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TAX EVASION AS AN ILLEGAL FORM OF TAX AVOIDANCE

Dragojlović Joko[1]

Đuričić Nada[2]

Abstract: *The life of a country and a society, as a whole, is financed from public revenues. Taxes are one, probably the most important, form of public revenue, and every legislator, including ours, regulates in detail the establishment and functioning of the tax system as a whole. Failure to collect taxes would lead to a complete financial collapse of a country, so certain forms of avoiding tax obligations - tax evasion – are sanctioned by legislators most severely. Such behaviour is considered as a delict, as the legislator applies the ultima ratio, and criminalizes certain evasive actions as criminal acts, i.e., defines a special set of criminal acts as tax crimes. Bearing in mind the relative prevalence of this phenomenon, as well as the exceptional effect and importance that tax evasion has, both for the state as a whole, and for the individual, this paper, in the first place, characterizes the phenomenon of tax evasion and its forms. Using the historical-legal method, the paper gives an overview of the issue of tax evasion and the way it was dealt with historically, starting with Dušan's code and ending with the former Yugoslav legislation. Then, by looking at the relevant legislation, some positive criminal-legal incriminations of tax evasion are pointed out, particularly the incrimination of tax evasion as*

1 Faculty of Law for Economy and Justice in Novi Sad, Geri Karolja 1, 21 000 Novi Sad, e-mail: jdragojlovic@pravni-fakultet.info

2Faculty of Law for Economy and Justice in Novi Sad, Geri Karolja 1, 21 000 Novi Sad, e-mail: nadasdjuricic@gmail.com

a criminal offense in the domestic legislation. Finally, the concluding thoughts speak about the potential need for a different regulation of this criminal offense, while paying attention to the practical implementation of legal rules in connection with the detection and prosecution of the criminal offense of tax evasion.

Keywords: *tax evasion / tax crimes / taxes.*

INTRODUCTORY NOTES

With the emergence of an organized society, that is, from the creation of the state as an organized political community, the formation of an independent arbiter that could protect the collective interests of society conditioned the need for it, and as a result, the need to finance this new phenomenon arose. The question was how to ensure the work of all those public actors whose work was necessary for maintaining peace, but also for the protection and promotion of collective (public) interests. The answer to the raised question certainly includes taxes, which refer to the determination and collection of public revenues, and is one of the most crucial methods for financing public expenditures.

In this sense, Stojanović (2021, p. 766) correctly observes that it is of great importance for every state to collect taxes that serve to cover its expenditures, that is, to ensure the basic functions of the state, but also to meet the general needs of citizens. Certainly, in author's opinion, the importance of taxes, that is, the purpose of tax obligations, was best explained by Judge Oliver Wendell Holmes (1927), who stated that "taxes are the price we pay to live in a civilized society."[3]

However, with the very appearance of taxes, that is, tax obligations, a negative social phenomenon appears - avoidance (evasion) of taxes and tax obligations. Generally speaking, therefore, tax evasion is as old as the occurrence of taxes. (Jovašević, 2016, pp. 20 et seq.). The negative social phenomenon of tax evasion, in principle, depends on numerous factors, such as tax morale, the educational structure of the country's population, the expertise of tax authorities, penal policy and the like. The emergence

3 Compania General de Tobacos de Filipinas v. Collector of International Revenue, dissenting opinion, United States Supreme Court, 1927.

of tax evasion has been a particular problem of our economy for many years. Significant sums of money and quantities of goods move partially or completely outside the taxation system, almost absolutely without any possibility of state tax authorities to exercise control over these flows of money and goods. Avoidance of tax obligations significantly disturbs the distribution of income in relation to the goals that society wants to achieve. Therefore, due to this extremely negative social phenomenon, the legislator intervened and criminalized the most difficult form of tax avoidance - tax evasion - as a criminal offense.

This paper points out certain criminal incriminations of tax evasion, looking at this phenomenon through the historical prism of its incrimination in criminal legislation in these regions, arriving at positive criminal incrimination of the tax evasion. The aim of the work is to provide a summary of the criminalization of tax evasion in domestic legislation, and to provide some specific guidelines for possible future legislative interventions in this area, emphasizing the need for more intensive efforts to implement existing legal solutions. The methods used in the preparation of this paper are the normative method, the legal-economic method, but also the historical-legal method, which gives a brief account of the regulation of the issue of tax evasion in the criminal legislation of the Republic of Serbia.

TAX EVASION

Essentially, at the base of all tax crimes regardless of the form or type of manifestation in a specific case, there are various manifestations of tax evasion (Jovašević, 2016, p. 86). Tax evasion of different forms and types, i.e. ways of avoiding the determination, deduction and collection of taxes and other prescribed duties represent a harmful, illegal and dangerous activity of individuals and groups that threaten the basic fiscal interests of society (Kulić, 1995, pp. 5-7).

Namely, taxpayers perceive tax as a kind of burden that only worsens their already unenviable financial situation, because paying taxes and other duties directly affects the reduction of economic and purchasing power of citizens.

Therefore, they avoid paying more or less tax or at least try to reduce its burden. All those different forms of tax avoidance represent, in fact, only

different forms and types of tax evasion (Kulić, 2012, p. 91 et seq.). A special form of this evasion is avoiding to pay taxes on income from illegal activities (Gnjatović, 1999, p. 139). Thus, two forms of tax avoidance are distinguished in theory and practice: a) legal and b) illegal tax evasion.

Legitimate (legal) evasion exists when individuals, as taxpayers, move within the general framework established by law or other general regulations in the field of the fiscal or tax system. However, these individuals try to avoid paying taxes and other duties in whole or in part in various ways. Here, practically speaking, we talk about different forms of using tax incentives, or the use of existing legal loopholes in tax and other laws and by-laws precisely because of the high degree of abstraction, generality or vagueness, i.e. the ambiguity of the words, expressions or concepts used or the imperfection of the language used by the legislator (Jovašević, 2016, p. 87).

Illegal evasion exists when an individual, as a taxpayer, comes under the influence of law and repression. Namely, in this case there is a violation of regulations to a greater or lesser extent, causing immediate, direct damage to the social community as a whole. Here, therefore, we are dealing with illegal, unlawful, and punishable activities directed directly against the tax (fiscal) system of the country (Jovašević, 2016, p. 88). Illegal tax evasion can occur in two forms that are the most typical of modern legal and social systems: a) the first form is tax evasion or avoiding paying taxes and contributions; b) the second form is smuggling of various goods, products or services across the borders of one or more countries. Namely, illegal evasion includes various actions of taxpayers aimed at avoiding paying taxes, which violate the tax law. In order to evade taxes, taxpayers cover up all or part of their assets in an illegal manner or of the object taxation (Milošević, Kulić, 2015, p. 111 et seq.). The goal of tax evasion is to reduce the tax debt. Illegal tax avoidance or tax evasion is punishable. All modern states, even all states since their inception, have opposed these illegal activities of taxpayers in different ways and with different measures. In the pursuit of a more effective implementation of tax policy, various preventive and repressive measures are employed. This is because avoiding the legal obligation to pay monetary compensation to the state, social protection institutions, funds, and the functioning of all budgetary institutions and jobs can have a negative impact (Kesner Škreb, 1995, pp. 267-268).

Both forms: legal and illegal tax evasion have a negative impact on the economy and society as a whole. However, in our opinion, the basis for distinguishing between these two phenomena, and, consequently, their different legal treatment, lies in the answer to the question of whether and to what extent is the state damaged by specific tax-evasion practices. Thus, when the state budget is not affected by a specific tax practice, which involves shifting the burden of tax liability to the consumer or buyer, the legislator does not intervene. The threshold of tolerance of the domestic legislator is significantly different, almost non-existent, when the evasion practice involves the complete avoidance of paying taxes so that the state is deprived of the amount of unpaid tax, which directly damages the state budget. Then the legislator will intervene decisively. Although, legally and politically, this practice could be understood, starting from the interest of the state treasury, we still believe that the legislator should sanction any evasion practice - it is not the interest of the state to protect itself and its budget; the legislator would have to set the rules of the economic game so that the user of the service or the consumer is not in an unreasonably less favourable position than the trader (who evades the tax obligation).

TAX EVASION AS AN INCRIMINATION OF TAX AVOIDANCE

As already pointed out, tax evasion, as a form of tax avoidance, is covered by criminal law. Tax evasion is a socio-economic phenomenon where a taxpayer does not settle their tax obligation, or does not legally pass it on to another person. As a result, the state is completely deprived of the amount of unreported or unpaid tax. In order to prevent this negative phenomenon, the state has intervened most strongly from the very beginning.

Historical overview of the criminalization of tax evasion

Given that the phenomenon of tax avoidance, i.e. tax evasion, is not new, the state's response, in the form of criminal incrimination of this behaviour, is not a new phenomenon either. Namely, when we talk about the criminal incrimination of tax evasion, already in Dušan's Code, which was adopted at the time of the rise of medieval feudal Serbia, among a large number of criminal law provisions, provisions relating to the

criminal offense of tax evasion or non-payment can be found as well.[4] What is today called the criminal offense of tax evasion, according to the Rakovic' manuscript, was also provided for in Article 198 of the Dušan's Code.[5]

Namely, Article 198 of Dušan's Code stipulated the criminal offense of not paying dues to the ruler. Duties that were given to the ruler included: royal income, levy, "soce"[6] and tribute. All subjects were obliged to pay these duties, which included every (free) man, as well as the local (land)lords. The due date of the obligation was precisely defined in advance - Mitrovdan as the first deadline and the Nativity of Christ as the second deadline. Failure to provide such established obligations within the established deadlines is a hallmark of this criminal offense (Jovašević, 2016, pp. 28 et seq.).

In case the landlord fails to fulfil or misses his/her obligation within the given period, the Code prescribes a severe penalty. Specifically, the Code stipulates that such a landlord would be bound at the imperial court until they pay double the value of the established ruler's duty (Dušan's Code, Article 198). Thus, a typical punishment for non-payment of financial obligations in the Middle Ages was the deprivation of freedom, as a form of coercive measure in order to force taxpayers to pay their obligations in full, that is, to pay their obligations within the prescribed period.

The next significant criminal law regulation of our country was adopted only in the middle of the 19th century.[7] In the period from Hatisherif in

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4 Jovašević (2016, p. 27) points out, however, that this "deed is unnamed in the legal text itself (which was also common in all older legal sources), but its content, nature and character consist precisely in avoiding the payment of duties to the ruler."

5 T. Taranovski , Istorija srpskog prava u Nemanjićkoj državi, Belgrade, 1996, p. 481; Jovašević (2016, p. 28), however, points out that this provision is only found in this copy of Dušan's Code, whose copy was created somewhere around 1701 . In addition, Jovašević points out that, due to the fact that this copy was kept for a long time in the library of the Novi Sad high school, it is often called the Novi Sad copy. However, since the existence of this provision is not contested, but its scope is only discussed, for the purposes of this paper the authors take the Rakovica copy as accurate and reliable.

6 Soce represents the main duty paid to the ruler, either in grain or in money.

7 At this point, the authors note, for the sake of caution, that the obligation to pay taxes and other duties existed in the period after Dušan's Code ceased to be valid (end of the 14th century) until the middle of the 19th century. However, this obligation existed towards the Ottoman Empire, bearing in mind the fact that until the Sultan's Hatisherif of 1838 (Hatisherif beeing the special proclamation by the Sultan personally), which gave Serbia a certain degree of independence, Serbia, including the

1838 to the middle of the 19th century, there was a very scattered, confusing and complex system of taxes and duties, both towards the Prince (Knez) of Serbia and towards to the Porte of the Ottoman Empire. The new Penal Code for the Principality of Serbia was adopted in 1860. This is the first systemic legal act in the field of criminal law of the Serbian state, modelled on the developed countries of Europe at the time. Although this Code marked positive tendencies in the development of our criminal law theory and legislation, and gave an exceptional impetus to the development of further criminal law theory, it did not provide any solutions for the protection of the state's fiscal interests. This is despite the fact that it was adopted during a time and under circumstances that were conducive to such protections.[8] We can understand this fact as the impossibility of the then legislator and the Prince to decide whether to sanction the non-payment of duties and to whom.

However, the criminal-legal protection of the fiscal system, taxes and other public benefits in Serbia was definitively established again only in 1884 with the adoption of a special Law on direct tax of Serbia (Kon, 1920) which has defined concept and types of taxes, their taxpayers, due date of these tax obligation, the way of determination and collection of taxes and punishment for violation of these legal provisions. Article 86 of this law provided for the criminal offense of not reporting one's condition to the tax board. This work had its basic form, as well as two more serious forms. The basic form of this criminal offense consisted in not reporting to the tax board within the legal deadline and not justifying this lateness of one's condition even within 20 days of the reporting deadline (Josimović, 1901, pp. 67-82). This regulation, with certain changes and additions, will be applied until the First World War.

When we talk about the period after the First World War, that is, in the time between the two world wars, the first regulation in the Kingdom of

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Serbian population, was completely subordinated to the Sultan and the Porte of the Ottoman Empire, which regulated issues of tax and other obligations independently, and the regulations from this period are not relevant to this paper.

8 There are many reasons for this situation, but one of the most significant is certainly the impunity for tax evasion to the Turkish supreme authority in Constantinople. Practically, avoiding the payment of taxes and other duties to the Port was considered a patriotic act that should not be punished (Criminal Code and criminal court procedure of the Kingdom of Serbia interpreted by the decisions of the general session and the division of the court of cassation, compiled by Gojko Niketić, with a foreword by Dušan Subotić, Belgrade, 1911).

Serbs, Croats and Slovenes that governed the criminal-legal matter of taxes was the 1922 Law on Tax on Business Transactions.[9] The very name of the legal text indicates exactly which type of tax the criminal protection referred to.[10] Namely, this regulation practically prescribed two criminal offenses from tax area (Niković, 1934, pp. 34 et seq.). The criminal offense of tax evasion was provided for in Article 12 of this Law. This offense was committed by a person who, with the intention of completely or partially avoiding the payment and assessment of taxes, or to achieve an illegal exemption from paying taxes, knowingly and with the intention of making false statements or deliberately silences them.

According to Popović (1928, pp. 32 et seq.), the act of committing this criminal offense is determined in two alternative ways. Thus, the first form of criminal action is the providing of untrue data or statements in connection with the determination of taxes. In this sense, the perpetrator had to implement this untrue statement in the business book, (tax) report, complaint or answer to the questions of the competent authority. Another form of criminal action was prescribed as not reporting of important data in the mentioned letters. For the existence of this criminal offense, it was necessary that the perpetrator took the act of omission or silence with the intention of completely or partially preventing the correct assessment of taxes or to achieve an exemption from paying taxes, which is illegal.

Furthermore, the 1928 Law on Direct Taxes[11], Article 142 provided for an independent criminal offense of tax evasion. This offense is committed by a taxpayer who knowingly and with the intention to avoid paying the legal tax in a tax return or in response to the questions asked by the competent authority or in a submitted appeal or application for exemption or reduction or write-off of tax makes false statements so that, as a result, he could get a total or partial tax reduction or an information on part of the property or a source of income that is subject to tax has been withheld (Živković, 1928). The criminal action could have been making false statements or concealing the source of income or part of the property.

9 Official gazette, Belgrade, number 37 as of February 18, 1922

10See also Vesić, S., & Veselinović, B. (2011). Corporate income tax evasion. Economics: theory and practice, 4(1), 64-75.

11 Law on immediate taxes from 8 February 1928, Official gazette, Belgrade, number 29 - VII of February 8, 1928, Tax anthology, editor Voj. St. Spasojević and Voj. J. Božanović , Belgrade, 1931.

Bearing in mind the method of execution, i.e. the intended actions of execution, it is important to point out that direct intent was necessary for the existence of the criminal act.

Legislative activity in the Kingdom of Yugoslavia intensified strongly at the end of the twenties of the twentieth century, which is how the unique Criminal Code was adopted. Jovašević (2016, p. 35) points out that this Code "represents the first and only criminal law act passed in our country between the two world wars, which aimed to codify various criminal law provisions of a material nature that were scattered throughout a series of legal regulations." However, although Jovašević's statement can generally be accepted as correct, it should be noted that this Code provides no solutions when it comes to tax crimes. This is because the then existing criminal incriminations of tax offenses were contained in the provisions of special or secondary laws in this area. Therefore, this Code does not represent a complete codification, although it was a strong step forward. The aforementioned rules were in force until the existence of the Kingdom of Yugoslavia, that is, until the end of the Second World War.

After the end of the Second World War, the construction of a completely new social, political and legal system was started in our country. This construction of a new system implied the intervention of the legislator in the field of criminal and tax law.[12] Thus, the provision on punishment for the criminal offense of evasion and non-payment of taxes and other public duties appeared for the first time in the legislation of post-war socialist Yugoslavia with the adoption of the Criminal Code of the FNR of Yugoslavia in 1951 (Jovašević, 2016, p. 35). Namely, in Article 235 of this Code, a special criminal offense with the title: "Giving false information regarding taxes" was included in the group of criminal offenses against the economy and the unity of the Yugoslav market. This offense consisted in providing false information about income, items subject to taxation or about any other facts important for tax determination if such information is given to state authorities with the intention of the perpetrator to completely or

12 Enumerating and summarizing of all criminal law regulations which one are incriminated tax evasion in the period from the end of WWII to the establishment autonomous and independent Republic of Serbia in 2006, would greatly exceed the scope of this work, and especially of this chapter, which should give an overview of the development of criminal legislation regarding tax evasion in the past. Therefore, at this point, only the most important issues of criminal incrimination of tax evasion in this period have been highlighted. For details, see: Jovašević (2016, pp. 35 et seq.).

partially avoid paying taxes for himself or others (Ravanić, 1955, p. 17). It is clear from the text of the provision that this criminal offense, in contrast to positive legal incrimination, related only to tax, and not to other duties such as contributions. The *actus reus*, therefore, involved providing false information to the relevant state authority that determines the amount of the tax. For the existence of a criminal act, the existence of direct intention was necessary. This Code did not prescribe more difficult or qualified forms of this act. However, with the amendments to the Criminal Code from 1959, the name of the crime was changed to "Tax evasion", while the more severe and qualified form of this crime was introduced. In addition, the basic form of the offense itself is expanded to include other duties (contributions and other obligations), and it is criminalized not only to provide false information, but also to not declare income, that is, items and other facts for tax determination.[13]

With further socio-political changes, the provisions of the criminal legislation were also changed to some extent. Thus, by the Criminal Code of the SR of Serbia, tax evasion was criminalized under that name within the framework of Article 154, and it occurred in two forms: basic and more severe. The basic form of this criminal offense consisted in providing false information about one's legally acquired income, objects or other facts that have an impact on the determination of such obligations or in failure to report in the case of mandatory reporting of legally acquired income, objects or other facts that have an impact on the determination such obligations with the intention of completely or partially avoiding the payment of taxes, social security contributions or other prescribed contributions for oneself or others, if the amount of the obligation whose payment is avoided exceeds 10,000 dinars.[14] Therefore, the essence of the legal provision remained unchanged, while certain terminological and linguistic adjustments were made. However, a new element for incrimination appears as an objective condition - for the offense to be considered a criminal offense, the amount of tax (or other duties) evaded must exceed 10,000 dinars. On the other hand, the more severe form of the offense requires the tax evaded to exceed 50,000 dinars, but it is not an objective condition for incrimination. These provisions of the Criminal

13Compare with Jovašević (2016, pg. 39).

14 See Article 154 of the Criminal Code of the SR of Serbia from 1989;

Code of the SR of Serbia will be valid until 2002, when the Law on Tax Procedure and Tax Administration was adopted, which deleted criminal offenses from the Criminal Code because the tax law contained provisions on tax offenses and criminal offenses, so these offenses "transferred" in secondary criminal legislation of our country.[15]

In 2005, a new Criminal Code was adopted in our country, which entered into force on January 1, 2006. With the adoption of this Criminal Code, tax crimes, such as tax evasion, are returned from secondary criminal legislation to the criminal law codification, where they remain today.[16] At that time, tax evasion was stipulated by Article 229 of the Criminal Code. However, with the last major amendment to the Criminal Code from 2016, major changes to the Criminal Code are taking place. Thus, with the Law on Amendments to the Criminal Code, the entire chapter twenty-two in the group of criminal offenses against the economy was amended: a) by prescribing new criminal offenses, b) by deleting certain criminal offenses, c) by changing the systematics of criminal offenses and d) by partial changes in the basic and qualified forms of certain criminal acts. Thus, tax evasion is now prescribed in Article 225, and non-payment of withholding tax in Article 226 of the Criminal Code (Jovašević, 2016, p. 48).

Criminalization of tax evasion in the positive law of the Republic of Serbia

All tax crimes, and especially the crime of tax evasion, represent extremely socially dangerous behaviour of individuals and groups of persons, as well as legal entities. By violating tax regulations, they directly or indirectly endanger the financial interests of society as a whole, primarily causing significant damage to the fiscal system and the public revenue system in general.

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15 For incriminated acts, see the Tax Procedure and Tax Law administration (Official gazette of Republic of Serbia number : 80/2002), Head seventh, Article 172 "Tax evasion", Article 173 "Non-payment of tax on deduction", Article 174 "Compilation or submission of a falsified document of importance for taxation", Article 175 "Endangering tax collection and tax control", Article 176 "Illicit circulation of excise goods products" and Article 176a "Unauthorized storage of goods"; See especially: M. Anđelković, D. Jovašević, Tax avoidance, Niš, 2006, p. 218-225;

16 With the entry into force of the new Criminal Code, the corresponding provisions of the Law on Tax Procedure and Tax Administration, namely: Article 172 and 174, ceased to be valid in September 2009, and the provision of Article 173 of this Law ceased to be valid.

Therefore, depending on the type of violation of the regulations, i.e., the consequences caused in terms of the extent and intensity of the violation, the damage done, or the endangerment of protected social values, the legislator provided different sanctions. The severity of the offense determines whether it is a criminal offense, an economic offense, or an offense. The Criminal Code covers tax crimes, including "Tax Evasion" in Article 225 and "Failure to Pay Withholding Tax" in Article 226. Here we present the positive legal prescription of tax evasion as a tax crime, contained in Article 225 of the Criminal Code.

Considering the nature of this criminal offense, Jovašević and Simović (2019, p. 509) point out that the legal description of this offense shows that it is a *sui generis crime*. However, in the theory of criminal law, there are also those who are of the opinion that this is only a specific form of the criminal act of fraud, more precisely an act of fraud where the fraudulent act itself damages society as a whole (Stojanović, Perić, 2000, p. 244).

This act is further characterized by a blanket disposition, which means that the completion of this act depends on other regulations in the field of the fiscal and tax system, which determine the concept, types and content of certain taxes and other public duties (contributions and public duties), the taxpayers of these benefits, as well as their payment terms. Namely, this type of disposition allows the nature and content of fiscal obligations, in terms of the object of protection of this criminal offense, to be determined on the basis of non-criminal regulations (Jovanović, Đurđić, Jovašević, 2006, pp. 256-258). To prove this criminal act, it is necessary to refer to other regulations that are not part of criminal law (Mrvić Petrović, 2018, p. 120; Radulović, 2010, p. 466). This indicates the complex nature of the criminal act in question.

Here, however, in our opinion, a specific issue related to the relationship between criminal law and tax law may arise. In such circumstances, the question of the legal and factual error institute may be significant. Namely, this is due to the fact that it is a well-known and generally accepted attitude that the domestic legislator very often carries out legislative interventions in the area of tax regulations, especially in the area of tax procedure, and that the constant monitoring of changes in these tax regulations, as well as various by-laws of tax authorities, has become extremely demanding, if not impossible even for many lawyers, including

those who primarily study either criminal or tax law. With that in mind, one can reasonably ask the question to what extent the ordinary and average citizen, the layman, can follow these changes, all while trying wholeheartedly. That is why, we believe, the institution of (legal) delusion should be brought into a strong connection with intent as a constitutive element of this criminal act. It is true that the existence of a rectifiable error of law does not exclude the existence of a criminal offense, that is, intent as an element of a criminal offense. However, in special circumstances, we believe that the existence of a legal mistake, even if it was rectifiable, excludes the possibility of the simultaneous existence of an additional necessary subjective element - a special intention to commit tax evasion, so there can be no criminal offense. The legislator should pay due attention to this issue. The legislator should either stop intervening so often in tax law, or set special standards regarding the errors of law or fact in connection with this criminal offence.

The current Criminal Code of the Republic of Serbia classifies the criminal offense of tax evasion in the twenty-second chapter - Criminal offenses against the economy, in Article 225 of the Criminal Code.

Bearing in mind the position in the system of criminal offenses within the Criminal Code, it can be said that the object of protection of the criminal offense of tax evasion is the country's fiscal system, which forms the basis of the economic system of every country, including ours. The object of the (criminal) attack itself is alternatively determined in the sense that the object of the attack can be a tax, contribution or other prescribed duty that represents public revenue (Igrački, 2021, p. 221). At the same time, it is not important whether these obligations refer to natural or legal persons. And whether in the specific case it is a type of fiscal obligation incriminated by law is a factual question which, among other things, is determined with regard to the regulations by which such obligations are established.[17] Jovašević by taxes understands, in any case, part of the income or property that the social community takes away from natural or legal persons (2016, p. 93).[18] However, Stojanović (2021, p. 767) points

17 Compare with Jovašević , Simović (2019), p. 510;

18 In theory, however, reference is also made to the judicial practice of the Supreme Court of Serbia, according to which there is no criminal offense of tax evasion in the case when the social revenue administration body at the time of passing the decision on determining the tax liability had reliable data that indicated the falsity of the data in the submitted tax return. report by the taxpayer, and even

out that, starting with the latest amendments to the Criminal Code, this criminal offense no longer refers to value added tax. Namely, this is due to the fact that thanks to a different wording, the crime from Article 173a of the Law on Tax Procedure and Tax Administration included complete or partial avoidance of value added tax, and based on its specialty, it has priority over the general crime of tax evasion from Article 225 Criminal Code (compare with Stojanović, 2021, p. 767).

The criminal offense of tax evasion has three different forms, one basic and two more severe. The basic form is committed when a person intentionally provides false information about their earned income, objects, or other relevant facts that impact the determination of taxes, contributions, or other prescribed duties, or if they intentionally fail to report acquired income or conceal data related to such obligations. This form applies if the amount of the obligation avoided is over one million dinars. (Article 225, paragraph 1, Criminal Code).

Regarding the act itself, this criminal offense has three alternative acts of execution. The first involves providing false information about earned income, about items or other facts of importance for determining the tax obligation and liability, contributions or duties. The second form involves failure to declare the acquired income, that is, objects or other facts that are of influence for determining the obligation to pay taxes, contributions or other duties. Finally, the criminal act may also be concealment in some other way of data related to the determination of the stated obligations (Stojanović, 2021, p. 766). All of this, in the first place, presupposes filling out and submitting a tax return, but it is possible to do the work in another way. Simply, the taxpayer is obliged to submit accurate data about his income and, in general, about the facts that are relevant for determining the amount of tax. The criminal act is no longer tied to legally acquired income, as we have seen was the case with earlier legal solutions. This, in turn, does not automatically mean that the crime of tax evasion extends to those situations where the income was obtained in an illegal manner. It is about the fact that the legal description of this criminal offense no longer requires providing false information about "legally acquired income", i.e. not reporting it. This does not mean that the obligation to pay taxes will

so, it bases its decision on the tax report submitted in this way - the judgment of the Supreme Court of Serbia Kž. I 1815/73 (cited according to Jovašević, 2016, p. 93).

also exist in relation to illegally acquired income, but that it will not be determined as an important feature of the criminal offense, which in practice has caused serious problems so far (Stojanović, 2021, p. 767). The act of tax evasion can only apply to income that is taxable, as determined by the relevant laws and regulations governing taxation, rather than by the Criminal Code itself. While previously it was the task of the court to always establish that unpaid tax refers to legally acquired income as an essential feature of the criminal offense, with the new solution, if it is in his interest, the defendant could prove that it is not legally acquired income. [19] In terms of the listed alternative criminal actions, the examples of the forms of tax evasion are very different: providing false information about the number of employed persons, providing false information about the number of household members or providing false information about the number of children attending school or about the employment status of the spouse (Anđelković , Jovašević, 2006, p. 195; Radulović, 2010, p. 467 and Jovašević, 2016, p. 124), not reporting income to the tax authority or reporting lower income, reporting deductions based on expenses that are false or were less than the stated amount or use of deductions whose purpose is not true (Popović, 2012, p. 624), incorrect calculation of tax obligations, false balancing of individual positions, double bookkeeping (Nicević, Ivanović, 2013, p. 143) and the like.

On the subjective level, it can be said that the subjective component of this criminal offense of tax evasion, apart from the criminal intent in form of *actus reus*, which must be direct, also includes the specific intention to avoid paying taxes, contributions or other duties. This intention must exist in all three alternative forms of criminal action. Intent can also refer to partial avoidance. Stojanović (2021, pp. 768-769) points out that although it is clear that for existence of this criminal offense it is not enough just to not pay taxes, i.e. that this in itself does not indicate the existence of the intention of non-payment of taxes, nevertheless, in the practice so far, the

19 Stojanović (2017, p. 731) points out that "Legally acquired income" as an essential feature of a criminal offense has caused serious problems in case-law so far. There was a firm position in judicial practice that the failure to establish that such income was involved leads to the conclusion that not all essential elements of the criminal offense of tax evasion have been acquired (such as, for example, the judgment of the Court of Appeal in Kragujevac, Kž. 187/14 of February 27, 2014)." That point of view was correct from the aspect of the earlier legal description of this criminal act. However, it is completely unjustified from a criminal and political point of view, so the courts sought a way out by qualifying the act as abuse of official position under Article 359 of the Criminal Code.

position has been taken that sets too high standards regarding the determination of the existence of the intention. Namely, in the case of this criminal offense, as well as other criminal offenses that have intent in their legal description, its existence can also be determined indirectly - through certain objective circumstances that point to it, or that exclude it. Therefore, there is no express prohibition to draw a reasonable conclusion about the existence of intent based on the available evidence. Thus, in some decisions, one can come across the opinion that some objective circumstances exclude this necessary intention, which often does not seem convincing enough.[20] Courts have set a high evidentiary standard when it comes to proving the intent to commit tax evasion, making it almost impossible to argue or prove that there was no specific intent. Mere failure to report a tax doesn’t *ipso facto* means that special intent existed. We already stated that the question of special intent is quite problematic in light of vary often legislator’s intervention into tax law and tax procedure. With that in mind, one could argue that the reasonable court should hold the bar so high.

The criminal offense of tax evasion is considered complete once the prescribed criminal action is undertaken. This means that providing false information or not reporting income, or concealing data relevant for determining tax obligations would fulfil the criminal act, and the legal description of this offense does not require any specific consequence. Therefore, the Criminal Code does not require that the perpetrator actually evaded the obligation to pay taxes, contributions, or other prescribed duties.[21]

This criminal offense also contains the objective condition of incrimination. Therefore, in order for a criminal offense to exist, it is necessary that the foreseen objective condition of incrimination has been fulfilled. The amount of avoided obligation must exceed one million

20 Stojanović (2021, pg. 769) states for example that Appellate court in Novi Sad and Basic court in Novi Sad consider that there is no necessary intention on part of the defendant because the accused has "always met his even much larger tax obligations towards the State", as well as that "the defendant, who it's not a legal professional, a owner and director of the company [...] immediately upon the notice made by the Tax administration [...] paid owed tax" (Appellate court’s decision Kž . 4452/13 of July 14, 2014 and Basic court in Novi Sadu K. 2626/11 of October 11 , 2013).

21 Similarly, Jovašević, Simović (2019, p. 514 et seq.).

dinars.[22] Stojanović (2021, p. 769) and Jovašević & Simović (2019, p. 514 et seq.) indicate that in the case of several types of obligations, i.e. amounts, the payment of which was sought to be avoided on the same occasion by one of the prescribed criminal action, and they arise from the same basis (e.g. tax and contribution), to determine whether the objective condition of incrimination has been met, the amounts of individual obligations are not taken separately, but they are added together (SJC Kž. I 32/78). Given that taxes, contributions and duties are calculated for the calendar year, it is necessary that the amount of the avoided obligations exceeds one million dinars in one calendar year. In other words, the amount of one million dinars represents an objective condition of incrimination that is linked to one calendar year (Kulić, Milošević, 2011, p. 328). If the perpetrator did not embezzle more than one million dinars, there will be no criminal prosecution. This, however, does not mean that there is no place for the responsibility of tax evaders. He will, however, be prosecuted as part of a misdemeanour proceeding or a proceeding for a commercial offense.

The perpetrator of a criminal offense can be any person who has the status of a taxpayer, as well as persons who are legal representatives of certain natural persons (e.g. guardian of a legally incapacitated ward) or legal persons.[23]

This criminal the act, as we have said, also has its more severe forms prescribed by paragraph 2 and 3 of the same article. Depending on the amount of the amount whose payment is avoided, the criminal suit of tax evasion has its severe (paragraph 2) and most severe form (paragraph 3). A disputed question arises as to whether this is an objective condition of incrimination, as with the basic form, or whether it is a qualifying circumstance that must be covered by the intention of the perpetrator. In theory and practice, there is also a compromise opinion that the perpetrator must know that it is a higher value but not the exact amount (Stojanović, 2017, pg. 733). Regardless of the fact that this understanding

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22 It should be noted that the legislator in a relatively short period of time increased the amount of the objective condition of incrimination that must be met in order to exist this criminal act. Thus, before the ZID KZ/2016, the requested amount was one hundred and fifty thousand, while after the ZID KZ from 2016, and before the ZID KZ/2019, the required amount was five hundred thousand dinars. Today it stands at one million dinars.

23 See Article 15 of the Law on Tax Procedure and Tax Administration.

is based on the fact that the difference between the basic and qualified form is only quantitative and not qualitative, nevertheless, by requiring that the perpetrator must know that it is a larger amount, it is closer to the position that it is a matter of qualifying circumstances, and not about the objective condition of incrimination (Stojanović, 2021, 770). Starting from the concept and legal nature of qualified forms, we believe that it should still be considered that this is an important feature, i.e. on the qualifying circumstance, regardless of the fact that it is formulated in the same way as with the basic form.

The detection of tax crimes is the responsibility of the Tax Police, which has the same powers in the pre-investigation procedure as the internal affairs body - the police - with one exception, which is that the Tax Police cannot restrict freedom of movement.

The amount of tax evaded in the case of a conviction for the crime of tax evasion cannot be considered as damage resulting from the commission of a criminal offense, nor can the accused be order by the verdict to pay the amount of tax evaded based on the property law request set by the municipal assembly.[24]

CONCLUSION

As we can see, tax evasion as a form of illegal tax avoidance is as old as the appearance of taxes themselves. Since the inception of tax liability, taxpayers have attempted to reduce this liability, transfer it to another person, or completely avoid it. However, tax evasion as an illegal form of tax avoidance poses a significant threat to modern business operations and the fiscal and economic systems of a count. All different forms of tax avoidance, especially tax evasion, threaten the fiscal and budgetary system, as well as the system of public revenues and expenditures of the state, which should ensure the efficient functioning of the state, but also of all economic entities and other social services. That is why tax evasion or tax avoidance has been criminalized since ancient times.

Specific problem arises from the requisite special intent to commit tax

24 Judgment Supreme court of Serbia Kž . And 901/73.

evasion, in light of so common changes to the tax material and procedural law. A legislator cannot insist on so extensive and often changes, depriving the citizens to actually get acquainted with the law, on one hand, and insist on specific intent to commit a tax evasion, which basically cannot be circumvented by invoking the error in law. Those two notions are, in our opinion, mutually exclusive and deserve much more consideration. We can only hope that future legislators will exercise restraint when intervening in tax law and display wisdom in altering the criminal approach to the matter.

Speaking *de lege ferenda,* the legislative and executive authorities should also pay more attention to the actual detection and prosecuting of tax evasion, bearing in mind that the substantive legal provisions are appropriate both in terms of content and scope. However, we still believe that setting the objective condition of incrimination at the amount of one million dinars is set too high, which resulted in partial decriminalization. Perhaps some future legislator will reduce this amount to a more reasonable level.

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PORESKA UTAJA KAO NEZAKONITI OBLIK PORESKE EVAZIJE

Joko Dragojlović

Nada Đuričić

Sažetak: *Život jedne države i jednog društva, u celini, finansira se iz javnih prihoda. Kao jedan, verovatno i najznačajniji oblik javnih prihoda, javljaju se porezi, te svaki zakonodavac, pa tako i naš, na detaljan način uređuje uspostavljanje i funkcionisanje poreskog sistema u celini, a neobezbeđivanje naplate poreza dovelo bi do potpunog finansijskog kolapsa jedne zemlje, pa pojedine oblike izbegavanja poreske obaveze – evazije poreza – zakonodavac najstrože sankcioniše, propisujući takvo postupanje ne samo kao delikt, već zakonodavac primenjuje* ***ultima ratio****, te pojedina evazivna postupanja inkriminiše kao krivična dela, odnosno propisuje poseban set krivičnih dela – poreska krivična dela. Imajući u vidu relativnu rasprostranjenost ove pojave, kao i izuzetan efekat i značaj koje poreska utaja ima, kako za državu u celosti, tako i za pojedinca. Ovaj rad se na prvom mestu bavi pojavom poreske evazije, te njenim pojavnim oblicima, da bi se, potom, primenom istorijsko-pravnog metoda, dao prikaz uređivanja pitanja poreske evazije na ovim prostorima, počev od Dušanovog zakonika, pa do bivšeg jugoslovenskog zakonodavstva. Potom se, sagledavanjem relevantnog zakonodavstva, ukazuje na pojedine pozitivne krivično-pravne inkriminacije izbegavanja poreske obaveze, a posebno inkriminisanje poreske utaje kao krivičnog dela u domaćem zakonodavstvu, da bi se, naposletku, istakli zaključci o eventualnoj potrebi drugačijeg uređivanja ovog krivičnog dela, te posvećivanja pažnji praktičnom sprovođenju zakonskih pravila u vezi sa otkrivanjem i gonjenjem krivičnog dela poreske utaje.*

Ključne reči: *poreska utaja, poreska krivična dela, evazija poreza, porezi.*