Notion and characteristics of the tax evasion in Criminal Law of Republic of Serbia after 2016

Dragan Jovašević, PhD,
Full professor
Law Faculty University in Niš
Republic of Serbia

Abstract

Since ancient times and up to the present, the matter of securing an orderly, lawful, well-timed and flawless functioning of the system of public revenues and expenditures has been rather significant for the State. Its basis is rooted in the fiscal system. As a matter of fact, the fiscal system and its orderly, well-timed, complete and flawless realization has a great impact on existence, survival and even development of the State itself. Consequently, it is understandable how important and necessary is for the State to oppose, by applying a wide range of various measures, as well as procedures, at all levels, the various kinds and types of failing to pay, concealing, failing to report or avoiding the payment of taxes, contributions and other dues that make the system of public tributes.

Violating the regulations in the fiscal system area may entail various damaging consequences. Depending on the kind of violation and/or damage caused in terms of its scope and intensity, or putting in danger protected social values, the law has provided different sanctions while distinguishing between criminal offences or certain other kinds of violation. The most dangerous and most serious forms of transgressing tax laws, apt to inflict most serious consequences, i.e. considerable damage to the society as a whole, make the category of tax criminal offences, or criminal offences in the area of taxes. Specific among these offences in terms of its significance, scope and characteristics is the act of tax embezzlement as the most serious form of expression of tax evasion threatened in criminal legislation by prescribed penalties and other criminal sanctions. Consequently, the present article is dedicated to elaboration of the criminal offence of tax embezzlement and description of efforts of the Republic of Serbia aimed at efficient suppression of various forms and types of that criminal offence.

Keywords*: taxation system, taxes, evasion, criminal offence, liability, sanction, Serbia*

1. Introductory considerations

Criminal offences and, more particularly, tax embezzlement (*evasion, fraude fiscal, omesso versamento di imposte, Steuerbetrug*) amounts to exceptionally serious unlawful and dangerous conduct committed by individuals or groups and/or legal entities (companies, institutions or other organizations) by which, through violation of regulations, financial interests of the entire social community are put in danger, which is primarily expressed in inflicting considerable damage to the fiscal system and the public revenues system in general, including also direct or indirect losses to all budgetary beneficiaries. These unlawful acts make a particular kind of commercial criminal

offences that may be classified as a sub-group of offences against public, i.e. State finances. Such offences are often also called financial criminal offences.

Considering the enormous significance of fiscal system, its orderly, well-timed, complete and efficient realization for the existence, survival and even development of the State and/or society, it is perfectly clear that it has to oppose, through various institutions, at all levels, and by applying wide range of various measures, ways and procedures, all forms and kinds of failure to pay, concealing, failure to report or avoiding of payment of taxes, contributions and other prescribed dues that make the system of public tributes and/or public revenues.

It goes without saying that the violation of regulations in the area of fiscal system may entail various damaging consequences. Depending on the kind of violation and/or damage caused in terms of scope and intensity or endangering the protected social values, the law provides various sanctions that depend on the type of offence or unlawful act committed in a particular case[1]. The most dangerous and serious forms of violating the tax laws, by which serious consequences are entailed and/or extreme damage inflicted against the society as a whole, are the criminal offences in the area of taxes[2].

2. Forms of expression of tax evasion

The ground of criminal offences in the area of taxes[3], regardless of the form of their expression in the specific case, is found in various kinds of tax evasion, particularly considering the fact that such evasion is at the same time one of the most frequent forms of black market. Such kind of market may take place practically in rather different areas of activity, such as: manufacturing and trade of goods and services, labor market and employment relations, building industry, housing and municipal services, real estate etc.[4].

However, most important in the optics of interest of the State are those black-market forms of that are particularly manifested in the sphere of disturbing, putting in danger or violating the fiscal (taxation) system[5]. Evasion or various forms and types, i.e. ways of avoiding reports and deciding on the amount of prescribed taxes and other dues and of their collection, amount to a damaging, unlawful and dangerous activity on the part of individuals and groups, by which fundamental fiscal interest of society are jeopardized[6].

The fact is that tax payers experience the tax as a specific expenditure which only makes worse their material situation, because payment of taxes and other dues has a direct impact on decreasing their economic power and purchasing capacity. Consequently, they avoid the payment of taxes or avoid it in various degrees, or at least try to do that in an attempt to make easier that burden. All these forms of payment avoidance amount in fact only to most serious and dangerous forms and types of

[1] D. Jovašević, *Poreska krivična dela*, Beograd, 2015, pp. 135-148.

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

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

[4] D. Jovašević, *Krivično pravo, Posebni deo*, Beograd, 2017, pp. 141-147.

[5] D. Jovašević, Lj. Mitrović, V. Ikanović, *Krivično pravo Republike Srpske, Posebni deo*, Banja Luka, 2017, pp. 281-285.

[6] B. Petrović, D. Jovašević, A. Ferhatović, *Krivično pravo 1*, Sarajevo, 2015, pp. 139-141.

expressing the tax evasion. A particular form of such evasion is the avoidance of income tax levied on unlawful activities.

Inclination of tax payers to completely or partially avoid payment of taxes and other dues depends primarily on the intensity of resistance toward such payment. This resistance intensity, on its part, depends on several elements that may be classified in the following manner: 1) the amount of tax burden, 2) the purpose of spending resources obtained through tax, 3) tax form, 4) public opinion regarding the justification of tax[7]. Consequently, one may distinguish between two forms of tax evasion – the lawful and the unlawful one. The lawful evasion exists where individual tax payers in fact respect the frameworks set on the ground of law or other general regulations in the area of fiscal or tax system, but still attempt, in various ways, to avoid totally or partially the payment of taxes and other prescribed dues.

Practically speaking, at issue here are various forms of use of tax incentives (in the form of exemption or tax relief in fixing the amount of taxes, tax assessing of payment of taxes). These forms include also using a gap in the law in tax or other laws and regulations, which is enhanced by the high degree of abstract notions, imprecision and generality of wording applied by the lawmaker. This is particularly the case in those systems where, due to speedy and abrupt changes in the economic sphere in the country and abroad, the very tax regulations had to be amended rather often in order to adapt to new social, legal and economic frameworks.

Furthermore, the lawful or – as some authors call it – permitted tax evasion[8] includes procedures resorted to by tax payers in order to totally or partially avoid the payment of taxes in one of the following ways: 1) change of stay or residence, 2) reducing or giving up the consumption of taxed products or services, and 3) finding the gaps in the law. The very moment of maturity means that the tax payer comes into debtor's delay regarding the payment of his/her tax debt, while this maturity means the feature of the tax debt according to which it has become due in terms of law. Missing the deadline for fulfillment of the relevant obligation materializes the fact of damaging and unlawful conduct.

The second form of tax evasion concerns an unlawful or prohibited evasion. Unlawful evasion means that an individual as a tax payer becomes exposed to the severity of law and penal repression. In this case, the regulations are violated in various degrees of intensity. This again means inflicting direct damage to social community. Such illegal acts are, as already said, aimed against the tax, i.e. fiscal system of the country. This unlawful evasion may take two forms which otherwise are most characteristic of modern legal and social systems.

The first mentioned form of avoidance of tax payment included tax evasion, tax embezzlement, i.e. avoiding of payment of taxes and other dues – which is the topic to be considered later on in this text. The second form of tax evasion is smuggling or cross-border contraband of various goods, products or services involving a single or several countries. These types of unlawful tax evasion are rarely undertaken independently from other illegal activities of their perpetrators. Most often they are but a stage in committing other punishable acts done on a permanent basis by individuals or, as the case may be, groups, which acts are otherwise specified as criminal offence, commercial violations or misdemeanors.

---

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

[8] B. Jelčić, *Nauka o finansijama i finansijsko pravo*, Zagreb, 1990, pp. 183-184.

Unlawful evasion includes various steps of law violation, taken by tax payers aimed at avoiding the payment of taxes. In order to evade the payment in a non-permitted way, the tax payers conceal, totally or partially their property subject to taxes. The aim of such embezzlement is to decrease the tax debt and, in this respect, depending on the object involved in the unlawful act, the theory knows of complete or incomplete embezzlement. Unlawful evasion of these types is punishable. All contemporary states as well as the states in the past have always taken various measures to oppose such punishable activities. Various preventive but also repressive measures are applied in this process in order to strengthen tax discipline. Considerable role in the prevention of unlawful tax evasion relates also to the reducing of tax burden into reasonable frameworks helping to attenuate the factors that contribute to higher intensity of resistance against payment of taxes.

According to some authors, the unlawful tax evasion is one of the key causes of existence of the black market. Indeed, this concept includes all illegal commercial activities aimed at acquiring economic gains for an individual and at the detriment of the State and persons engaged in lawful commercial activities. The former illegal activities are affected by avoiding or violating of relevant regulations. Some authors call this black-market economy also – non-taxed, informal, underground, black, informal or unofficial economy. But, regardless of the variety of terms, almost all authors do agree in looking at these unlawful activities as improper or as the ones imprecisely or wrongly interpreted in the media.

3. Characteristics of the criminal offence of embezzlement

Criminal offences in the area of taxation are distinguished from other criminal offences by their nature and character. There are several kinds of such offences. The basic one of the kinds is tax evasion specified in art. 225 of the Criminal Code of the Republic of Serbia (past of Novel this Code from 2016.). This was the way, after entering into force of this Law on 1 January 2006, of replacing the offence "Avoidance of tax payment" formerly provided for in art. 172 of the Law on Tax Procedure and Tax Administration (which abolished on 1 January 2003 the provision of article 154 of the Criminal Law of the Republic of Serbia covering the act of embezzlement). The mentioned Law on Tax Procedure and Tax Administration, as a secondary law in this matter, still includes certain other offences in the sphere of taxes.

As already said, avoiding of legal duty of payment of specific amounts of money to the benefit of the State, is an act of damaging the interest of society, entailing also negative consequences for the social security funds and institutions, hampering as well the functioning of all budgetary institutions and affairs. However, only where such avoidance amounts to a wider scope or assumes more serious forms, one may speak of taking place of the criminal offence in the area of taxes. All other less important and different cases of lack of tax discipline and tax embezzlement, although certainly unlawful and punishable conduct, belong to the category of commercial violations and/or misdemeanors.

3.1. The Concept of Criminal Offence of Embezzlement

The basic criminal offence in the legal system of the Republic of Serbia is the tax embezzlement. In some legal systems, this offence goes under the term tax evasion" or

"tax and other dues evasion", and the like. In our system, it is provided for, after 2016, in article 225 of the Criminal Code of the Republic of Serbia. Its elements include disclosing of false information on one's legally acquired revenues, objects of property or other facts relevant in assessing the tax duty, or the failure to report these where submission of tax form is prescribed, as well as concealing of data important in assessing the tax duty with the aim of totally or partially avoiding the payment of taxes and other prescribed dues and contributions for oneself or for others, where the amount of avoided obligation exceeds 500,000 RSD.

The title of this offence derives from its element expressed in committing an unlawful acquisition by the perpetrator of that number of dues whose payment is avoided by such an act. In this way, the mentioned criminal offence formerly specified in article 172 of the Law on Tax Procedure and Tax Administration has ceased to exist.

3.2. The Object of Protection

According to statutory description of the criminal offence of embezzlement, one may conclude that this is an offence of a *sui generis* nature. However, according to some authors, this is a specific form of criminal offence of fraud, although, to be true, the one inflicting damage to the society as a whole[9]. This offence is characterized also by the blank, disposition, meaning that completing its content depends on other regulations in the area of fiscal and tax systems that have to determine the concept, the kind and the content of individual taxes and other public dues (contributions and public duties), the tax payers of these duties as well as the payment time limits[10]. Such kind of disposition allows that the nature and content of fiscal duties, in terms of the object of protection by this criminal offence, be determined on the ground of regulations outside of the criminal law sphere[11].

The object of protection by prescribing this criminal offence is the fiscal system, the public revenues system that makes the foundation of the economic order of the country. There are also conceptions[12] in the theory according to which the object of protection in this case is the duty of payment of taxes, contributions and other dues. Public duties include taxes, customs duties, fees and contributions. The object protected is determined in an alternative way. It may include the following categories: taxes, contributions and other duties specified by law and included in public revenues. The treatment is the same, regardless of whether these duties refer to natural persons or legal entities. It is a matter of factual case to determine, according to relevant regulations, the kind of fiscal duty.

Since our fiscal system acknowledges several kinds of taxes, this conception includes, in any case, the part of income or property taken by the social community from natural persons and legal entities (companies, institutions, and other organizations) and/or entrepreneurs to cover the corresponding public expenditures without giving to tax payers any direct counter favor or counter service. The State, in fact, does the above by taking a part of income or property from its citizens, on the ground of government authority, without countering with some direct counter action. Consequently, taxes are a

[9] Z. Stojanović, O. Perić, *Krivično pravo, Posebni deo*, Beograd, 2000, p. 244.
[10] Lj. Lazarević, *Krivično pravo, Posebni deo*, Beograd, 1993, p. 229.
[11] D. Jovašević, *Krivično pravo, Posebni deo*, Beograd, 2017, pp. 256 - 258.
[12] B. Pavišić, V. Grozdanić, P. Veić, *Komentar kaznenog zakona*, Zagreb, 2007, p. 636.

rather important category from several points of view[13], since they serve as an instrument of realization of further and higher objectives in the name and for the satisfaction of needs of the entire social community and at the same time represents a strongly efficient mechanism of social policy[14]. On the other hand, taxes may be defined also as benefits in terms of money, or revenues calculated on the income of tax payers, used for covering public expenditures. Taxes are thus the part of property or income taken from natural persons and legal entities with the purpose of covering the expenses of social and political community[15].

Similar is the function and role of contributions and other prescribed dues which fall also in the category of revenue in our legal system. These benefits as well serve for satisfying common and general social needs[16].

Contributions[17] are also benefits to be calculated according to law and other regulations from the income of natural persons or legal entities and/or entrepreneurs. Their purpose is meeting the needs of various social institutions and services in the following areas: social security for children and other categories of population, health care, education, culture, science, temporary unemployment or inability for work, etc.

According to some authors, contribution may also be treated as pecuniary prestations to be paid to compensate for specific services or in order to exercise certain rights[18]. They may also be a category of benefits to be levied on the ground of law and other regulations from personal incomes, in order to cover the common needs in various areas of social activity.

Especially conspicuous in the present practice are social security contributions. One has to note that the failure to pay them is a criminal offence, which (in terms of protected object) applies also to other dues entering in the sphere of public revenues. This very fact is a basis of the claim that in this case it is possible to speak of blank subject-matter of the criminal offence. Such formulation of blank disposition characteristic of the criminal offence of embezzlement has been introduced in our legislation as well during the legislative reform in 1977.

However, at that time the concept of contribution, in terms of the object of protection, included numerous and different public dues, in addition to those in the sphere of social insurance – which is the case in the present legislation. After the introduction of new fiscal system in our Republic in 1992, the concept of contributions includes only those social security contributions that, together with taxes and other dues representing public revenues category. Consequently, avoiding of payment of other public revenues, such as fees, customs duties, dues related to various other purposes, do not amount to the object of protection in terms of this criminal offence, so that, in a concrete case, depending on the action taken by the perpetrator and other relevant circumstances, another criminal offence maybe at issue or another kind of unlawful conduct (commercial violation or misdemeanors).

---

[13] B. Petrović, D. Jovašević, A. Ferhatović, *Krivično pravo 2*, Sarajevo, 2016, pp. 252-255.

[14] K.Turković *et al.*, *Komentar Kaznenog zakona*, Zagreb, 2011, pp. 225-231.

[15] Lj. Lazarević, B. Vučković, V. Vučković, *Komentar Krivićnog zakonika Crne Gore*, Cetinje, 2004, p. 660.

[16] D. Jovašević, Lj. Mitrović, V. Ikanović, *Komentar Krivičnog zakonika Republike Srpske*, Banja Luka, 2018, pp. 698-700.

[17] *Contributions are all kinds of duties toward social community. Verdict of the Supreme Court of Serbia*, Ki. No. 32/78.

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

The court practice supports the above-mentioned conception[19], meaning that the concept of other prescribed contributions includes all kinds of duties toward social community. According to another standpoint of the Supreme Court of Serbia, in deciding on arraignment due to a criminal offence of tax embezzlement it is not necessary that the amount of the embezzled tax be determined in advance by the tax authority in the administrative proceedings. The area of fiscal law and the public revenues law informs us on the plurality of statutory substantive law provisions serving in determination of individual types and forms of taxes and other public benefits depending on the kind of activity and/or other type of taxation source as well as on the status of the tax payer.

In any case, it is important to particularly point out that correct application of the criminal law provisions and the qualification of the concrete state of facts are much helped also by the decision of the Supreme Court of Serbia according to which there is no criminal offence of tax embezzlement where the administrative agency in charge of taxes was in possession of valid data at the moment of rendering the decision, which information indicated the falsity of data reported in the tax return submitted by the tax paver, but in spite of that still founds its decision on such (false) tax return[20].

3.3. The Perpetration of Criminal Offence

According to statutory definition of the criminal offence of embezzlement that offence may appear in two forms. These are the basic and the serious, i.e. qualified form. The basic form of this criminal offence, depending on the criminal action taken, may appear in three separate kinds[21]. These include: 1) disclosing of false revenue data, 2) failure to report revenues in case the report is compulsory, and 3) concealment of data in some other way[22].

Since at issue here is a specific form of criminal offence of fraud[23], according to some authors the unlawful action in the case of this offence, general by speaking, may be said to be the fraudulent activity. In its becoming concrete, it may be manifested in two ways alternatively: as an active and positive act – *delicta commissiva,* and as a passive, i.e. negative act (failure to act, missing of one's duty) – *delicta omissiva*. In this respect, disclosing false data regarding the revenues is considered as a positive action of perpetration of this criminal offence, while failure to report – as a passive activity committed by the perpetrator, while the action of concealment may be undertaken both by acting or failure to act[24].

a) Disclosing of false data on lawfully acquired revenue, objects of property or other facts relevant in assessing tax duties exists as an offence if facts regarding the lawfully acquired revenues, objects of property and other facts have been untruly and incorrectly reported as compared to the really existing state of affairs; it is essential here that these have to be data concerning revenues or objects of property that are acquired in lawful way. In case of this form of criminal offence, to be true, the perpetrator formally acts

---

[19] *Verdict of the Supreme Court of Serbia*, Kž. No. I 32/78.

[20] G. Mršić, *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.

[21] D. Jovašević, *Komentar Krivičnog zakona SR Jugoslavie*, Beograd, 2002, pp. 34-37.

[22] M. Simović, D. Jovašević, *Leksikon krivičnog prava Bosne i Hercegovine*, Sarajevo, 2018, pp. 637-638.

[23] D. Jovašević, *Leksikon krivičnog prava*, Beograd, 2011, p. 689.

[24] D. Jovašević, *Komentar Krivičnog zakona Republike Srbije sa sudskom praksom*, Beograd, 2003, p. 556.

according to prescribed requirements for disclosing the facts that are important in assessing the amount of duty, but he still fails to respect the substantive law requirements by failing to report the facts as they really are[25]. 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[26].

Other elements of unlawful action in this offence include the following: reporting revenues in amounts lower than they really are, i.e. reporting the lesser value or lesser scope of objects of property for the tax reporting period, or reporting incorrectly and untruly other facts and data relevant for assessing the amount of legally prescribed taxes, social security contributions or other prescribed contributions (these other facts and data may refer to the failure to report the exact number of employed persons or the number of family members, or the number of school children as well as the fact of employment status of the spouse, and all that at the time of maturity and place of effecting a given tax duty, and the like)[27].

The ways of such false reporting of relevant facts may be rather different in real life. Thus, it is possible to reduce in the tax return the revenues realized in their totality or partially, or to report only some items of the revenues or those from some of the sources or, as the case may be, those realized in a certain period and at a certain place or in another geographic area; financial results may also be reported in smaller amount, while business expenditure may be raised contrary to the real state of affairs, and the like. It is essential that this false disclosing of data, as far as the action of perpetrating the criminal offence of tax embezzlement is concerned, involves decisive facts that are significant in assessing the amount of tax and other duties. Disclosing of false data regarding the facts having no relevance in assessing the tax duty or its amount, and/or in determining other prescribed dues or contributions or their amounts is not qualified as unlawful action in committing this criminal offence.

The way and form of submitting to the tax authority the tax return with falsely reported data and facts are totally irrelevant for this offence to take place. Such tax return may be submitted either orally or in writing (which is a more frequent case), but this may be done also by just presenting for inspection to the tax authority relevant documents, accountancy records and other documentation related to business activity, which documents are false, purposely changed, forged etc., regardless of whether they are presented for inspection to tax authorities at their request or at the initiative of the tax payer.

There shall be a criminal offence of tax embezzlement also should false data be presented, either at the request of tax authorities or at the tax payer's initiative, only subsequently as a supplement to an already submitted tax return, or, as the case may be[28], in the revenue of controlling procedure (regular or extraordinary inspection), or even if these false data and facts are presented as a supplement to the enclosed documentation that has to be submitted together with the tax return. There shall be no criminal offence of tax embezzlement[29] where the administration agency in charge of

---

[25] Lj. Lazarević, *Krivično pravo, Posebni deo*, Beograd, 1993, p. 229.

[26] *Verdict of the Supreme Court of Serbia*, Kž. 1815/73.

[27] M. Lerković, *Kaznena odgovornost za povrede poreznih propisa, Porezni vjesnik*, Zagreb, no. 5/2000.

[28] I. Simić, M. Petrović, *Krivični zakon Republikc Srbije – praktična primena*, Beograd, 2002, pp. 154- 156

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

social revenues, at the moment of rendering the decision on assessing tax duty has been in possession of reliable data that indicated the falsity of such data in the tax return submitted by the tax payer, while in spite of that the agency founds its decision on such tax return[30].

A tax embezzlement[31] may be committed only by disclosing false data regarding the acquired revenues and objects of property, meaning that a person failing to submit a tax return to report revenues originating from committing criminal offences, commercial violations, misdemeanors or other unlawful acts (for instance, engaging in intended to avoid payment of just one or more dues specified in the law or other regulations. The embezzled amount of tax in prosecuting for the criminal offence of tax embezzlement may not be considered as damage caused through commission of the criminal offence, nor the accused may be ordered by the court to repay the embezzled tax on the ground of the property law claim motioned by the municipal assembly.

The consequence of the criminal offence of tax embezzlement consists, according to one conception, in causing damage to institutions, services and affairs that are in the interest of the entire social community, because timely, efficient and complete collection of taxes, contributions and other prescribed dues which make the public revenues are the essential sources of financing of these institutions and services. According to another view, the consequence of this offence consists in the very failure of payment on time and in legally specified amount of taxes, contributions and other prescribed public duties for the benefit of social community.

The offence is completed by committing the act of reporting false data regarding the facts, or with concealing of data at the time the decision of the competent public revenue agency on assessing the tax or contribution has become final. Until that moment, there is just an attempt which, depending on the amount of the penalty threatened for the basic criminal offence, may be not punishable. However, there is a conception in legal theory according to which this offence is deemed completed by disclosing false data and/or by failing to file the tax return or, as the case may be, by omitting to indicate in the tax return of all legally relevant data, including the concealment of specific facts.

In case of taxes and contributions to be collected after deduction, the offence is deemed completed at the moment of maturity of the tax debt, while in case of taxes for which the law itself specifies the payment time limit, the offence is completed with the expiration of the legally specified deadline. Where this offence is committed by omitting to file the tax return, it is deemed completed after the competent tax authority, within the time limit prescribed for assessing the given kind of taxes, has failed to render the corresponding decision.

As far as answering the question of completion of criminal offence of tax embezzlement is concerned, one finds in the criminal law literature different standpoints as well[32]. According to some authors, namely, this offence is deemed completed after the perpetrator has reported false data regarding his/her lawfully acquired income, objects of property and other facts and/or after he/she failed to report the lawfully acquired income, objects of property and other facts within the prescribed

[30] Verdict of the Supreme Court of Serbia, Kž. I 1196/85.

[32] Lj. Jovanović, D. Jovašević, *Krivično pravo, Posebni deo*, Beograd, 2002, p. 212.

[32] Z. Stojanović, O. Perić, *Komentar Krivičnog zakona*, *op. cit.*, p. 245.

time limit[33]. Consequently, in this case, it is not required that the perpetrator has avoided (completely or partially) the payment of taxes and other corresponding contributions. Therefore, the facts that the competent tax authority, not believing in the authenticity of the filed tax return, finds for itself the real situation and, on the ground of such finding, assesses the tax, are not apt to have a bearing on individualization of penalty as well as on the existence of the criminal offence. On the other hand, this criminal offence may not exist where the agency in charge, at the moment of rendering the decision on assessing the tax or other duty, was in possession of reliable data and, in spite of that, founds its decision on the untrue tax return filed by the tax payer[34].

The perpetrator of the criminal offence of tax embezzlement is any person who reports false data or conceals such data and/or fails to file on time the tax return, while being bound by law to act accordingly. This role is most frequently taken by the tax payer, but by other persons as well; these may be: legal representative or proxy of such person or the person filing the tax return on his/her behalf and for his/her account, a person in charge of accountancy and other documentation, the one making final and preliminary balances of payment of an enterprise, or another legal entity. This may also be a person who only formally, and under another person's name, is engaged in some business activity imposing on him/her the duty of filing tax returns and of payment of corresponding contributions to the social community. But in committing this criminal offence characterized by specific form of taking the act of commission, it is possible that the perpetrator is not only a direct actor engaged in one or several activities specified by law, but other persons as well who take part in these activities by rendering help to such person or making some other contribution to him/her, creating in this way favorable conditions to completely realize his/her intention, or realize it as soon as possible, more efficiently and in a simpler way.

If we have a situation in which a legal entity (an enterprise, company, institution or other organization), by way of an activity effected by its responsible or official person, is successful in avoiding the payment of taxes or other prescribed contributions – meaning that requirements are met for this criminal offence to be materialized – such legal entity shall be liable for the commercial infraction committed (entailing the imposition of fines and protective measures), while the person in charge or the official person appear as the concrete perpetrator of the offence of tax embezzlement.

An owner of a private company (enterprise) purchasing and putting in market various goods without prescribed documentation and, by doing that, fails to pay in the retail sale tax – if this is done with the aim of avoiding the payment of taxes due – commits the criminal offence of tax embezzlement. As far as criminal liability is concerned, the law requires the existence of direct criminal intent on the part of the perpetrator of the criminal offence.

Such criminal intent includes the following elements: 1) the awareness of the perpetrator that he/she gives false data or conceals real data and/or the awareness of his/her failure to file the tax return within the prescribed time limit; 2) volition to undertake concretely these positive or, as the case may be, negative activities; 3) intention of the perpetrator to avoid in this way, for him or some other person, entirely or partially, the payment of taxes and other prescribed duties[35].

---

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

[34] R. Sokolović, D. Jovašević, *Poreski delikti*, Beograd, 2015, pp. 96-105.

[35] M. Simović, D. Jovašević, M. Simović, *Politika suzbijanja kriminaliteta*, Istočno Sarajevo, 2016, pp. 213-219.

This criminal offence is threatened by a cumulative penalty of six months to five years of imprisonment and a fine. This is an exception from the rule according to which the law-maker prescribes for each particular criminal offence alternatively one or several penalties[36]. In addition to punishments, some other criminal sanctions may be imposed against the perpetrator[37]; these are: security measure of ban on being engaged in a specific profession, activity and duty (specified in article 85 of the Criminal Code of the Republic of Serbia), and 3) property law measure in terms of articles 91 through 93 of the Criminal Code of the Republic of Serbia, enabling the imposition penalty of confiscation of property benefit that is acquired through the commission of a criminal offence (this is a *sui generis* criminal law measure)[38].

4. More serious form of manifestation of tax embezzlement

In addition to basic types of the criminal offence of tax embezzlement, the law-maker has provided for a more serious, i.e. qualified offence. This offence is specified in article 225, paragraphs 1 and 2 of the Criminal Code of the Republic of Serbia. This more serious offence, threatened by law with stricter punishment, may appear in two forms:

The first more serious form of this criminal offence, threatened by the penalty of one to eight years of imprisonment and, cumulatively, with a fine, exists where the amount of tax duty to be paid, in terms of laws covering specific business activities, exceeds 1.500,000 RSD.

The most serious criminal offence exists if the perpetrator, by any kind of his activity or activities, is successful in avoiding the payment of taxes in the amount exceeding 7.500,000 RSD. This offence is threatened by the penalty of from two to ten years of imprisonment and by a fine.

The qualifying circumstance for taking place of this more serious form of criminal offence of tax embezzlement concerns the amount of avoided duty and/or the amount of damage inflicted to agencies and services that are financed if collected public revenue. Finally, that qualifying circumstance must be included in the criminal intent of the perpetrator. In other words, since at issue here is a criminal offence qualified by a more serious consequence, its existence must depend on the fact that the perpetrator is aware that his/her action is aimed at embezzlement of tax and other duties in large amount. There is, however, no requirement that he/she is entirely aware of some specific amount of the tax embezzled, which applies also to other contributions and dues entering in the area of public revenues.

We have to say that, in addition to the mentioned conception, there is still no complete agreement in the criminal law theory regarding the issue of determination of the nature and character of the criminal offence of tax embezzlement. Thus, according to one conception, this is a criminal offence qualified by a particular circumstance (as already elaborated in this text). The perpetrator, namely, has to be aware of his committing a large-size tax embezzlement, but in a concrete case it is not required that he/she is aware of the exact amount of tax to be avoided in this way. However, we still claim that at issue here is an offence qualified with a more serious consequence, because the amount of the avoided tax is a decisive factor for indicating the scope and intensity

[36] D. Jovašević, *Korporativno krivično pravo*, Niš, 2012, pp. 99-107.
[37] M. Simović, D. Jovašević, V. Simović, *Privredno kazneno pravo*, Banja Luka, 2016, pp. 221-234.
[38] D. Jovašević, *Praktikum za krivično pravo*, Opšti deo, Niš, 2014, pp. 189-191.

of the consequence damaging public finances, and/or the system of regular, unimpeded and legal financing of budgetary beneficiaries and other public services.

On the other hand, the court practice regarding this qualification of unlawful conduct of the perpetrator has not always been uniform. At the beginning, it has hesitated with its approach, while in recent years the conception has taken root according to which there is no genuine difference between the basic and the qualified form of the offence of tax embezzlement, since both forms indeed include identical characteristics of its subject-matter. The difference between these two forms of this offence is found, in fact, in the sphere of quantity, i.e. in the amount of the tax and other kinds of prescribed dues and contributions embezzlement.

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 regarding determination of 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 embezzlement. The point at issue here is that both forms of this criminal offence include one and the same statutory definition as well as all relevant identical elements, so that the only difference is a quantitative one (expressed in the amount of avoided duty of payment), and not of the qualitative nature. Such conception has also been accepted at the symposium of judges of criminal chambers of the Supreme Court of Yugoslavia and representatives of republic supreme courts, held also in Belgrade on 26th and 27th December 1968.

Court practice, as well as legal theory engaged in discussing the matter of qualification of the serious form of offence of tax embezzlement seriously consider whether this offence may exist if the perpetrator is committing tax embezzlement in course of several years by the same or various activities. In other words, whether individually avoided payment amounts for every tax year determine each particular yearly qualification of the criminal offence of tax embezzlement so that in this case it would be appropriate, depending on the amount of totally avoided tax, contributions or other dues prescribed, to qualify this offence as a serious form of tax embezzlement.

The issue is even more complex if considered from the aspect of whether in mentioned cases the continuing tax embezzlement (for many years), involving also avoiding of payment of contributions and other dues prescribed by law, may be qualified as an extended criminal offence (that is committed within a given period of time in the same manner, by the same means and/or by applying the same permanent relationship situation or circumstance and with the single intention and the same form of guilt), or as a real accumulation. In answering this question both legal theory and court practice are in favor of the concepts in in terms of which it is possible to apply the construction of extended criminal, but with applying in every concrete instance the statutory requirements provided for the existence of the tax embezzlement (and more particularly the one regarding the amount of avoided tax as an objective condition for incrimination).

5. Conclusions

Even from ancient times and up to the present it has been particularly important for every State to ensure an orderly, efficient, lawful, well-timed and flawless functioning of the public revenues and expenditures system. Its foundation is the

country's fiscal system. Indeed, the fiscal system, i.e. its flawless, well-timed, complete and efficient realization has an impact on the existence, survival and even development of the State itself. It is therefore understandable how important is for the State to apply a whole spectrum of measures, means, ways and procedures at all levels in order to resist various forms and types of concealment, failure to report and avoidance of payment of taxes, contributions and other prescribed duties which represent public tributes and/or public revenues.

The violation of regulations in the area of fiscal system may entail various consequences. Depending on the kind of violation, and/or ensued consequences in terms of the scope and intensity of endangering of protected social values, the law-maker has provided various sanctions as well, distinguishing in his approach between criminal offences and other kinds of unlawful act. The most dangerous and most serious forms of tax laws violation, apt to entail most serious consequences and/or inflict considerable damage to social community, are the criminal offences in the area of taxes. Conspicuous among them, due to its significance, scope, characteristics, nature and effect, is the tax embezzlement as the most serious manifestation of tax evasion which is threatened in criminal legislation with prescribed penalties and other kinds of criminal sanctions.

The basic fiscal criminal offence in the legal system of the Republic of Serbia is at present the tax embezzlement specified in article 225 of the Criminal code of the Republic of Serbia. In some legal systems this offence is called also – "tax evasion" or "evasion of taxes and other dues", and the like. Otherwise, this offences consists of reporting false data on one's lawfully acquired income, objects of property or other facts relevant in assessing of duties, or in the failure to report these where reporting is an obligation, or, as the case may be, it consists of concealing of data regarding assessment of tax duty with the purpose of avoiding, totally or partially, for oneself or others, the payment of taxes, contributions and other prescribed dues, where the amount of the avoided duty exceeds 500,000 RSD. This offence owes its name to the fact of committing, on the part of perpetrator, an unlawful acquisition of that number of dues the payment

This criminal offence – which may take place in three different types and in two serious forms – is threatened by the Criminal Code with cumulative penalties: penalty of imprisonment and fine. However, in addition and parallel to penalties, the court may impose against the perpetrator of the offence other criminal sanctions as well. These include: security measures and the measure of confiscation of property benefit obtained by committing the criminal offence.

References

1. Group of authors, *Komentar Krivičnog zakona Republike Srbije*, Beograd, 1995.
2. Jelčić, B., *Nauka o finansijama i finansijsko pravo*, Zagreb, 1990.
3. Jovanović, Lj., Jovašević, D., *Krivično pravo, Posebni deo*, Beograd, 2002.
4. Jovašević, D., Gajić Glamočlija, M., *Poreska utaja – oblici ispoljavanja i mere zaštite*, Beograd, 2008.
5. Jovašević, D., Hašimbegović, T., *Sistem poreskih delikata*, Beograd, 2004.
6. Jovašević, D., *Komentar Krivičnog zakona Republike Srbije sa sudskom praksom*, Beograd, 2003.
7. Jovašević, D., *Komentar Krivičnog zakona SR Jugoslavije*, Beograd, 2002.
8. Jovašević, D., *Korporativno krivično pravo*, Niš, 2012.
9. Jovašević, D., *Krivično pravo, Posebni deo*, Beograd, 2017.

10. Jovašević, D., *Leksikon krivičnog prava*, Beograd, 2011.
11. Jovašević, D., Mitrović, Lj., Ikanović, V., *Komentar Krivičnog zakonika Republike Srpske*, Banja Luka, 2018.
12. Jovašević, D., Mitrović, Lj., Ikanović, V., *Krivično pravo Republike Srpske, Posebni deo*, Banja Luka, 2017.
13. Jovašević, D., *Poreska evazija i poreska krivična dela, Bezbednost*, Beograd, no. 4/2005.
14. Jovašević, D., *Poreska krivična dela*, Beograd, 2015.
15. Jovašević, D., *Praktikum za krivično pravo*, Opšti deo, Niš, 2014.
16. Lazarević, Lj., *Krivično pravo, Posebni deo*, Beograd, 1993.
17. Lazarević, Lj., Vučković, B., Vučković, V., *Komentar Krivičnog zakonika Crne Gore*, Cetinje, 2004.
18. Lerković, M., *Kaznena odgovornost za povrede poreznih propisa*, Porezni vjesnik, Zagreb, no. 5/2000.
19. 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.
20. Pavišić, B., Grozdanić, V., Veić, P., *Komentar Kaznenog zakona*, Zagreb, 2007.
21. Petrović, B., Jovašević, D., Ferhatović, A., *Krivično pravo 1*, Sarajevo, 2015.
22. Petrović, B., Jovašević, D., Ferhatović, A., *Krivično pravo 2*, Sarajevo, 2016.
23. Popović, D., *Nauka o porezima i poresko pravo*, Beograd, 1997.
24. Simić, I., Petrović, M., *Krivični zakon Republikc Srbije – praktična primena*, Beograd, 2002.
25. Simović, M., Jovašević, D., *Leksikon krivičnog prava Bosne i Hercegovine*, Sarajevo, 2018.
26. Simović, M., Jovašević, D., Simović, M., *Politika suzbijanja kriminaliteta*, Istočno Sarajevo, 2016.
27. Simović, M., Jovašević, D., Simović, V., *Privredno kazneno pravo*, Banja Luka, 2016.
28. Sokolović, R., Jovašević, D., *Poreski delikti*, Beograd, 2015.
29. Stojanović, Z., Perić, O., *Krivično pravo, Posebni deo*, Beograd, 2000.
30. Turković, K., *et al.*, *Komentar Kaznenog zakona*, Zagreb, 2011.
31. Verdict of the Supreme Court of Serbia, Ki. No. 32/78.
32. Verdict of the Supreme Court of Serbia, Kž. 1815/73.
33. Verdict of the Supreme Court of Serbia, Kž. I 1196/85.