspended sentence. In 2017, 33 people were sanctioned with a people sentence of 6 to 12 months. In 2018, 50 people were sanctioned with a prison sentence, of which the largest number of convicted people were sentenced to a prison sentence of 6 to 12 months. In 2019, 34 people were sentenced to prison, of which 13 convicted people were sentenced to prison for 1 to 2 years, and 11 people to prison for 6 to 12 months. In 2020, 25 people were sanctioned with imprisonment, of which 11 people were sentenced to imprisonment for a period of 6 to 12 months. By looking at the statistical data, we come to the conclusion that the judicial practice of the courts in Serbia regarding the imposition of criminal legal sanctions is mild, that a large number of people were sentenced with a suspended sentence, which would mean that these are people who have been criminally prosecuted for the first time. In the second decade, the suspended sentence is replaced by a prison sentence, and it is generally milder, for a duration of 6 to 12 months, which leads us to the conclusion that there are more perpetrators - returnees. The assumption is that stricter punishment and repressive measures would give more effective results in terms of prevention.

Inadequate and mild punishment sends a negative message to taxpayers. The imposition of adequate penalties is important from the aspect of general prevention for the reason that tax evasion “represents a social danger that is reflected in the damage to fiscal interests because the state budget remains deprived of the evaded tax”.

Based on the presented data, we come to the conclusion that dealing with the mentioned data is necessary from the point of view of pointing out the importance of taking appropriate measures and implementing the penal policy in practice, in order to suppress the crime of tax evasion and crimes against the economy in general.

EU directives and the situation in Europe

Directive (EU) 2017/137117 on the fight against fraud to the detriment of the financial interests of the European Union through criminal law measures (henceforth the PFI Directive) adopted by the European Union foresees the obligation for member states to: prescribe as criminal offenses the most serious forms of fraud in connection with value added tax; provide adequate and efficient mechanisms for the detection of tax offenses and appropriate investigative powers of competent authorities for the prosecution of such offences; provide effective powers for confiscation of income obtained from the commission of tax offenses; precisely define the competences of the relevant national authorities; ensure effective international cooperation.

Directive (EU) 2018/84319: prescribes the statute of limitations for criminal prosecution for criminal offenses to the detriment of the financial interests of the European Union for five years and not less than three years, and obliges to take the necessary measures that enable investigation, prosecution, trial and judicial decisions for criminal acts to the detriment of the financial interests of the European Union for which a maximum penalty of at least four years of imprisonment is prescribed (Article 12 of Directive 2018/84319).

According to the report of the European Commission, the fight against tax crime is complex and requires the interaction, cooperation and coordination of the members, as well as the expansion of the powers of the competent authorities. It is demanding considering that despite the stricter sanctioning system, tax crimes are still committed on a large scale and have negative effects on the financial system. A large number of countries, as well as the Republic of Serbia, provide for the cumulative imposition of prison sentences and fines (Macedonia, Bulgaria, France). Macedonia, Germany, Croatia and other countries prescribe harsher sentences - sentences of up to five years in prison, while lighter sentences are prescribed, e.g. Slovenia and Bulgaria.



Figure 1: VAT GAP in 2019, Source: 2021 GAP Report

The importance of the legal regulation of the tax system and the application of adequate measures and criminal protection are indicated by the data on the total income tax in the nominal amount, the gap in the EU, which in 2019 was reduced by almost 6.6 billion euros to 134 billion euros, which represents an improvement compared to the decrease from 2018 of 4.6 billion euros. The question arises of the impact of the corona virus pandemic on this downward trend. In 2019, the largest national gap in VAT compliance was recorded in Romania, with 34.9% of VAT revenue missing in 2019, followed by Greece (25.8%) and Malta (23.5%). The smallest gap was observed in Croatia (1.0%). In absolute terms, the largest VAT deficits were recorded in Italy (€30.1 billion) and Germany (€23.4 billion). Based on the data, we conclude that the share of the VAT Gap decreased in 18 member states, mostly in Croatia and Cyprus, while Greece, Lithuania, Bulgaria and Slovakia recorded a decrease of between -3.2 and -2.2 percent. In Sweden, Finland and Estonia, fiscal authorities limit the loss of VAT revenue to less than 5% of VAT. The experiences and practice of countries that have managed to limit the loss of VAT revenue for years could be guidelines for further action in the Republic of Serbia (GAP Report for 2021).

I conclude that the recommended measures for the purpose of establishing an adequate tax system and its criminal protection, and thus reducing the possibility of tax evasion, would be both in Europe and in Serbia: adequate state strategy (immediate coordination of states; appropriate coordination of tax rules of states strengthened by effective cooperation; application of principles non-discrimination in the jurisprudence of the European Court of Justice that cross-border situations cannot be treated less favorably than comparable domestic situations (COM/2006/823, 2006); harmonization between the taxation systems of countries in order to avoid double taxation and double non-taxation; introduction of minimum standards for cross-border loss relief which includes relief for losses of subsidiaries at the parent company level.

Causes of tax evasion and measures to combat it - results and discussion

It is not possible to predict and enumerate all the causes of tax evasion, which leads us to the conclusion that we cannot completely prevent tax evasion. What is possible is the classification of the causes of tax evasion into three groups: problems of institutional infrastructure, legal system and socio-economic causes. The largest number of causes can be found in the institutional infrastructure.

	CAUSES	MEASURES
INSTITUTIONAL INFRASTRUCTURE	corruption	"honest behavior"
	institutional weaknesses	-appropriate professional education of the official - education and improvement of the knowledge of civil servants -accreditation of Tax Studies within Law Faculties
	number of administrations	an efficient, fast, transparent and cheap tax administration that would collect as much tax revenue as possible
	administrative obstacles	▪ - establishing better understanding and trust between taxpayers and tax authorities; -providing information on taxes and assistance to taxpayers
	government and the ruling structure	trust in the Government and its institutions
LEGAL SYSTEM	unclear and imprecise legal provisions and legal gaps	clarity, precision and completeness of legal provisions
	frequent tax changes	stability of the tax system
	mild punishment	adequate type and severity of punishments
	insufficient supervision	- legal regulation of the institute of inspection supervision - the possibility of systematic monitoring of taxpayers
SOCIO-ECONOMIC	morals of the taxpayer	institutional equipment in raising tax morale
	amount of tax burden	fair distribution of the tax burden
	suspicion of abuse of public revenues	transparency

Research and statistical data related to tax evasion do not provide answers to the question of what are the specific causes of tax evasion, and which would enable its effective suppression.

Measures to combat and prevent tax evasion should be related to its cause and, in general, the extent of its presence in practice. It is necessary to observe the measures in their interdependence, and not individually, because that way they will give positive results. In the future, more attention should be paid to the application of preventive measures in order to make tax control more acceptable as a form of positive cooperation between the Tax Administration and taxpayers (Rapajić, Lapčević & Miladinović, 2021). We should also highlight the importance of cooperation between domestic and international tax authorities and the exchange of information between them. The adoption and implementation of the proposal for the adoption of the institution of crime prevention (Simonović, 2001) would give positive results in the prevention and suppression of the crime of tax evasion.

Conclusion

Due to the dynamism of social relations, tax crimes are subject to changes, which leads us to the need to adapt and change tax and criminal law regulations. In addition to the determination of criminal remedial measures and the pursuit of a just, socially justifiable and efficient criminal policy, engagement in the direction of prevention is necessary, with the aim of suppressing economic and tax crime. At the same time, it is necessary to foresee measures that will protect the object of protection of the criminal offense of tax evasion: the tax liability but also the fiscal system of a country. The reason for determining adequate measures and legal norms lies in the presence of problems during the prosecution of the criminal offense of tax evasion. We encounter problems during the implementation of the financial investigation and further during the process. Based on the presented norms in the Republic of Serbia, the penal policy of Serbia regarding the act of tax evasion is adequate, but despite this, the commission of this delict is present, it can be said due to the mild penal policy of the courts. The milder punishment present in court practice cannot give favorable results in terms of general and special prevention, and may contribute to non-compliance with tax regulations.

There is also the question of the satisfactory level of knowledge of officials in this area. It is necessary to raise the question of the adequacy of the incrimination in view of the harmful consequences of tax evasion for the fiscal system of the state. In order to overcome these issues and achieve prevention, and for the purpose of suppressing tax evasion, the following measures should be applied:

- Institutional measures: improvement of the entire tax administration; building relations with taxpayers; higher education of officials and their further education; building trust in the tax system, the Government and its institutions.
- Legal measures: stability of the tax system; precision of tax and criminal law regulations; review of the system of punishments and the lenient punishment policy of the courts; determination of the time frame for carrying out an action that has the characteristics of the criminal offense of tax evasion; determining the records of the tax administration in order to monitor taxpayers.
- Socio-economic measures: building the morale of taxpayers and transparency of public revenues and their intended spending.
- The experiences and practice of other countries that successfully limit the loss of tax revenue can serve as guidelines in the further actions of authorized state bodies and the legal regulation of their functions and powers.
- Harmonization between the taxation systems of the states, especially in order to avoid double taxation or double non-taxation, which favors the possibility of tax evasion.

The success of preventing tax evasion depends on adequate legal regulations that follow social changes, regulation of the tax system and the system of criminal justice protection, adequate cooperation and exchange of information between authorized state authorities and cross-border cooperation in general. The combination of these preventive and repressive measures can be effective provided that there is no lack of an adequate penal policy and its not mild application in practice. Only in this way, and with the

strengthening of tax discipline, tax evasion can be suppressed, that is, it can be influenced to deter illegal behavior.

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