

Review Article

**TAX EVASION AS A CRIMINAL OFFENCE
IN THE NEW CRIMINAL CODE OF THE REPUBLIC OF SERBIA**

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Dragan Jovašević

Faculty of Law, University of Niš, Serbia

Abstract. *Securing an orderly, lawful, well-timed and flawless operation of public revenues and expenditures has always been a significant issue for any state since the ancient times. The system of public revenues and expenditures is based on the fiscal (tax) system. The well-organized, efficient and flawless operation of the fiscal system has a considerable impact on the existence, survival and development of the State. Consequently, it is important and necessary for the State to prevent various forms of tax evasion by instituting a range of various measures, instruments and procedures at all levels aimed at counteracting various types of tax evasion (tax avoidance, concealing or failing to report taxes, failing or avoiding to pay taxes, contributions or other dues constituting the system of public revenues.*

The infringement of regulations governing the fiscal system may entail various detrimental consequences. Depending on the kind of violation, the scope and intensity of incurred damage and imminent risk to protected social values, the legal system provides different sanctions while distinguishing between criminal offences and misdemeanors. The criminal offences in the field of taxation are the most serious and dangerous forms of tax law infringement, which may cause considerable damage to the society as a whole. One of the most serious criminal offences in tax law is the act of tax evasion. In terms of its significance, scope and characteristics, it is regarded as the most serious form of tax fraud and, as such, it is punishable under the criminal legislation which prescribes relevant criminal sanctions and penalties. In this article, the author deals with the criminal offence of tax evasion and elaborates on the efforts of the Republic of Serbia aimed at efficient suppression of various forms and types of tax fraud.

Key words: *taxation system, taxes, tax evasion, criminal offence, liability, sanction.*

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Corresponding author: Dragan Jovašević, LL.D. Full professor

Faculty of Law, Trg kralja Aleksandra 11, 18 000 Niš, Serbia

Tel: +381 18 500 234 • E-mail: jovas@prafak.ni.ac.rs

1. INTRODUCTORY CONSIDERATIONS

The criminal offence of tax evasion¹ (*tax fraud*, *French: fraude fiscale*, *Italian: omesso versamento di imposte*, *German: Steuerbetrug*) is defined as an exceptionally serious unlawful act committed by individuals, groups and/or legal entities (companies, institutions or other organizations) and socially dangerous conduct which implies a violation of the applicable law and financial interests of the entire social community. The illegal act is primarily reflected in inflicting considerable damage or harm to the fiscal system and the public revenues system in general,² as well as direct or indirect losses to all budgetary beneficiaries. The unlawful acts of this kind may be classified as a specific kind of commercial criminal offences, which may further be categorized as a sub-group of criminal offences against public (state) finances which are often designated as financial criminal offences.

Considering the huge significance of the fiscal system, its proper, timely, comprehensive and efficient operation for the existence, survival and further development of the State and society as a whole, it is perfectly clear that the State has to preclude various forms of tax evasion by instituting a wide range of various measures, instruments and procedures aimed at counteracting diverse kinds of *tax offences: tax evasion or avoidance, falsifying records or concealing taxable assets, failure to report or pay taxes, contributions or other dues constituting the system of public revenues*.

It goes without saying that the violation of legal provisions governing the fiscal system may entail various detrimental consequences. Depending on the kind of violation, the scope and intensity of damage and/or imminent risk to the protected social values, the law provides various sanctions which largely depend on the type of offence or unlawful act committed in a particular case.¹ The criminal offences in the field of taxation (tax crimes) are the most serious and dangerous forms of tax law infringement, which may cause considerable damage and harm to the society as a whole.²

2. FORMS OF TAX EVASION

The criminal offences in the field of taxation (tax crimes)³ are embodied in various kinds of tax evasion, irrespective of their specific form of expression in each particular case. In particular, tax evasion is concurrently one of the most frequent forms of the black-market practices. The black market may be established practically in any area of social activity: manufacturing, trade of goods and services, labor market and employment relations, building industry, real estate, housing and municipal services, etc.⁴ However, from the point of view and interest of the State, the most important forms of black-market

¹ Kovčo Vukadin, I., *Gospodarski kriminalitet - kriminološka obilježja*, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, no. 2/2007, pp. 435 - 493.

² Jovašević, D., Hašimbegović, T., *Sistem poreskih delikata*, Beograd, 2004, pp. 68 - 81.

³ Jovašević, D., Gajić Glamočlija, M., *Poreska utaja - oblici ispoljavanja i mere zaštite*, Beograd, 2008, pp. 189-216.

⁴ Pogarčić, Z., *Nova kaznena djela iz područja gospodarskog postovanja*, Računovodstvo, revizija i financije, Zagreb, no. 12/2003, pp. 141-147.

practices are those that are prevalent in the sphere of disturbing, endangering or violating the fiscal (taxation) system.⁵

The various forms and types of tax evasion (e.g. dishonest reporting on taxable assets, attempt to avoid tax assessment and payment of taxes, contributions and other dues) are designated as harmful, illegal and socially dangerous activities committed by individuals and/or groups whose unlawful conduct jeopardizes the fundamental fiscal interest of the society at large.⁶

It is an indisputable fact that tax-payers perceive taxes as a specific state-imposed expenditure which significantly degrades their financial standing, given that the payment of taxes and other dues directly diminishes their economic power and purchasing capacity. Consequently, they fully or partially avoid the payment of taxes in an attempt to ease the state-imposed burden. In fact, all these forms of avoidance to pay the levied tax amount to the most serious and dangerous forms and types of tax evasion. A special form of tax evasion is, for example, the avoidance to pay tax on the income stemming from unlawful activities.

The taxpayers' propensity to fully or partially avoid paying taxes and other dues largely depends on the intensity of resistance toward such payment. Further on, the intensity of tax resistance depends on several elements which may be classified as follows: 1) the amount of tax burden; 2) the purpose of spending the funds collected through taxation; 3) the type of tax; and 4) the public opinion on the justification of the specific tax.⁷ Consequently, tax law distinguishes between two forms of tax fraud: tax avoidance and tax evasion.

Tax avoidance implies a legally permissible use of the existing tax law to avoid tax payment; it occurs when individual taxpayers actually abide by the legislative framework or other general regulations in the area of fiscal (tax) system but still attempt to find different lawful ways of reducing the tax burden or avoiding the payment of taxes and other prescribed dues, either fully or partially. Practically speaking, the key issue in tax avoidance are various tax incentives (in the form of tax exemption or tax relief) and establishing the taxable amount in the tax assessment proceeding. Tax avoidance basically rests on legal gaps in tax legislation and other areas of law, as well as a large number of loopholes embodied in abstract notions, general statements and ambiguous wording used by the lawmaker. Such practices are typical for those legal systems where tax regulations have to be frequently amended in order to keep up with the speedy and abrupt economic changes in the country and abroad and, accordingly, adapt the fiscal (tax) system to the new social, legal and economic frameworks.⁸

Furthermore, tax avoidance entails legally permissible means, activities and procedures⁹ which taxpayers may resort to in order to fully or partially avoid tax payment; these activities include: 1) changing the place of domicile or residence; 2) reducing or giving up the consumption of taxed products or services; and 3) finding legal gaps or

⁵ Kos, D., Kaznenopravna odgovornost za krivična djela gospodarskog kriminaliteta, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, no.2/2000, pp. 381 - 398.

⁶ Gašić, B., Neki novi pojavni oblici privrednog kriminaliteta, Pravna misao, Sarajevo, no. 9-10/1981, pp. 39-41.

⁷ Popović, D., Nauka o porezima i poresko pravo, Beograd, 1997, pp. 450 - 451.

⁸ Najamšić, T., Kaznena djela porezne naravi, Pravni vjesnik, Zagreb, no. 9/1999, pp. 33.

⁹ Jelčić, B., Nauka o finansijama i finansijsko pravo, Zagreb, 1990, pp. 183 - 184.

loopholes in the law. Upon the maturity of the tax amount which is due for payment, the taxpayer comes into a debtor's delay in terms of paying his/her tax debt. The maturity is a feature of a tax debt which implies a taxpayer's obligation perform, i.e. to pay the amount by due date. The performance time limit is prescribed by the law, and the omission or failure to pay the tax duty within the statutory period constitutes a detrimental and unlawful conduct.

On the other hand, *tax evasion* is an unlawful or prohibited activity which implies that an individual taxpayer has willingly, deliberately and dishonestly misrepresented the state of affairs to the tax authorities in order to reduce or avoid the tax liability. Given the fact that such illegal acts are in contravention with the fiscal/tax system and that they are directly aimed at inflicting direct damage/harm to the social community, they are punishable under the criminal legislation. The infringement of legal provisions and regulations may vary in scope and intensity but, generally, there are two characteristic forms of tax evasion which are most prominent in modern legal and social systems.

The first illicit form of tax evasion is *tax fraud*, which implies a deliberate avoidance to pay taxes, contributions and other dues by engaging in diverse fraudulent activities aimed at concealing the taxable assets. This form of tax evasion will be explored in more detail further on in this article. The second form of tax evasion is *smuggling or cross-border contraband* of various goods, products or services, which may involve a single or several countries. These two types of unlawful tax evasion are often associated with and undertaken in conjunction with some other illegal activities performed by individuals/groups on a regular basis. Most frequently, they are but a stage in committing other punishable acts, which may be designated as criminal offences, commercial violations or misdemeanors.

This unlawful form of tax evasion may entail various illegal activities and degrees of infringement aimed at avoiding the payment of tax liabilities. Such acts are punishable under the criminal legislation. In order to evade tax payment, taxpayers fully or partially conceal the taxable assets in order to reduce their tax liability. In that context, depending on the object (type of assets) involved in the commission of the illegal act, the legal theory makes a distinction between a full or a partial tax fraud. All contemporary states have taken various preventive and repressive measures to counteract such illicit activities but the imposed preventive and repressive measures are primarily aimed at strengthening the tax discipline. In order to prevent the illicit tax evasion, many contemporary states exert considerable efforts to reduce the tax burden and enact a reasonable taxation framework, thus endeavoring to attenuate the impact of the factors contributing to taxpayers' resistance towards tax payment.

According to some authors, the illicit tax evasion is one of the major causes for the emergence of the black market economy. This concept includes all illegal commercial activities aimed at acquiring economic gain for an individual; being committed by avoiding or violating relevant regulations, these illegal activities are detrimental for the State and other persons engaged in lawful commercial activities. Some authors describe the black market economy as an informal, underground, unofficial or non-taxed economy. In spite of such a variety of terms, almost all authors agree that these illegal activities are socially unacceptable and that the public awareness of such illicit acts is frequently inappropriate primarily due to the inadequate media coverage.

3. CHARACTERISTICS OF THE CRIMINAL OFFENCE OF TAX EVASION

Criminal offences in the area of taxation are distinguished from other criminal offences by their nature and character. There are several kinds of tax crimes. The basic one of the kind is tax evasion specified in Article 229 of the Criminal Code of the Republic of Serbia. After the Code entered into force on 1st January 2006, the criminal offence of tax evasion replaced the criminal offence designated as "Failure to pay taxes", formerly envisaged in Article 172 of the Tax Procedure and Tax Administration Act (which, on 1st January 2003, abolished the provision on the criminal act of tax embezzlement contained in Article 154 of the Criminal Act of the Republic of Serbia). As the secondary legislation on this matter, the Tax Procedure and Tax Administration Act includes some other offences in the area of taxation.

As already said, the act of avoiding the legal duty to pay a specific amount of money for the benefit of the State is detrimental to the public interests of the state/society as it entails negative consequences for the social security funds and institutions, and hampers the operation of all budgetary institutions. However, such an act may be regarded as a criminal offence in the field of tax law (tax crime) only if it implies a more serious form and scope of tax evasion. In all other less serious cases involving a lack of tax discipline and less substantial tax evasion, the unlawful conduct is punishable under the rules governing commercial infringements and misdemeanors.

3.1. Concept of the criminal offence of tax evasion

In the legal system of the Republic of Serbia, the basic criminal offence in the field of taxation is *tax evasion*. In some other legal systems, this offence is designated as "tax evasion" or "the evasion of taxes and other dues". In Serbian legislation, this criminal offence is envisaged in Article 229 of the Criminal Code of the Republic of Serbia, which entered into force on 1st January 2006. This Article prescribes the criminal sanction of imprisonment of up to 3 years and a fine for any person who deliberately provides false information about one's lawfully acquired income, assets or other facts relevant for the assessment of tax duty, or for any person who fails to report such income, assets or relevant facts (if the submission of tax return is compulsory) or conceals the data relevant for assessing the tax duty with an intent to fully or partially avoid the payment of taxes and other prescribed contributions and statutory dues (either for one's own benefit or for the benefit of another), where the amount of avoided tax duty exceeds 150,000 RSD. In case of more substantial amounts of avoided tax, the Article also prescribes a fine and a term of imprisonment ranging from 3 to 8 years. This offence has been designated as "tax evasion" given the fact that the committed act includes an element of unlawful appropriation of the amount that the perpetrator has avoided to pay. This legal provision invalidated the provision on "failure to pay taxes" which was formerly envisaged in Article 172 of the Tax Procedure and Tax Administration Act.³⁰

3.2. The object of protection

Considering the legal definition of the criminal offence of tax evasion, one may conclude that this is a criminal offence *sui generis*. However, according to some authors, this is a specific form of fraudulent activity which is aimed at inflicting damage to the society

as a whole.¹⁰ This offence is also characterized by the "blank" disposition, which implies that its content depend on other in fiscal and tax regulations which are applied to determine the concept, the kind and the content of individual taxes, contributions and other public dues, as well as the taxpayers of these duties and the payment time limits.¹¹ The blank disposition allows that the nature and content of fiscal duties (which are protected by this criminal law provision) shall be determined on the ground of regulations outside the criminal legislation.¹²

As envisaged in the definition of this criminal offence, the object of protection is the fiscal, public revenues system which is the cornerstone of state economic policy. In legal theory, there are other opinions¹³ according to which the object of protection is the public duty of paying taxes, contributions and other dues. Public duties include taxes, customs, fees and contributions. The object of protection may include taxes, contributions and other duties prescribed by the law and included in the system of public revenues. All natural persons and legal entities (companies, institutions and other organizations) are subject to an equal treatment. The specific kind of fiscal duty is determined in each specific case, in compliance with the applicable law.¹⁴

As our fiscal system acknowledges several kinds of taxes, the concept of public revenues also includes a portion of income or property that the social community takes from natural persons and legal entities (companies, enterprises and other organizations) to cover its public expenditures, without providing any direct counter-performance or counter-favor to the taxpayers. In that context, taxes are a very important category¹⁵ because they serve as an instrument for accomplishing higher public objectives and satisfying the needs and interests of the entire social community; but, they are also a highly efficient mechanism of social policy.¹⁶ On the other hand, taxes may also be defined as prestations (payment of a portion of money), which are calculated from the taxpayers' income and used for covering public expenditures. Thus, taxes are a portion of income or property taken from natural persons and legal entities for the purpose of covering the expenses of the social and political community.¹⁷

Contributions and other prescribed dues falling into the category of revenues have a similar function in our legal system. They are also aimed at satisfying common and general social needs.¹⁸ Contributions¹⁹ are also prestations which have to be collected from the income of natural persons or legal entities and/or entrepreneurs, in accordance with the applicable law. They are primarily aimed at meeting the needs of various social institutions and services in the following areas: social security for children and other catego-

¹⁰ Stojanović, Z., Perić, O., *Krivično pravo, Posebni deo*, Beograd, 2000, p. 244.

¹¹ Ocvirk, D., *Skriveni transferi dobiti, Porezni vjesnik*, Zagreb, no. 3/20001, pp. 53 - 62.

¹² Jovanović, Lj., Đurđić, V., Jovašević, D., *Krivično pravo, Posebni deo*, Beograd, 2004, pp. 256 - 258.

¹³ Pavišić, B., Grozdanić, V., Veić, P., *Komentar kaznenog zakona*, Zagreb, 2007, p. 636.

¹⁴ Lazarević, Lj., *Krivično pravo, Posebni deo*, Beograd, 1993, p. 229.

¹⁵ Sućević, R., *Uloga poreza i drugih davanja, Pravo i porezi*, Zagreb, no. 3/1997, pp. 52- 55.

¹⁶ Škof, B., *Utaja poreza na dodatu vrijednost i njezino kažnjavanje, Financijska praksa*, Zagreb, no. 4/1996, pp. 425- 431.

¹⁷ Lazarević, Lj., Vučković, B., Vučković, V., *Komentar Krivičnog zakonika Crne Gore*, Cetinje, 2004., p. 660.

¹⁸ Stojanović, Z., Perić, O., *Krivično pravo, Posebni deo*, op. cit., p. 224.

¹⁹ Contributions are all kinds of duties toward the social community; Decision of the Supreme Court of Serbia, Ki. No. 32/78.

ries of population, health care, education, culture, science, temporary unemployment or disability, etc. According to some authors, contributions may also be treated as monetary prestations, which are to be paid to compensate for specific services or to exercise certain rights.²⁰ They may also be collected from personal incomes, in accordance with the applicable law, in order to cover the common needs in various areas of social activity.²¹

In current practice, social security contributions have a prominent position in the taxation system. A failure or omission to pay these contributions is a criminal offence, which also applies to other dues falling into the category of public revenues. In that case, it is possible to apply the blank disposition to determine the specific kind of tax evasion.

Such a formulation of the blank disposition (which is characteristic of the criminal offence of tax evasion) was introduced into our legislation during the legislative reform in 1977.²² However, at that time, the concept of contributions included various and numerous public dues, in addition to those in the sphere of social insurance (which are also part of the present legislation). After the introduction of a new fiscal system in the Republic of Serbia in 1992, the concept of contributions includes only those social security contributions which (along with taxes and other dues) fall into the category of public revenues. Consequently, the act of avoiding to pay other public revenues (such as: fees, customs duties and various other dues) does not amount to the criminal offence of tax evasion; then, the specific action undertaken by the perpetrator and other relevant circumstances are the key criteria for establishing the nature of the committed act, which may be qualified as a criminal offence, a commercial violation or a misdemeanor.²³

The judicial practice supports the above conception,²⁴ which implies that the concept of other prescribed contributions includes all kinds of duties toward the social community. According to another decision of the Supreme Court of Serbia, in deciding on raising an indictment for a criminal offence of tax evasion, the tax authorities need not determine the amount of the embezzled tax in the course of an administrative proceeding. The area of fiscal (tax) law and public revenues provide ample substantive law provisions which define particular types and forms of taxes and other public dues, depending on the kind of taxpayer's activity, the type and/or the source of taxation, and the taxpayer's status.²⁵

In particular, the relevant application of criminal law provisions and the correct qualification of factual grounds in each specific case were reinforced in another decision of the Supreme Court of Serbia. The Court ruled that a criminal offence of tax fraud cannot not be qualified as such if the tax authority was in possession of information which (at the moment of tax assessment) clearly indicated the falsity of data reported in the tax return submitted by the taxpayer and, nevertheless, based its decision on such false tax return data.²⁶

²⁰ Pavišić, B., Grozdanić, V., Veić, P., *Komentar Kaznenog zakona*, op. cit., p. 636.

²¹ See footnote 38.

²² See footnote 36.

²³ Mršić, G., *Kaznena djela utaje poreza i drugih davanja - poseban osvrt na slućajeve iz prakse*, *Radno pravo*, Zagreb, no. 9/2207, pp. 61 - 68.

²⁴ Decision of the Supreme Court of Serbia, Kž. No. I 32/78.

²⁵ See footnote 23.

²⁶ Mršić, G. *Kaznena djela protiv sigurnosti platnog prometa i poslovanja - poseban osvrt na kazneno djelo utaje poreza i drugih davanja*, *Hrvatska pravna revija*, Zagreb, no. 10/2006, pp. 89-96.

3.3. The commission of the criminal offence of tax evasion

According to the legal definition, the criminal offence of tax evasion may appear in two forms: the basic (less serious) form and the aggravated (more serious) form. Depending on the undertaken criminal activity, the basic form of tax evasion includes three distinctive forms of unlawful conduct:²⁷ 1) providing false income data on taxable assets; 2) failure to report income (if filing a tax return is compulsory); and 3) concealing data in some other way.²⁸

Given the fact that this is a specific form of fraud,²⁹ some authors consider that (generally speaking) this unlawful action may be qualified as a fraudulent activity. In particular, it may be manifested in two ways, alternatively: as a commission of an act (*delicta commissiva*), and as an omission or failure to act (*delicta omissiva*). In this context, the act of providing false data on one's income/revenues is regarded as a positive activity i.e. a commission of this criminal offence; a failure to report one's income/revenues is considered to be a passive or negative act involving the offender's omission to act; the act of concealing data may be perceived either as a commission or an omission to act.³⁰

The act of providing false data on a lawfully acquired income/revenue, property assets or other facts relevant for assessing tax duties exists as an offence if the facts regarding the lawfully acquired revenues, property assets and other facts have been untruly and incorrectly reported, as compared to the actual state of affairs; in this case, an essential requirement is that the data relevant for tax assessment have been acquired in lawful way. In this form of fraud, the perpetrator formally acts according to the prescribed requirements for disclosing the facts that are important in assessing the amount of tax duty, but he still fails to respect the substantive law requirements by failing to report the facts as they really are.³¹ This criminal offence does exist regardless of whether the amount of the embezzled tax has been previously assessed in the administrative proceedings conducted by competent tax authority.³²

Other elements of unlawful action in this offence are: reporting a smaller amount of revenues than they actually are; reporting a lesser value or scope of property assets for the respective tax-reporting period; misrepresentation of other facts and data relevant for the assessment of the legally prescribed taxes, social security contributions or other prescribed contributions (here, the other facts and data may refer to the failure to report the exact number of employees, family members or school children, the spouse's employment status, the due payment date or the place where the payment has to be effected, etc).³³

The misrepresentation of relevant facts may include various activities³⁴, such as: fully or partially reducing the tax return on revenues; reporting only some items or some sources of revenues, or reporting only the revenues obtained in a certain period, location or in another geographic area; reporting smaller amounts of revenues or reporting larger amounts of business expenditures, etc. As far as an act of tax fraud is concerned, it is es-

²⁷ Jovašević, D., Komentar Krivičnog zakona SR Jugoslavie, Beograd, 2002, pp. 34 - 37.

²⁸ Đurđić, V., Jovašević, D., Krivično pravo, Posebni deo, Beograd, 2010, pp. 237 - 239.

³⁰ Jovašević, D., Leksikon krivičnog prava, Beograd, 2011, p. 689.

³¹ Jovašević, D., Komentar Krivičnog zakona Republike Srbije sa sudskom praksom, Beograd, 2003, p. 556.

³¹ Lazarević, Lj., Krivično pravo, Posebni deo, Beograd, 1993, p. 229.

³² Decision of the Supreme Court of Serbia, Kž. 1815/73.

³³ Lerković, M., Kaznena odgovornost za povrede poreznih propisa, Porezni vjesnik, Zagreb, no. 5/2000.

³⁴ See footnote 49.

essential that the disclosure of false data involves relevant and decisive facts which are significant for assessing the amount of tax and other duties. However, the disclosure of false data including the facts which are of no relevance for assessing the amount of tax duty and/or other prescribed dues or contributions is not qualified as an unlawful act.³⁵

The form and the manner of submitting the tax return with falsely reported data to the tax authorities are totally irrelevant for the qualification of this offence.³⁶ A tax return may be submitted either orally or in writing (which is more common); it may also be done by presenting relevant files, accountancy records and other business-related documentation containing false, forged or misrepresented facts for inspection of tax authorities, regardless of whether the inspection is conducted at the request of tax authorities or at the initiative of the taxpayer.³⁷

A criminal offence of tax fraud also exists when the false data are provided subsequently as a supplement to an already submitted tax return (either at the request by tax authorities or at the tax payer's initiative) or, as the case may be,³⁸ in the course of revenue control procedure (either regular or extraordinary inspection control), or even if the false data and facts have been presented as a supplement to the enclosed documentation that had to be submitted together with the tax return. There shall be no criminal offence of tax embezzlement³⁹ where the administration agency in charge of revenues, at the moment of rendering the decision on assessing tax duty, has been in possession of reliable data that indicated the falsity of data in the tax return submitted by the tax payer but, nevertheless, based its decision on such a tax return.⁴⁰

Tax fraud⁴¹ may be committed only by providing false data on the lawfully acquired revenues and property assets. Hence, a person who fails to submit a tax return to report revenues originating from the commission of criminal offences, commercial violations, misdemeanors or other unlawful acts (e.g. performing an independent activity without a permission from the competent authority, avoiding the payment of one or more dues, or engaging in black-market activities) shall not be considered to have committed this criminal act. In prosecuting the perpetrator of this criminal offence, the embezzled tax amount shall not be considered as damage caused by the commission of the criminal act, nor shall the defendant be ordered by the court to repay the embezzled tax amount on the grounds of the property claim filed by the municipal administration.

According to one conception, the consequence of the criminal offence of tax evasion is damage to institutions, services and affairs which are of public interest to the entire social community; therefore, it is essential to ensure a full, timely and efficient collection of taxes, contributions and other prescribed dues in the system of public revenues, which is an important source of funding public institutions and services. According to another view, the consequence of tax fraud is the failure to affect the payment of taxes, contributions and other prescribed dues in time and in legally specified tax amounts, for the benefit of the society at large.

³⁵ Simić, I., Petrović, M., *Krivični zakon Republike Srbije - praktična primena*, Beograd, 2002, pp. 154-156.

³⁶ See footnote 21.

³⁷ See footnote 23.

³⁸ A group of authors, *Komentar Krivičnog zakona Republike Srbije*, Beograd, 1995, p. 553.

³⁹ Vukić, Z., *Porezna utaja*, *Hrvatska pravna revija*, Zagreb, no. 10/2003, pp. 56-65.

⁴⁰ Decision of the Supreme Court of Serbia, Kž. I 1196/85.

⁴¹ Jovanović, Lj., Jovašević, D., *Krivično pravo, Posebni deo*, Beograd, 2002, p. 212.

The offence is deemed to have been committed by submitting a tax return containing false data or by concealing the data which are relevant for the assessment of taxpayer's taxes and/or contributions by the competent public revenue agency. Until that moment, there is just an attempt which, depending on the amount of penalty envisaged for the basic criminal offence, may be not punishable. However, the legal theory includes a conception according to which this offence is deemed to be committed by providing false data and/or by failing to file a tax return or, as it may be, by omitting to indicate all legally relevant data in the tax return or concealing specific facts.⁴²

In case taxes and contributions are to be collected after deduction, the offence is deemed to be committed at the moment of maturity of the tax debt; in cases where tax payment has to be effected within a prescribed period of time, the offence is completed upon the expiry of the statutory time limit. In case the tax payer has omitted to file a tax return, the offence is deemed completed after the competent tax authority has failed to render a relevant decision within the time limit prescribed for assessing the given kind of taxes.

In criminal law literature, there are different standpoints on the issue of completion of the criminal offence of tax fraud.⁴³ According to some authors, this offence is deemed completed after the offender has reported false data regarding his/her lawfully acquired income, property assets and other facts, and/or after the offender has failed to report the lawfully acquired income, property assets and other facts within the prescribed time limit.⁴⁴ Consequently, in this case, it is not required to prove that the perpetrator has avoided (fully or partially) the payment of taxes and other contributions. Therefore, in case the competent tax authority has reason to suspect the authenticity of the filed tax return, the actual facts revealed by the competent tax authority and their subsequent tax assessment based on such findings are unlikely to have a bearing on determining individual penalty or proving the existence of the criminal offence. On the other hand, this criminal offence may not exist where the competent tax authority was in possession of reliable data at the moment of rendering a decision on tax assessment but, eventually, based its decision on the untrue tax return filed by the tax payer.⁴⁵

The perpetrator of the criminal offence of tax fraud is any person who reports false data or conceals such data, and/or fails to file a tax return within the legally prescribed time limit. The offender is most frequently the tax payer but this role may also be assumed by some other persons acting for or on behalf of the tax payers, such as: a legal representative or proxy, or another person in charge of filing a tax return on behalf of and for the account of a tax payer, book-keeping and accountancy, making final and interim balances of payment of a company or another legal entity. It may also be a person who is only formally engaged (usually under the name of another) to perform some business activity, which implies an obligation to file tax returns and pay corresponding contributions to the social community. However, in the commission of this criminal offence, the perpetrator may not be the only direct participant involved in one or several criminal activities (envisaged in the applicable law); there are other persons who may take part in these activities by assisting the offender

⁴² See footnote 35, *op. cit.*, p. 230.

⁴³ Stojanović, Z., Perić, O., *Komentar Krivičnog zakona Srbije i Krivični zakon Crne Gore sa objašnjenjima*, Beograd, 1996, p. 245.

⁴⁴ Jovašević, D., *Poreska evazija i poreska krivična dela*, *Bezbednost*, Beograd, no. 4/2005, pp. 541-561.

⁴⁵ See footnote 96.

or otherwise contributing to the commission of this criminal act, by facilitating the illegal activities or ensuring their prompt and efficient realization.

In case a responsible person or official representative acting for and on behalf of a legal entity has failed to pay taxes and/or other prescribed contributions (which is an essential requirement to be met in establishing the criminal offence of tax evasion), the responsible person or official representative shall stand trial as a perpetrator of the criminal act of tax fraud; on the other hand, the legal entity shall be held liable for a commercial misdemeanor (infraction), the commission of which entails imposing a fine and protection measures.

The criminal offence of tax embezzlement may be also committed by the owner of a private company (enterprise) who deliberately avoids tax payment or fails to pay the retail sale tax while purchasing and placing various goods in the market without prescribed documentation. As far as criminal liability is concerned, the law requires the existence of direct criminal intent on the part of the criminal offender. Direct criminal intent includes the following elements: 1) the perpetrator's awareness that he/she provides false data or conceals real data, and/or the awareness of the omission to file the tax return within the prescribed time limit; 2) the perpetrator's volition to undertake these activities involving a commission of an act or omission to act; 3) the perpetrator's intent to fully or partially avoid the payment of taxes and other prescribed duties, either for his/her own benefit or for the benefit of another.⁴⁶

The prescribed punishment for this criminal offence is a cumulative sentence including a term of imprisonment ranging from six months to five years and a fine. This provision is an exception from the rule according to which the law-maker alternatively prescribes one or several penalties for each particular criminal offence.⁴⁷ In addition to criminal punishment, the perpetrator may be awarded some other criminal sanctions,⁴⁸ such as: a security measure banning the offender from exercising a specific professional activity and duty (envisaged in Article 85 of the Criminal Code of the Republic of Serbia), and a special security measure (envisaged in Articles 91-93 of the Criminal Code of the Republic of Serbia) involving a confiscation of illicit gain appropriated by the commission of a criminal offence (which is a criminal law measure *sui generis*).⁴⁹

4. MORE SERIOUS FORM OF TAX EVASION

In addition to the basic types of tax evasion, the law-maker has also envisaged a more serious (qualified) form of tax evasion. It is provided in Article 229, paragraphs 1 and 2 of the Criminal Code of the Republic of Serbia. This more serious criminal offence may appear in two forms, which imply a more severe punishment.

The first more serious form of tax evasion exists where the specific amount of tax duty that the offender avoided to pay by engaging in a legally prescribed activity exceeds

⁴⁶ See footnote 100.

⁴⁷ Jovašević, D., Sistem kazni u novom krivičnom zakonodavstvu Republike Srbije, Pravo, teorija i praksa, Novi Sad, no. 2/2007, pp. 99-117.

⁴⁸ Simović, J., Rogić Jugarić, T., Cindori, S., Utaja poreza u Republici Hrvatskoj i mjere za njezino sprječavanje, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 2/2007, pp. 591-617.

⁴⁹ Jovašević, D., Krivično pravo, Opšti deo, Beograd, 2010, pp. 289 - 291.

1,500,000 RSD; in that case, the prescribed cumulative penalty is a term of imprisonment ranging from one to eight years and a fine.

The most serious criminal offence exists if the perpetrator's activity or activities resulted in avoiding the tax payment of an amount exceeding 7,500,000 RSD; in that case, the prescribed cumulative penalty is a term of imprisonment ranging from two to ten years and a fine.

The specific circumstance qualifying this more serious form of tax evasion is the amount of avoided duty and/or the amount of damage inflicted to public agencies and services which are financed from the collected public revenue. The amount is determined by taking into account the specific time of committing the basic form of this criminal offence, and there must be causation between this amount and the committed act. Finally, the qualifying circumstance must be included in the perpetrator's criminal intent. In other words, given the fact that this criminal offence is qualified by a more serious consequence, its existence has to depend on the fact that the perpetrator is aware that his/her action is aimed at committing tax embezzlement involving a large amount of tax or other duties. Yet, there is no explicit requirement that the offender shall be aware of any specific amount of tax to be embezzled in this way, which applies also to other contributions and dues in the system of public revenues.

In the criminal law theory, there is no complete agreement on the issue of determining the nature and character of the criminal offence of tax evasion. Thus, according to one conception, this criminal offence is qualified by a specific circumstance; the perpetrator has to be aware of large-scale tax evasion but he need not be fully aware of the exact amount of embezzled tax. However, we still claim that this is a criminal offence qualified with a more serious consequence because the amount of the avoided tax is a decisive factor for indicating the scope and intensity of the consequence that are detrimental for public finances and the system of regular, unimpeded and legal funding of budgetary beneficiaries and other public services.

On the other hand, the court practice has not always been uniform in terms of qualifying perpetrator's unlawful conduct. At first, the judicial approach to this issue was hesitant but, in recent years, the judicial practice has taken a standpoint that there is no substantial difference between the basic and the qualified form of the offence of tax evasion because both forms include identical substantive elements and characteristics. The only difference between these two forms of tax evasion is considered to be of quantitative rather than qualitative nature, which is reflected in the amount of the embezzled taxes, contributions and other prescribed dues.

At the symposium of judges of criminal chambers of the Supreme Court of Yugoslavia and the representatives of criminal chambers of republic supreme courts, held in Belgrade on 7th through 9th December 1965, the opinions were divided in terms of the difference between the basic and the qualified form of this criminal offence. Later on, as already stated, the courts have accepted the conception according to which there was no qualitative difference between the basic and the qualified criminal offence of tax evasion. Namely, both forms of tax evasion include the same statutory definition, all relevant elements and identical characteristics; the only difference is a quantitative one (expressed in the amount of tax which avoided to be paid) rather than a qualitative nature of the act itself. Such a conception was accepted at another symposium of judges of criminal chambers of the Supreme Court of Yugoslavia and representatives of republic supreme courts, held in Belgrade on 26th and 27th December 1968.

The legal theory and the court practice further discussed the issues pertaining to the qualification of the serious form of tax evasion in order to establish whether this offence may exist if/in case where the perpetrator has committed the tax evasion by performing the same activity or a number of different activities over a period of several years. In other words, the key issue here is whether the total amount of taxes that the perpetrator avoided to pay at the end of each tax year are a relevant factor in determining the particular qualification of each criminal offence of tax fraud committed on an annual basis. Depending on the total amount of avoided taxes, contributions or other prescribed dues, it would be appropriate to qualify this offence as a serious form of tax evasion.

The issue is even more complex if it is considered from the aspect of whether continuous tax embezzlement (for years) and/or the avoidance to pay contributions and other prescribed dues shall be qualified as an extended criminal activity or as a real concurrence. An extended criminal activity exists when it is committed within a continuous period of time, in the same manner, by using the same instruments and/or the same permanent relation, situation or circumstance, as well as the same form of culpability as prescribed by the law. In answering this question, both legal theory and judicial practice are in favor of applying the extended criminal activity construction, providing that (in each case) this construction should include statutory requirements envisaged for the criminal offence of tax evasion (particularly, the requirement concerning the total amount of avoided tax, which shall be stipulated as an objective condition for incrimination).

5. CONCLUSIONS

Securing an orderly, lawful, well-timed and flawless operation of public revenues and expenditures has always been a significant issue for any state since the ancient times. The system of public revenues and expenditures is based on the fiscal (tax) system. The well-organized, efficient and flawless operation of the fiscal system has a considerable impact on the existence, survival and development of the State. Therefore, it is important for the State to prevent various forms of tax evasion by instituting a range of various measures, instruments and procedures at all levels aimed at counteracting various types of tax evasion: tax avoidance, concealing or failing to report taxes, avoiding or failing to pay taxes, contributions or other dues included in the system of public revenues.

The infringement of regulations governing the fiscal system may entail various detrimental consequences. Depending on the kind of violation, the scope and intensity of incurred damage and imminent risk to protected social values, the legal system provides different sanctions while distinguishing between criminal offences and misdemeanors. The criminal offences in the field of taxation are the most serious and dangerous forms of tax law infringement, which may cause considerable damage to the society as a whole. One of the most serious criminal offences in tax law is the act of tax evasion. In terms of its significance, scope and characteristics, it is regarded as the most serious form of tax fraud and, as such, it is punishable under the criminal legislation which prescribes relevant criminal sanctions and penalties.

In the legal system of the Republic of Serbia, the basic form of the criminal offence of tax evasion is prescribed in Article 229 of the Criminal Code of the Republic of Serbia (2006). Tax evasion is defined as a criminal act of reporting false data on one's lawfully acquired income, property assets or other facts relevant for the assessment of tax duty, or a failure to report such

income, assets and facts where a tax payer is obliged to report, or an act of concealing data relevant for assessing the tax duty with an intent to fully or partially avoid the payment of taxes and other prescribed contributions and statutory dues (either for one's own benefit or for the benefit of another) where the amount of the avoided tax duty exceeds 150,000 RSD. This offence has been designated as "tax evasion" owing to the fact that the committed act includes an element of unlawful appropriation of the amount that the perpetrator has avoided to pay, and which has remained in the perpetrator's possession.

Given that there are three different types and two serious forms of non-compliance with tax regulations, the Serbian Criminal Code has envisaged a cumulative punishment which includes: a term of imprisonment and a fine (whose scope depends on the total amount of avoided tax liability). However, in addition to criminal punishment, the competent court may impose some other criminal sanctions on the perpetrator, by awarding some security measures as well as a special criminal law measure involving a confiscation of illicit gain appropriated by the commission of this criminal offence.

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PORESKA UTAJA KAO KRIVIČNO DELO U NOVOM KRIVIČNOM ZAKONIKU REPUBLIKE SRBIJE

Izbegavanje plaćanja utvrđenih poreza i drugih javnih dažbina od strane poreskih obveznika direktno dovodi u pitanje ostvarivanje brojnih državnih funkcija. Stoga sve savremene države predviđaju veoma razuđen sistem različitih delikata: krivičnih dela, privrednih prestupa i prekršaja za koje su predviđene različite vrste sankcija. Na ovaj se način, s jedne strane, teži zakonitom i efikasnom utvrđivanju kaznene odgovornosti učinilaca poreskih delikata od strane nadležnih državnih organa i, s druge strane, ovaj sistem treba preventivno da deluje u pravcu podizanja opšte poreske discipline u društvu. U ovom radu se analiziraju karakteristike poreske utaje, kao osnovnog fiskalnog krivičnog dela u novom Krivičnom zakoniku Republike Srbije.

Ključne reči: *poreski sistem, porezi, poreska utaja, krivično delo, odgovornost, sankcije.*