

TAX CRIMES IN THE ITALIAN LEGISLATION

Abstract

In spite of the fact that tax crimes are offences mala prohibita, rather than mala per se, a social consensus has long existed according to which certain behaviours that harm the state budget should be stipulated by criminal legislation. According to some data, penalties for failure to pay dues to the state existed even in ancient Egypt. The only things that have changed over time were the number of tax-related criminal offences and the type of sanctions prescribed for these offences. Most certainly, such solutions were conditioned by concrete social circumstances. Nowadays, all legislations provide for tax criminal offences. In some countries they are a part of the primary criminal legislation, in others they are provided for by the secondary criminal legislation, while some countries have separate regulations, which in the matter relating to tax criminal offences represent lex specialis. Given that it contains specific solutions, the subject of the analysis of this paper are the provisions of the Italian Law on Tax Crimes, which in addition to the substantive criminal law, also regulate some mechanisms of the criminal procedure law.

Keywords: *taxes, criminal offences, secondary criminal legislation, primary criminal legislation, Italy.*

1. Introductory remarks

In order to preserve and have the efficient fiscal policy, of great importance for every country is to strike a balance between public revenue and expenditure. The public expenditure is financed from taxes and other duties paid by the citizens. According to some variants of natural law thought which start from the existence of the social contract, humans were autonomous and sovereign beings in their natural state; when they entered a community they concluded a contract by which they gave up some of their

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powers in favour of the state, but they also retained some of their rights.² The rights that they waived in the favour of the state are their obligations towards the state, and the rights that they retained are human rights proclaimed by the international and national documents. Thus, the obligation towards the state to pay taxes represents a waiver of a part of the right to property, i.e. a part of their property, but it is at the same time a precondition for achieving the economic, social and cultural rights, whose achievement is financed from the taxes and other duties that citizens pay to the state.³

However, it seems that sometimes the citizens show a resistance towards the obligation to pay dues. This is why in such situations it is necessary to apply additional pressure aimed at fulfilling these obligations. The resistance towards the obligation of paying statutory dues is likely to be the greatest if the citizens do not see the effects in terms of achieving their economic, social and cultural rights. The reasons for such an attitude may be various, and persons not paying the statutory dues may be both poor citizens and those with greater incomes. For these reasons, some behaviours by which payment of taxes and other dues is avoided, are provided for in the national legislations as tax delicts (tax violations and tax criminal offences). Given the fact that a part of tax revenues at the territory of Member States represents the revenue of the European Union, the said community is very much interested in improvement of the mechanisms which affect the prevention of tax delicts, but which also improve the cooperation of Member States in detection and processing of these offences and their perpetrators.

The main goal of prescribing tax criminal offences is not the protection of the fiscal system and the economy, but of the human rights guaranteed by international documents. The stability of the fiscal and economic system serves the achievement of human rights. Thus, the Universal Declaration of Human Rights stipulates that every member of society has the right to social security and the right to realization of the economic, social and cultural rights indispensable for his/her dignity and the free development of his/her personality, which he/she realizes with the support from the state. Likewise, the Declaration stipulates that everyone has the right to a standard of living ensuring the health and well-being of him/herself and of his/her family, including food, clothing, housing, medical care, necessary social services, as well as the right to security in the event of unemployment, sickness, disability, widowhood, old age or

² V. Dimitrijević *et al*, *Ljudska prava*, Beogradski centar za ljudska prava, Dosije, Beograd 1997., 47.

³ *Ibid.*, 370-371.

other cases of lack of livelihood in circumstances beyond his/her control.⁴ Without the well-being of a state as a community, there is no well-being for an individual. The authors dealing with human rights also believe that, although human rights are protected by different mechanisms, a special place and importance still belongs to criminal sanctions.⁵

2. Tax delicts

According to some sources, a complex tax system was established way back in the ancient Egypt, during the XVIII dynasty of pharaohs, in the XV century B.C. Pharaohs requested and received once a year, in goods, one-fifth of all revenues earned in the kingdom. They then stored the goods in the royal warehouses in order to pay their civil servants. According to Herodotus, if the citizens of Egypt failed to fulfil these obligations, they could have been sentenced to a death penalty.⁶ Nevertheless, the understanding of the type and severity of penalty for crimes that prevent the inflow of state revenues has changed over time. Consequently, nowadays there are various tax offences, as well as different types of sanctions, depending on the degree of social danger that any particular behaviour carries.

In addition to the fact that they contain a certain degree of social danger, punishable offences are behaviours of natural and legal persons towards which the state takes certain measures in order to prevent their further commission, that is, behaviours that are prohibited by legal norms, because they are contrary to the functioning of the state and must be prevented in order to provide the basic conditions necessary for life in a community, but also those conditions that are necessary to promote its development.⁷

However, not all behaviours deserve a criminal law sanction. The type of sanction that will be prescribed for them depends on the very degree of their social danger. Taking into account the previously mentioned, many legislations prescribe two types of sanctions: for violations and for criminal offenses. Nevertheless, even the violations contain a certain degree of social danger, however lower compared to the criminal offences.

The elements of tax criminal offences have developed through a dynamic process that has lasted for a very long time. However, tax delicts

⁴ The mentioned rights are stipulated in Articles 22 and 25 of the UN's Universal Declaration of Human Rights. The Declaration was adopted and declared the Resolution of the UN General Assembly 217 A (III) of 10 December 1948.

⁵ M. Paunović *et al.*, *Osnovi međunarodnih ljudskih prava*, Megatrend univerzitet, Beograd 2007., 99.

⁶ B. Tičar, *Uvod v korporacijsko davčno pravo*, Institut za javno upravo pri Pravni fakulteti v Ljubljani, Ljubljana 2001., 18.

⁷ F. Antolisei, *Manuale di diritto penale, parte speciale*, Giuffrè editore, Milano 2008., 7. e, 8.

have occurred very early in criminal legislation and have constantly been present in all countries throughout their historical development.⁸

All countries strive to combat tax crime. There are certain differences in criminal legislations in terms of determining the elements of tax criminal offences. However, their primary goal is the same – a threat of sanctioning those who would avoid reporting data and facts of relevance for assessing tax or other fiscal dues to the competent authorities, or those who would present false information on these facts in order to avoid total or partial fulfilment of such obligations.⁹

In Italy, tax criminal offences are provided for by a single law – the Law on Tax Crimes (hereinafter referred to as LTC)¹⁰, while in Germany – by the Federal Fiscal Code.¹¹ Unlike in Italy, where this is not a secondary, but a separate law that is the integral part of the criminal legislation given that it exclusively regulates the matter concerning tax crimes, in Germany, the tax criminal offences, together with the customs criminal offences, are provided for exclusively by the secondary criminal legislation. Prescribing tax criminal offences in laws governing the tax matter has both advantages and disadvantages. Specifically, having in mind that these are criminal offences with incomplete description¹², defining the specific elements of the crime is easier when they are provided for by the secondary criminal legislation. The disadvantages are reflected in poor nomotechnics, which differs from the one contained in the criminal law provisions. Likewise, the question may arise on the adequate assessment of the social danger of a tax criminal offence when prescribing sanctions, and it is therefore a better solution when all criminal offences are provided for exclusively by the criminal code. Naturally, this is also a better solution in terms of legal certainty. However, it seems that the highest legal uncertainty is created by a situation where tax criminal offences are provided for by two laws. This is the case in the Republic of Serbia, where the mentioned offences are provided for by both the Law on Tax Procedure and

⁸ M. Kulić, G. Milošević, „Poreski kriminalitet“, *Revija za kriminologiju i krivično pravo* 3/2010, 108.

⁹ *Ibid.*

¹⁰ Legge sui reati tributari, Decreto Legislativo 10 marzo 2000, n. 74 sul reati tributari Pubblicato sulla *Gazzeta Ufficiale-Serie Generale*, n. 76 del 31. marzo 2000, Testo e aggiornato al Decreto legislativo 24 Settembre 2015, n. 158.

¹¹ Fiscal Code of Germany in the version promulgated on 1 October 2002 (Federal Law Gazette (Bundesgesetzblatt) l p. 3866; l p. 61), last amended by Article 5 of the Ordinance of 3 December 2015 (Federal Law Gazette l p. 2178), https://www.gesetze-im-internet.de/englisch_ad.html, last visited 11 October 2016.

¹² Incomplete description of a crime only partially determines specific elements of criminal offence. For complete determination of a criminal offence, application of other regulations is necessary. When it comes to tax criminal offences, those are regulations governing tax matters.

Tax Administration¹³ and the Criminal Code.¹⁴ Since in Italy the problem of tax criminal offences is approached in a specific manner, the subject of the analysis in this paper are, first of all, the provisions of the Italian LTC. The said law, in addition to the provisions of substantive law nature, also contains provisions of procedural law nature, bearing in mind the specific nature of the matter it regulates.

3. Tax criminal offences in the Italian legislation

The tax criminal offences in Italy are regulated by a special LTC. These offences are characterized by a high degree of social danger, since the loss caused by failure to pay taxes or other dues is extremely harmful for the fiscal interests of the state.¹⁵ As has already been said, the tax criminal offences in Italy are provided for by a special regulation. The reason for such legislator's approach, above all, lies in the specific nature of the mentioned offences, as well as in the manner of their detection and elimination of the harmful consequences of their commission, which through endangering the fiscal interest of the state also endanger the rights of its citizens.

The Italian LTC prescribes two groups of criminal offences. The first group, envisaged within the first part of the said Law, contains criminal offences relating to filing information of relevance for assessing the tax liability¹⁶, while the second group contains criminal offences relating to the tax documentation and tax payment¹⁷. In addition, the Law also foresees security measures¹⁸, which can be imposed on the perpetrators

¹³ Zakon o poreskom postupku i poreskoj administraciji [The Law on Tax Procedure and Tax Administration], *Službeni glasnik Republike Srbije*, broj 80/2002, 84/2002 - ispr., 23/2003 - ispr., 70/2003, 55/2004, 61/2005, 85/2005 - dr. zakon, 62/2006 - dr. zakon, 63/2006 - ispr. dr. zakona, 61/2007, 20/2009, 72/2009 - dr. zakon, 53/2010, 101/2011, 2/2012 - ispr., 93/2012, 47/2013, 108/2013, 68/2014, 105/2014, 91/2015 - autentično tumačenje, 112/2015 i 15/2016.

¹⁴ Krivični zakonik Republike Srbije [The Criminal Code of the Republic of Serbia], *Službeni glasnik Republike Srbije*, broj 85/2005, 88/2005-ispr., 107/2005-ispr., 72/2009, 111/2009, 121/2012, 104/2013 i 108/2014).

¹⁵ S. Gennai, A Traversi, *I delitti tributari, profili sostanziali e processuali*. Giuffrè Editore, Milano 2011., 41.

¹⁶ All tax criminal offences are provided for in the Chapter II of the Italian LTC. Offences relating to filing information relevant for determining the tax liability are provided for in the said Chapter, in the first section, Articles 2-7 of the mentioned Law.

¹⁷ Criminal offences relating to the tax documents and tax payment are provided for in the section II, Articles 8-11 of the Italian LTC.

¹⁸ The additional sanctions are foreseen within the provisions that are mutual for all tax criminal offences stipulated by the Law. They are prescribed in the Chapter III, Article 12 of the LTC. Within the same Chapter, Article 12-bis foresees the provision on seizure of assets, while Article 13 foresees a possibility of exemption from punishment, if the perpetrator of the offence, under conditions stipulated by law, pays his/her tax debt. In addition, the Chapter III also foresees the mitigating and aggravating circumstances which the court takes into account when determining the punishment.

of tax criminal offences, as well as some provisions of the procedural law nature, such as the provision on the territorial jurisdiction of the court¹⁹. The Law also contains the provision on handling the objects confiscated during a tax control²⁰, as well as provisions governing the relation between the criminal and administrative sanctions.²¹

3.1. Tax criminal offences relating to filing information of relevance for assessing the tax liability

The Italian LTC foresees two groups of the mentioned offences. The group of offences relating to filing information of relevance for assessing the tax liability contains the following criminal offences: filing false information contained in invoices or other documents for non-existing transactions²², filing false information by using other fraudulent means²³, Filing a false tax return²⁴ and failure to file a tax return²⁵.

3.1.1. Filing false information contained in invoices or other documents for non-existing transactions

The criminal offence of filing false information contained in invoices or other documents for non-existing transactions exists if a person, in order to evade payment of income tax or value-added tax, files to the competent authorities false information contained in invoices or other documents for non-existing transactions for the purpose of presenting a false amount of relevance for assessing the tax liability. Perpetrator of the mentioned offence can be a person who, in accordance with the tax regulations, is obliged to pay the income tax or the value added-tax. The prescribed punishment for the perpetrator of this offence is imprisonment from one year and six months, up to six years. Bearing in mind that the act is undertaken for the purpose of presenting a false amount relevant for assessing the tax liability, the criminal offence of filing false information contained in invoices or other documents for non-

¹⁹ The territorial jurisdiction of the court is prescribed in Article 18 of the LTC.

²⁰ The procedure of handling the confiscated objects is prescribed in Article 18-bis of the LTC.

²¹ The relation between the criminal and administrative sanctions, as well as between the competent authorities in tax, administrative and criminal proceedings, is prescribed within the Chapter IV, Articles 19-21.

²² The criminal offence of filing false information contained in invoices or other documents for non-existing transactions is prescribed in Article 2 of the LTC.

²³ The criminal offence of filing false information by using other fraudulent means is prescribed in Article 3 of the Law.

²⁴ The criminal offence of filing a false tax return is prescribed in Article 4 of the Law.

²⁵ The criminal offence of failure to file a tax return is prescribed in Article 5 of the Law.

existing transactions can be committed only with an intent. However, in order for this offence to occur, it is not necessary that the competent authorities, due to committed criminal offence, have really determined the lower amount of the tax liability. The mentioned punishment is foreseen in the case when filing false information contained in invoices or other documents for non-existing transactions was committed for the purpose of evasion of payment of income tax or value-added tax in the amount of EUR 154,937.07 or ITL 300 million. In cases when the amount is lower, a less serious form of this criminal offence will exist, with the punishment of imprisonment from six months up to one year.

The term *issuing invoices or other documents for non-existing transactions* is defined in Article 1, Paragraph 1, Item a) of the LTC. According to this provision, in order for the criminal offence prescribed in Article 3 of the said Law to exist, it is necessary that invoices or other documents that can be used as a basis for assessing the tax liability in accordance with tax regulations, were issued in connection with business operations that were not carried out in whole or in part, or that do not match the actual value of the performed transaction. This means that, for example, the criminal offence will exist even if an amount that is lower than the value of purchased goods is entered in the invoice or other documents in order to assess or calculate a lower amount of tax liability.

In addition to the punishment, some of the following security measures foreseen in the LTC can be imposed on the perpetrator of the criminal offence: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years²⁶, ban on practising a duty of a tax representative or advisor from one up to five years, permanent exclusion from membership in a tax commission and publication of the judgement in accordance with Article 36 of the Penal Code.²⁷

The security measure of ban on working of a legal person from six months up to three years, as well as the security measure reflected in the inability to conclude contracts (i.e. business operations) with the state

²⁶ In a way, this measure seems like retaliation. Given that the legal person has not paid a certain amount in the budget in accordance with tax regulations, it is denied the possibility of receiving certain funds from the budget, for example, based on a concluded public procurement contract.

²⁷ Article 36 of the Criminal Code of Italy foresees the publication of the judgement on the website of the Ministry of Justice. The duration of the public display of the judgement is up to 30 days, and for how long the judgement will be available to the public depends on the court's decision. In the absence of such a decision, the judgement will be available to the public on the website of the Ministry for fifteen days. The judgement is published in the enacting terms of the decision, unless the judge decides otherwise. The judgement is published at the expense of the convicted person. Codice Penale, Regio Decreto 19 ottobre 1930. n. 1398, Decreto Legislativo 21. giugno 2015, n. 125, L 11 luglio 2016, n. 133 e L. 28 luglio 2016, n. 153. <http://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale>, last visited 20 October 2016.

administration from one up to three years, largely affects all business entities, given the fact that during this period they could lose a large part of the potential revenues. Therefore, it appears that the said security measures may have adequate preventive effect on potential perpetrators of tax criminal offences. Unlike the previously mentioned security measures, ban on practising a duty of a tax representative or advisor from one up to five years, as well as permanent exclusion from membership in a tax commission, are imposed on natural person who is a perpetrator of some of the criminal offences provided for by the LTC. The measure of publication of the judgement may be imposed on both legal and natural persons who, in accordance with the Law, can be considered a perpetrator of tax criminal offences.

In addition, the Law stipulates the mandatory imposition of the security measure of ban on practising public service from one up to three years. This measure is not imposed for a less serious form of the criminal offence of filing false information contained in invoices or other documents for non-existing transactions. The said security measures deprive the perpetrator of a criminal offence of or limit his/her certain rights, however at the same time they represent means of protection of a society from criminal offences that harm it.²⁸ Therefore, in each specific case the court should assess whether there is a need for its application.

For this criminal offence, as well as for other tax criminal offences in cases provide for in Article 163 of the Italian Criminal Code, a suspended sentence can be imposed.²⁹ Nevertheless, the suspended sentence won't be imposed if the amount of the unpaid tax exceeds 30% of the value of turnover, as well as if the amount of the tax intended to be evaded exceeds EUR 3 million. Article 6 of the LTC explicitly stipulates that one cannot be punished for the attempted criminal offence of filing false information contained in invoices or other documents for non-existing transactions exists. Although not explicitly stipulated by law, it can be concluded from the legal description of *actus reus* of the criminal offence that an attempt of such criminal offence is not even possible.

²⁸ D. Jovašević, *Leksikon krivičnog prava*, Službeni glasnik, Beograd 2006., 295.

²⁹ Pursuant to Article 163 of the Italian Criminal Code, a suspended sentence can be imposed if the perpetrator has committed a criminal offence punishable by up to two years imprisonment. A suspended sentence can also be imposed if the perpetrator was punished with a fine (be it a basic punishment or auxiliary punishment that complements punishment of up to two years imprisonment). According to Article 163 of the Italian Criminal Code, a suspended sentence can be delayed for three months.

3.1.2. Filing false information by using other fraudulent means

Except in the cases provided for in Article 2 of the LTC, the punishment of imprisonment from one year and six months up to seven years can be imposed on a person who, in order to evade tax payment or assessment of the tax liability, uses false business operations, false documents or other means to deceive the authorities competent for tax assessment and collection of tax liabilities, as well as in case if he/she files an incomplete tax return in terms of the amount of liabilities. Precondition for the criminal offence of filing false information by using other fraudulent means is that *actus reus* was undertaken for the purpose of assessing the lower amount of tax liability or accepting a false amount of tax credit. In addition to these preconditions, the following conditions must also be met: that the amount of the duty whose assessment is being evaded, in relation to certain taxes (duties), exceeds EUR 30,000, and that the amount of the tax that would have been paid, if there had been no misrepresentation of data, is by five per cent higher than the amount that would have been assessed by filing false data, or if the amount of the tax that would have been paid, if there had been no misrepresentation of data, is higher by EUR 1 million than the amount that would have been assessed by filing false data.

The above-mentioned conditions represent a legislative motive for criminalization, that is, the reason why a specific behaviour is defined as a criminal offence.³⁰ Perpetrator of this criminal offence can be both a person who is a taxpayer and a person who has the right to a tax credit in accordance with tax regulations. For the existence of this offence, it is not necessary that its consequence really occurred – that the false amount of the tax liability or tax credit was really assessed. It is sufficient that *actus reus* was undertaken in order to assess a lower amount of tax to be paid or to accept the false amount of the tax credit, together with the fulfilment of the previously mentioned conditions.

In addition to the punishment stipulated for the criminal offence of filing false information by using other fraudulent means, the perpetrator of

³⁰ However, one should have in mind the provision of Article 3, Paragraphs 2 and 3 of the LTC, according to which for the existence of the criminal offence under this Article, it has to include documents that are a part of the mandatory accounting documentation in accordance with the relevant regulations, which can be used as evidence before the competent financial authorities in certain procedures, including the tax liability assessment procedure. In addition, for the existence of the criminal offence stipulated in Article 3 of the LTC, it is not sufficient that a false invoice was issued, i.e. invoice which contains false information, as well as that false information whose amount is smaller than the actual are reported in the accounting books. It is necessary that these are documents and records used for the purpose of tax liability assessment that are presented to the competent tax authorities. Likewise, *actus reus* must be undertaken with the purpose of deceiving the competent tax authorities and assessment of a lower amount of tax liability.

this offence can also be imposed with some of security measures that can also be imposed on perpetrators of other tax criminal offences stipulated by law: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years, ban on practising a duty of a tax representative or advisor from one up to five years, permanent exclusion from membership in a tax commission, and publication of the judgement in accordance with Article 36 of the Italian Criminal Code. Of course, the said security measures are imposed depending on the perpetrator's status (natural or physical person), as well as on the court's assessment in each specific case. Likewise, the measure of confiscation of material gain can also be imposed on the perpetrator of the criminal offence of filing false information by using other fraudulent means. When it comes to the criminal offence stipulated in Article 3, the mandatory security measure of ban on practising public service from one up to three years is imposed on its perpetrator.³¹

Article 6 of the LTC explicitly prescribes that it is not possible to punish a person for the attempted criminal offence of filing false information by using other fraudulent means. Nevertheless, this attitude of the legislator stems from the very legal description of the specific elements of the criminal offence of filing false information by using other fraudulent means.

3.1.3. Filing a false tax return

The criminal offence of filing a false tax return is stipulated in Article 4 of the Italian LTC. Imprisonment from one up to three years is foreseen for a person who with intent to avoid the assessment of the obligation of payment of income tax or value-added tax, reports in the annual tax return information of relevance for assessment of tax liability in the amount lower than the actual. The following conditions must be met for this criminal offence to exist: that the amount of the liability whose payment is evaded exceeds EUR 150,000, and that the amount of the liability whose payment is evaded is higher by 10% than the amount reported in the tax return or that it exceeds EUR 3 million.

The mentioned amounts represent a legislative motive for criminalization, and for the existence of the criminal offence of filing a false tax return, the existence of the perpetrator's intent is necessary, given that *actus reus* was undertaken with a specific purpose. Depending

³¹ Cases in which the security measure of ban on practising public service from one up to three years is mandatory imposed are provided for by Article 12, Paragraph 2 of the LTC.

on the perpetrator's status and the court's assessment in each specific case, some of the following security measures prescribed by law can be imposed: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years, ban on practising a duty of a tax representative or advisor from one up to five years, permanent exclusion from membership in a tax commission, and publication of the judgement in accordance with Article 36 of the Italian Criminal Code. In addition to the said measures, the measure of confiscation of material gain obtained by this criminal offence can also be imposed.

For the existence of the criminal offence of filing a false tax return, it is necessary that it is an annual tax return, with the fulfilment of the additional conditions, which refer both to the amount of the tax liability and the amount whose payment is evaded. In addition, for the existence of the criminal offence stipulated in Article 4 of the LTC, it is not required that a smaller amount of the tax liability was really assessed – it is sufficient that the perpetrator had the intent that the tax authorities assessed a smaller amount of the tax liability than the real one.

Article 6 of the LTC explicitly prescribes that it is not possible to punish a person for the attempted criminal offence of filing a false tax return. From the very legal description of the specific elements of the criminal offence of filing a false tax return stems that its attempt is not possible, hence such an attitude of the legislator contained in the said Article.

3.1.4. Failure to file a tax return

Article 5 of the LTC foresees the criminal offence of failure to file a tax return, as a last resort for combating this unlawful act.³² This offence is a so-called criminal offence of omission, given that its *actus reus* consists of the omission.³³ The thing in common for the criminal offence of failure to file a tax return and other offences that consist of avoiding of filing a tax return or documentation of relevance to the tax authorities, is the inability to evident and asses the tax liability in total or partially.³⁴

Imprisonment from one year and six months up to four years is foreseen for a person who with intent to evade the payment of income tax or value-added tax, fails to file a tax return to the tax authorities in accordance with the relevant regulations, if the amount of the concrete tax liability exceeds EUR 50,000. The same punishment will be imposed

³² G .L. Soana Gianluca, *I reati tributari*, Giuffrè editore, Milano 2009., 193.

³³ *Ibid.*, 194.

³⁴ A. Lorio, *I nuovi reati tributari*, IPSOA Gruppo Wolters Kluwer, Milano 2012., 9.

also in the case of failure to file a withholding tax return, if the amount of the withholding tax that is intended to be evaded exceeds EUR 50,000. Article 5, Paragraph 2 stipulates that the criminal offence of failure to file a tax return will not exist if the tax return is filed within ninety days from the date of expiry of the deadline for its filing, as well as in the case when the tax return is not signed or filed in accordance with the template, that is, in the manner prescribed by relevant regulations. Depending on the perpetrator's status and the court's assessment in each specific case, some of the following security measures prescribed by law can be imposed: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years, ban on practising a duty of a tax representative or advisor from one up to five years, permanent exclusion from membership in a tax commission, and publication of the judgement in accordance with Article 36 of the Italian Criminal Code. In addition to these measures, the measure of confiscation of material gain obtained by this criminal offence can also be imposed.

3.2. Criminal offences relating to the tax documents and tax payment

Criminal offences relating to the tax documents and tax payment are foreseen in the Chapter II, section 2 of the Italian LTC. These include the following: issue of invoices or other documents for non-existing transactions³⁵, concealment or destruction of account books³⁶, non-payment of withholding tax³⁷, non-payment of value-added tax³⁸, unlawful compensation³⁹ and fraud relating to tax payment.⁴⁰

3.2.1. Issue of invoices or other documents for non-existing transactions

The criminal offence of issuing of invoices or other documents for non-existing transactions exists if a person who with intent to enable

³⁵ The criminal offence of issuing of invoices or other documents for non-existing transactions is prescribed in Article 8 of the Italian LTC.

³⁶ The criminal offence of concealment or destruction of account books is prescribed in Article 10 of the LTC.

³⁷ The criminal offence of non-payment of withholding tax is prescribed in Article 10, Paragraph 2 of the LTC.

³⁸ The criminal offence of non-payment of value-added tax is prescribed in Article 10, Paragraph 4 of the LTC.

³⁹ The criminal offence of unlawful compensation prescribed in Article 10, Paragraph 3 of the LTC.

⁴⁰ The criminal offence of fraud relating to tax payment is prescribed in Article 11 of the LTC.

tax evasion for him/herself or other person, issues invoices or other documents for non-existing transactions. Prescribed punishment for the perpetrator of this offence is imprisonment from one year and six months up to six years. If several documents or invoices were issued for non-existing transactions during one tax year, it will be considered that one criminal offence was committed (this probably refers to the application of the provisions of the Criminal Code that define the extended criminal offence).

In addition to its basic form, the Law also prescribes a less serious form of the criminal offence, which will exist if the amount in invoices or other documents is smaller by EUR 154,937.07 or ITL 300,000,000 million from the amount that would otherwise be paid if the invoice or other documents for non-existing transactions had not been issued, which also includes a transaction performed in an amount different from actual. The punishment for the perpetrator of this offence is imprisonment from six months up to two years.

Article 9 of the LTC also regulates the question of complicity while committing the criminal offence of issuing of invoices or other documents for non-existing transactions. Notwithstanding Article 110 of the Criminal Code, issuing of invoices or other documents for non-existing transactions is not punishable as complicity in committing the criminal offence provided for in Article 2 of the LTC. Furthermore, a person who uses invoices or other documents for non-existing transactions will not be punished for complicity in the criminal offence of issuing of invoices or other documents for non-existing transactions. In fact, in this particular case, it is actually a criminal offence that precedes the commission of the criminal offence provided for by Article 2 of the LTC. The act of issuing invoices or other documents for non-existing transactions is committed for the purpose of concealment of the criminal offence of filing false information contained in invoices or other documents for non-existing transactions, i.e. for the purpose of making it difficult to detect the criminal offence prescribed in Article 2 of the LTC. This is why the offence prescribed in Article 8 is foreseen as a separate criminal offence. The perpetrator of the offence can be a person who will later, for the purpose of evading the assessment of the actual amount of the tax liability, file to the competent authorities false information contained in invoices or other documents for non-existing transactions in order to evade his/her tax liability⁴¹, as well as a person who assists him/her in commission of the criminal offence prescribed in Article 2 of the LTC.

⁴¹ In case that the perpetrator of the criminal offence of filing false information contained in invoices or other documents for non-existing transactions and of the criminal offence of issuing of invoices or other documents for non-existing transactions is the same person, a concurrence of criminal offences will exist.

In addition to the justified attitude of the legislator to prescribe assistance in committing the mentioned offence as a separate criminal offence, in such situations it is also justified to impose certain security measures. Of course, all security measures provided for by Article 12 of the LTC can be imposed on the perpetrator of the offence, and if the perpetrator is a person engaged in a business activity, a very strong preventive effect have the following security measures: ban on working of a legal person from six months up to three years, and inability to conclude contracts (i.e. business operations) with the state administration from one up to three years.

3.2.2. Concealment or destruction of account books

The LTC provides for the criminal offence of concealment or destruction of account books. If it doesn't fall under the legal description of specific elements of some other criminal offence, punishment of imprisonment from one year and six months up to six years can be imposed on a person who with intent to evade the payment of income tax or value-added tax, as well as to enable another person to avoid the criminal responsibility for reporting false data in account books, conceals or destroys the whole or a part of account books for which the obligation of keeping is prescribed by law, and thus prevents the assessment of the amount of income or volume of business. Perpetrator of the criminal offence of concealment or destruction of account books can be any person. However, a precondition of this offence is that *actus reus* was undertaken for the purpose of realization of some of the aforementioned goals. *Actus reus* of the criminal offence provided for in Article 10 of the LTC is also an act of aiding, since it is undertaken in order to enable another person to avoid the criminal responsibility for reporting false data in account books. When it comes to the criminal offence of concealment or destruction of account books, it is necessary that undertaken *actus reus* prevented the assessment of the amount of income or volume of business, which also reflects on the assessment of the tax liability. This at the same time is a consequence of the criminal offence. *Actus reus* is undertaken exclusively with intent. Some of the security measures provided for by Article 12 of the LTC can be imposed on the perpetrator of this offence.

3.2.3. Non-Payment of withholding tax

The LTC provides for a punishment of imprisonment from six months up to two years for a person who within the deadline for filing the annual tax return reports in the said return an amount smaller by EUR 150,000 than the actual one. Perpetrator of this criminal offence

can be a person who, according to tax regulations, is obliged to pay the withholding tax. For the existence of this offence, it is not required that the non-payment of tax really occurred, it is sufficient that a person obliged to pay duties reported an amount smaller than the actual. In addition, it is required that the actual amount is by EUR 150,000 higher than the one reported in the tax return. This amount also represents a legislative motive for criminalization of the criminal offence of non-payment of withholding tax. In addition to the punishment stipulated for this offence, some of the security measures prescribed in Article 12 of the LTC can also be imposed on the perpetrator. Nevertheless, since perpetrators of the criminal offence of non-payment of withholding tax are mostly responsible persons in legal persons, which are obliged to pay withholding tax, some of the following security measures will have the greatest impact on them: ban on working of a legal person from six months up to three years, inability to conclude contracts (i.e. business operations) with the state administration from one up to three years, as well as confiscation of gain obtained by this criminal offence.

3.2.4. Non-payment of value-added tax

The criminal offence of non-payment of value-added tax will exist if a person, within the prescribed deadline, does not pay the amount of value-added tax based on the annual tax return, in the amount of EUR 250,000. Punishment is imprisonment from six months up to two years. Perpetrator of this offence is a person who, in line with tax regulations, is obliged to pay the value-added tax. However, in this particular case, precondition is that amount of tax liability exceeds the amount of EUR 250,000, which at the same time represents a legislative motive for criminalization. In addition to the punishment prescribed for this criminal offence, some of the security measures provided for by the LTC can be imposed on the perpetrator, including the confiscation of gain obtained by this criminal offence.

3.2.5. Unlawful compensation

The criminal offence of unlawful compensation will exist if a person does not pay the amount of taxes he/she owes, but instead uses compensation pursuant to Article 17 of the Legislative Decree No. 241 of 9 July 1997. Precondition of this offence is that in this way the annual tax debt was not paid in the amount that exceeds EUR 150,000. For the perpetrator of this offence, punishment is imprisonment from six months up to two years. This offence will also exist if a person uses

compensation pursuant to Article 17 of the Legislative Decree No. 241 of 9 July 1997 for the realization of the non-existing tax credit in the amount higher than EUR 50,000. Perpetrator of this offence will be punished by imprisonment from one year and six months up to six years. Perpetrator of this criminal offence can be any taxpayer, as well as a person who has the right to tax credit. When it comes to the criminal offence of unlawful compensation, it contains incomplete description, since the determination of its contents depends exclusively on application of Article 9 and Article 17 of the Legislative Decree No. 241 of 9 July 1997. Of course, some of the security measures provided for by the LTC can be imposed on the perpetrator of this criminal offence, including the confiscation of gain obtained by this criminal offence.

3.2.6. Fraud relating to tax payment

The criminal offence of fraud relating to tax payment will exist if a person, with intent to evade the payment of income tax or fine imposed for a tax violation relating to the obligation of payment of tax in the total amount that exceeds EUR 50,000, fictively alienates or undertakes some other fraudulent actions towards his/her or the property of another, in order to complicate or prevent enforced tax collection procedure. Punishment is imprisonment from six months up to four years. If the amount of the liability or fine for a violation whose payment is evaded exceeds EUR 200,000, a more serious form of the criminal offence will exist under Article 11 of the LTC. For this offence, the prescribed punishment is imprisonment from one up to six years. The criminal offence will also exist if a person with intent to achieve for him/herself or another person payment of smaller amount of taxes and other duties, suggests that the documentation presented in the tax collection procedure contains elements according to which the amount of tax liability is by EUR 50,000 smaller than the one claimed in the enforced collection procedure. For this offence, punishment is imprisonment from six months up to four years. If the same is claimed for the amount of EUR 200,000, the more serious form of the offence will exist. In that case, punishment is imprisonment from one up to six years. In addition to the criminal sanctions, some of the security measures provided for by the LTC can be imposed on the perpetrator, including the confiscation of gain obtained by this criminal offence.

3.3. Optional grounds for impunity and mitigating and aggravating circumstances under which a criminal offense was committed

Bearing in mind that these criminal offences cause damage to the state budget, it seems that the provision of Article 13 of the LTC gives priority to the public interest rather than to the imposition of criminal sanctions, although the optional grounds for impunity are applied in order to provide an opportunity to the perpetrator of the criminal offence to repent for his/her deeds and timely prevent the occurrence of harmful consequences. The mentioned Article foresees the optional grounds for impunity that will exist if the taxpayer pays the tax debt for the following criminal offences: non-payment of withholding tax, non-payment of value-added tax and unlawful compensation before the detection of the criminal offence, including the administrative sanctions and interest, as well as if the debt is paid in the settlement proceedings in connection with the payment of arrears provided for by tax laws. This is considered to be the act of so-called active remorse, given that the person, by paying the tax debt, shows remorse for the crime he/she has committed. Likewise, the perpetrator of the criminal offence of filing a false tax return and the criminal offence of failure to file a tax return will not be punished if the tax debt, including the administrative sanctions and interest, are paid in the settlement proceedings, which also represents a sort of active remorse (in case of the criminal offence of filing a false tax return), or if the person files a tax return within the prescribed deadline for the timely assessment of the tax liability. Naturally, criminal sanctions will not be imposed on the perpetrator of the mentioned offences if he/she prior to the payment or filing of the tax return had not been notified of the inspection or audit, or of any other action which could have resulted in initiation of criminal proceedings. This is entirely justified, given that in such cases there is no act of active remorse, but the fear of criminal liability. Even when the provisions of Article 13 of the LTC are applied, the court finds the perpetrator guilty, but does not impose criminal sanctions. In such cases criminal liability is not excluded – it is stated in the decision of the competent authority, however, the punishment is not being imposed.

Article 13, Paragraph 2 of the LTC stipulates that when imposing criminal sanctions on perpetrators of tax criminal offences, the court takes into account specific mitigating or aggravating circumstances. Thus, punishment prescribed for a particular criminal offense will be reduced by half and statutory security measure will not be applied if before filing charges, the perpetrator pays the amount of tax owed, including the administrative sanctions and interest. The same applies if the tax liability is paid in the settlement proceedings (mediation) provided for

by tax regulations. The said circumstance does not constitute grounds for exemption from punishment since it does not represent active remorse; this activity can also be undertaken after the audit or tax inspection, and it is required that the tax debt is paid before filing charges to competent authorities in this case as well.

When imposing a punishment, it is considered an aggravating circumstance if some of the tax criminal offences was committed with the involvement of a person (as an accomplice) who participates in tax consulting, as well as with the assistance of a financial or banking intermediary. Aggravating circumstance is the very fact that the service of a professional was used in order to conceal the execution of the offence. In these cases, it is envisaged that when sentencing a perpetrator of some of the tax criminal offenses, prescribed punishment will be doubled.

The LTC contains many referral provisions in relation to the Criminal Code. Pursuant to Article 17 of the LTC, limitation on criminal prosecution is suspended in cases provided for in Article 160 of the Criminal Code. However, given that tax criminal offenses are detected in the financial control procedure (including control of auditors, tax or other financial inspection), it is stipulated that the statute of limitations for the mentioned offences expires after elapse of a period longer by 1/3 than the one provided for by law for criminal offenses eligible for the same sanctions.

4. Conclusion

Only a small number of countries prescribe tax criminal offences in other regulations outside the criminal legislation. Bearing in mind the specific nature of these offences, as well as the harm they cause to the social community, the Italian legislator, with intent to regulate in the best possible manner some important issues relating to the tax criminal offences, has prescribed the said offences in the Law on Tax Crimes. Of course, this Law does not belong to the secondary criminal legislation, but is a part of the system of criminal legislation, given that the phrase secondary criminal legislation is used for regulations which do not govern the criminal law matter, but which still contain provisions that provide for criminal offences in specific areas. Bearing in mind the provisions of the Italian LTC, specific solutions are already contained in the titles of the chapters which contain provisions providing for tax criminal offences. The first part provides for criminal offenses relating to filing information of relevance for assessing the tax liability, while the second part contains criminal offenses relating to tax documentation and tax payment.

In addition to the mentioned specific feature, the LTC also provides for the possibility of acquittal, if the perpetrator of the offence

due to his/her remorse for the committed offence, before being noticed that the control of financial operations will be varied out, pays the tax debt, including the interest and other accompanying debts. The goal of such a solution is the very protection of the public interest by payment of taxes. Perpetrator is given the opportunity to show remorse and thus contribute to the achievement of this interest. In addition to the aforementioned, another specific provision is the one according to which an aggravating circumstance in sentencing will be the fact that a person, in order to commit a criminal offence, has engaged a tax advisor or some other financial expert. In such cases, it is evident that the perpetrator's motive was to conceal the commission of the offence and obtain material gain. Taking into account that in such situations the court may double the prescribed punishment, that fact will have an additional preventive effect on potential perpetrators. This attitude of the legislator is justified due to the fact that a professional was hired in order to more efficiently conceal the tax liability, that is, with intent to prevent the assessment of the tax liability and tax collection. But, regardless of the large number of quality solutions, and taking into account that these are criminal offences with incomplete description and that the LTC includes a large number of referral provisions, it can be said that this form of prescribing tax criminal offences has its shortcomings, despite the need to regulate this matter in a specific manner. Still, it can be concluded that even such a solution is much better in comparison to the Serbian legislation, in which tax criminal offences are stipulated by both the Law on Tax Procedure and Tax Administration and the Criminal Code of the Republic of Serbia. If one takes into account the legal certainty, as well as other advantages of prescribing criminal offences by primary criminal legislation, it seems that the best solution is when tax criminal offences together with other offences are provided for by a criminal code of a country.

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PORESKA KRIVIČNA DELA U ITALIJANSKOM ZAKONODAVSTVU

Rezime

Iako su poreska krivična dela mala in prohibita, a ne mala per se, odavno postoji društveni konsenzus da određena ponašanja kojima se nanosi šteta državnom budžetu treba da budu propisana krivičnim zakonodavstvom. Prema nekim podacima kazne za neplaćanje dažbina državi postojale su još u starom Egiptu. Jedino se vremenom menjao broj poreskih krivičnih dela i vrsta sankcije propisane za ta dela. Naravno takva rešenja bila su uslovljena konkretnim društvenim prilikama. Danas su poreska krivična dela predviđena u svim zakonodavstvima. U nekim zemljama ona su deo osnovnog krivičnog zakonodavstva, u nekim su predviđena sporednim krivičnim zakonodavstvom, dok neke zemlje imaju posebne propise koje u materiji poreskih krivičnih dela predstavljaju *lex specialis*. S obzirom da sadrži specifična rešenja, predmet analize u ovom radu jesu odredbe Zakona o poreskim krivičnim delima Italije.

Ključne reči: porezi, krivična dela, sporedno krivično zakonodavstvo, osnovno krivično zakonodavstvo, Italija.