

# FISCAL OFFENCES – NOTION AND COMPENSATION

*Jelena Šuput, Dr.Sc*

*Research Fellow, Institute of Comparative Law, Belgrade*

*e-mail: suputjelena@yahoo.com*

*Vladan Martić MA*

*Assistant, PhD Candidate, University Mediteran, Podgorica*

*e-mail: vladan.martic@unimediteran.net*

## Abstract

Tax evasion and other charges contribute to the budget deficit, and thus unbalance the budget. This has a negative effect, both on the economy and on the social status of the citizens. Based on an analysis of the court judgements in the Republic of Serbia for the past five years, it can be concluded that the courts in the case of tax offenses did not automatically award restitution claims. They do so only at the request of the Public Attorney's Office. In relation to these offenses, the said authority is representative of the injured party. However, it cannot be expected that restitution claim will be filed in a timely manner in all cases of fiscal offenses. The biggest problem is the inadequate cooperation of the competent authorities. In practice, such a procedure is generally time consuming and delays the procedure itself. In this paper, the authors try to identify the problems which arise in practice and try to give suggestions to overcome them. For that purpose, they use the method of content analysis of data from the reports of the Ministry of Finance, but also the contents of court judgements in the Republic of Serbia.

**Keywords:** *fiscal offenses, budget, damage, restitution claim.*

## 1. INTRODUCTION

Criminal offenses committed against the fiscal system represent a great expense for the state budget. They are committed solely for the purpose of gaining illegal benefit. Insufficient inflow of funds in the budget can contribute to creating a budget deficit that is necessary to compensate through a variety of measures, including the austerity measures. Such measures negatively affect the overall social welfare. Accordingly, one might ask the question what the most appropriate sanction that may be imposed on the perpetrators of these offences is. Given the motive for commission of fiscal criminal offences, apart from sanctions, some other measures could be imposed as well, such as awarding a claim for restitution or seizure of proceeds of crime. The first measure is imposed at the request of the injured party or his/her legal representative, while the second one is imposed *ex officio*. As regards fiscal offences, both measures imply the payment of money in the budget, and consequently compensation for caused damage. Application of such measures as stipulated by the criminal legislation could influence potential perpetrators of these criminal offences to refrain from committing them. Utilitarians advocated such a position. According to the founder of utilitarianism, Jeremy Bentham, the task of law is to provide the well-being of community members, and therefore should achieve three objectives: take care of crime prevention, help satisfy the injured party and punish the guilty ones. (Ignjatović, 2011:64).

The legislator cannot be the exclusive contributor to the realization of these goals, but those enforcing the law must participate as well. Utilitarianism pioneered by Bentham had an impact on the development of economic theory of crime, which may not be applicable to all criminal offenses, but can be applied when it comes to perpetrators of property crimes. According to Gary Becker, people decide to commit crimes calculating the maximum benefit that they will achieve from it. The decisive reason for undertaking criminal activities is the very expectation of greater benefits from these activities than from refraining from them (Schmidt & Witte, 1984:142). This theory is applicable when there is a possibility of “rational choice“ and when the goal of committing a crime is primarily acquiring material gain, as is the case with tax evasion (Schmidt & Witte, 1984:143).

It is certain that the expected benefit decreases with the increase of punishment (and consequently its monetary equivalent), as well as with the increase in probability of detection of the perpetrator of a criminal offence, that is, passing a final conviction. Therefore, the greater the punishment, the smaller the expected benefit of violation of the law, and consequently it is less likely that a violation of law will occur. This finding has led to the conclusion that effective penal policy is a basic factor of general crime prevention, that is, of violation of the law (Begović, 2007:46). However, for fiscal criminal offenses, other than general prevention, one can pose the question of compensation for damages, since their commission causes high costs for the budget. Fiscal criminal offenses are prescribed primarily for the purpose of protection of human rights, the so-called new generation rights – economic and social. However, the perpetrator’s awareness of the fact that criminal offence they commit potentially reduces their own rights would not affect refraining from committing crime. However, if the perpetrator would be aware that the same amount of money obtained by tax evasion, failure to pay withholding tax or amount of budgetary funds that he/she improperly used must return to the budget, he/she probably would consider refraining from commission of the crime. Although a fine can be imposed to the perpetrator of fiscal offenses, it is often lower than the amount of damage that occurs as a result of their commission. It is therefore essential, in addition to punishments, to impose return of unpaid or unlawfully used budget funds as well.

Bearing in mind the aforementioned, the subject of the analysis in this paper is the content of judgements of courts in the Republic of Serbia. The goal of such analysis is to determine the frequency of imposing claim for restitution and measure of seizure of proceeds of crime. The limiting factor in the proper content analysis of judgments of fiscal criminal offenses, and consequently in making a more reliable conclusion, is the fact that the subject of the analysis were only judgements convicting persons for tax-related criminal offenses. The reason for this is the fact that it is harder to come by judgements on other fiscal crimes, than when it comes to tax-related criminal offenses.

## **2. THE NOTION AND TYPES OF FISCAL CRIMES**

The word fiscal comes from the Latin word *fiscus* meaning state treasury or state assets (Klajn & Šipka, 2007:1328). According to Vujaklija, word fiscal comes from the Latin word *fiscalis* meaning “pertaining to state treasury“, belonging to state treasury, going in favour of state treasury, which has to do with the Latin word *fiscus* meaning treasury. In the Roman emperors’ era, the said word meant the Emperor’s private treasury, unlike the word *erarium* which meant the state treasury. Today, the notion *fiscus* means state property or state treasury (1970: 1012). Taking into account the meaning of the notion fiscal, the umbrella of fiscal criminal offenses includes criminal offences which directly or

indirectly endanger the treasury (budget) or state property. These criminal offences can be considered in the narrow or broader sense. In the narrow sense, these are exclusively criminal offenses which directly threaten state property, while in the broader sense they also comprise some other criminal offences, which depending on the circumstances of a particular case (the object of attack or perpetrator) may be directed against state property or state treasury.

Fiscal offenses in the narrow sense include tax, customs and budgetary crimes. Tax-related criminal offences are defined by the Law on Tax Procedure and Tax Administration<sup>1</sup>. These are criminal offences defined by law, whose possible consequence is full or partial tax evasion, drafting and submitting a forged document of importance for taxation, jeopardizing tax collection and tax control, illicit trafficking of excise goods and other illegal actions related to tax evasion.<sup>2</sup> Some tax-related crimes are provided for in primary, while others in secondary criminal legislation. The Criminal Code of the Republic of Serbia prescribes the following criminal offences: tax evasion, non-payment of withholding tax and preventing control.<sup>3</sup> Secondary criminal legislation, i.e. the Law on Tax Procedure and Tax Administration, prescribes the following tax-related criminal offenses: unfounded expression of amounts for tax reimbursement and tax credit, jeopardizing tax collection and tax control, illegal markets of excise products and illegal storing of goods.<sup>4</sup>

As opposed to the tax-related criminal offences, other fiscal offenses are not defined by other regulations and are exclusively regulated by the Criminal Code. Within the Chapter twenty-two, which comprises a group of criminal offences against economy, customs criminal offence – smuggling, is provided for.<sup>5</sup> In addition to tax and customs criminal offenses within the same chapter and group of criminal offences against the economy, criminal offense whose object of protection is dual, is provided for – misfeasance in public procurement.<sup>6</sup> In contrast to the previously mentioned offences, only criminal offense of spending funds from the budget for a purpose other than designated is provided for under the Chapter thirty-three, within the group of criminal offenses against

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<sup>1</sup> The Law on Tax Procedure and Tax Administration (“Official Gazette of the Republic of Serbia”, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014)

<sup>2</sup> Tax-related criminal offences are defined in the Article 135, paragraph 2 of the Law on Tax Procedure and Tax Administration of the Republic of Serbia.

<sup>3</sup> Although committed to the detriment of the budget, i.e. fiscal system, tax-related criminal offenses are stipulated in the group of criminal offenses against the economy. Criminal offence Tax Evasion is prescribed in the Article 229, criminal offence Failure to Pay Withholding Tax in Article 229a, criminal offence Preventing Control in Article 241 of the Criminal Code („Official Gazette of the Republic of Serbia“, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014). Tax-related criminal offences are only in the legislation of the Republic of Serbia prescribed in two laws.

<sup>4</sup> Criminal offence Unfounded Expression of Amounts for Tax Reimbursement and Tax Credit is prescribed in Article 173a, Jeopardizing Tax Collection and Tax Control in Article 175, Illegal Markets of Excise Products in Article 176, and criminal offence Illegal Storing of Goods in Article 176a of the Law on Tax Procedure and Tax Administration.

<sup>5</sup> Criminal offence Smuggling is prescribed in Article 230 of the Criminal Code.

<sup>6</sup> Criminal offence Misfeasance in Public Procurement is prescribed in Article 234 of the Criminal Code.

official duty.<sup>7</sup> Fiscal offenses in broader sense are criminal offenses that do not always cause damage to the state budget or property, but which, depending on the circumstances of a particular case, can be committed to the detriment of the fiscal system.

Criminal offence of obtaining and using credit and other benefits under false pretences exists if a person by false presentation of facts or their concealment obtains for him/herself or another a credit, subvention or other benefit even though not meeting the relevant requirements, as well in the case when a person uses the obtained credit, subvention or other benefit for purposes other than those for which the credit, subvention or other benefit was granted. Keeping in mind that subventions are granted from the budget, offence can be considered as fiscal criminal offense if false data were submitted to the competent authorities or if relevant data were concealed in order for a specific person (for example, a public company or natural person) to receive a subvention even though he/she does not meet the stipulated requirements or if subvention was used for a purpose other than designated. For a criminal offense of obtaining and using credit and other benefits under false pretences to be considered a fiscal criminal offense, it is necessary to have been committed in relation to the budget (public funds), that is, that it was committed in order to obtain subventions from the budget of the Republic of Serbia, territorial autonomy or local self-government unit, as well as in the case when granted subvention is used for a purpose other than designated.<sup>8</sup>

According to some authors, criminal law protection of public revenues has always existed, but varied depending on the social organization and socio-economic relations. However, all countries have sought to combat tax crimes, by stipulating criminal offences that provided criminal protection to public revenues (Vučković, 2013:5). Tax-related criminal offences were prescribed first, while the need for prescribing other criminal offences committed at the detriment of the fiscal system arose much later. The consequence of these criminal offences is prevention of the inflow of public revenues in the budget (in terms of tax and customs offenses), as well as the excessive spending of these funds (when it comes to budgetary criminal offenses). In addition to reducing public revenue and damage to the budget, by committing fiscal criminal offenses, other social values are endangered as well, which implies adequate reaction not only on legal, but also on the moral level. The consequences are not only adverse fiscal effects, but also the repercussions on the economic-political and socio-political level. Fiscal crime significantly affects the weakening of the economic base of a society (Kulić & Milošević, 2010:117).

Fiscal criminal offenses are mostly committed with mercenary motives and represent a great expense to a country, bearing in mind that in this way state budget is damaged, as well as citizens. A large part of public spending is financed from public revenues, and it is therefore necessary to find a way to compensate for the damage to the budget resulting from the failure of payment of public revenues and their illegal payment. However, this does not mean that these measures should be given priority over punishment. But, it seems that on the decisions of the perpetrator to refrain from committing a fiscal criminal offense to a greater extent would influence the likelihood that

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<sup>7</sup> Criminal offence Spending Funds from the Budget for a Purpose Other than Designated is prescribed in Article 362a of the Criminal Code.

<sup>13</sup> Criminal offence Obtaining and Using Credit and Other Benefits under False Pretences is prescribed in the Chapter XX, in the group of criminal offences against property, Article 209 of the Criminal Code. Subventions are part of budgetary funds that are being allocated for economic incentives.

in the event of discovery of his/her offence, he/she will be required to pay into the budget the funds not paid or was illegally spent .

### **3. PRESCRIBING FISCAL CRIMINAL OFFENCES FOR THE PURPOSE OF HUMAN RIGHTS PROTECTION**

Recent variations of the natural law teachings are based on the existence of the social contract. According to them, people were autonomous and sovereign beings in natural state, and by entering into the community they concluded an agreement, giving up some of their powers in favour of the state, but retaining some rights. These rights which people gave up in favour of the state represent liabilities towards the state, and the rights that they retained are human rights proclaimed by international and national documents. Thus, the obligation to pay taxes to the state is waiving a part of their rights to property, i.e. part of their property, but it is also a prerequisite for the achievement of economic, social and cultural rights, whose realization is financed by these taxes and other duties that citizens pay to the state (Dimitrijević et al, 1997: 370-371).

The Article 22 of the Universal Declaration of Human Rights provided that everyone, as a member of society, has the right to social security and the right to economic, social and cultural rights necessary for personal dignity and free development of his/her personality, with the help from the state and international cooperation, and in accordance with the organization and resources of each state. The said Declaration stipulates that everyone has the right to a standard of living that ensures health and well-being of him/herself and of his/her family, including food, clothing, housing and medical care and special social services, as well as the right to security in case of unemployment, sickness, disability, widowhood, old age or other cases of lack of livelihood in circumstances beyond his/her control.<sup>9</sup> Besides the rights, the Declaration stipulates that everyone has duties towards the community, and that only community provides the free and full development of his/her personality, as well as that in the exercise of his/her rights and freedoms, everyone can be subject only to such limitations as are determined by law, for the purpose of securing due recognition and respect for the rights and freedoms of others and the general welfare, all these in order to meet the just requirements of morality, public order and the general welfare in a democratic society.<sup>10</sup> Therefore, citizens waive a part of their income in order to secure the rights and freedoms of others and the general social welfare. The right to social security, as well as the right to achieve economic, social and cultural rights are conditioned by funds which the state has at its disposal. These funds are provided from the state budget. Therefore, the stability of the fiscal system of a country is of great importance for the functioning of the community.

Human rights are protected by different mechanisms. Nevertheless, a special place and significance belongs to criminal law sanctions (Paunović et al, 2007:99). Essentially, criminal law protection of human rights as such (in the narrow sense), has developed only when the very idea of human rights and obligation of their respect developed. Thus, it is the achievement of recent times. (Paunović et al, 2007:100).

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<sup>9</sup> Article 25 of the Universal Declaration of Human Rights. The text of the Declaration in English language is available on the following webpage:

[http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf) (accessed in January 2016)

<sup>10</sup> Article 29, paragraphs 1 and 2 of the Universal Declaration of Human Rights

International standards guarantee economic and social human rights. In accordance with them, everyone has the right to a dignified life and to a minimum standard of living, as well as to health and social care. The state has a dominant role in the realization of these rights. The quality of these rights, of course, depends on the material wealth of a country. Therefore, of great importance for every state is preservation of its fiscal system. It is quite justified that the most serious forms of violations and endangering the tax, customs and budgetary system are prescribed as a fiscal criminal offenses. Bearing in mind the above said, it can be concluded that these offences do not only damage the state budget, but also citizens, and it is therefore necessary to apply appropriate measures that will prevent the potential perpetrators from committing crimes.

#### **4. COMPENSATION FOR THE DAMAGE TO THE BUDGET – THE CONTENT ANALYSIS OF THE COURT JUDGEMENTS**

According to the data of the Tax Administration, in the period from 1 January 2009 to 31 December 2013 the tax police filed 8468 criminal charges, while the state was damaged by 64 598 658 586,65 Dinars for non-payment of taxes in the stated period.<sup>11</sup> However, when it comes to fiscal criminal offenses, it is not only necessary to punish the perpetrator, but also to return unpaid funds in the budget. Two measures can be imposed on perpetrators: awarding restitution claim and confiscation of proceeds of crime. Restitution claim is a claim which is a result of commission of a criminal offence or of a wrongful act stipulated by law as a criminal offence. It is considered upon a motion by authorised persons in criminal proceedings, unless it would substantially prolong proceedings. Restitution claim may relate to the compensation of damage, return of objects or annulment of a certain legal action, and may be submitted by a person who is authorised to submit such a claim in civil proceedings.<sup>12</sup> While submitting a restitution claim, authorized submitter is required to submit evidence.<sup>13</sup> If due to the criminal offence or wrongful act stipulated by law as criminal offence public property was damaged, the authority authorised by a law or other regulation to take care of the protection of this property may participate in proceedings in accordance with the authorisation it possesses pursuant to that law or other regulation.<sup>14</sup> If public property was damaged, the authorized person is the State Attorney's Office, as protector of the property rights and interests of the Republic of Serbia. This claim may be submitted no later than the conclusion of the main hearing before the first instance court.<sup>15</sup> In case that an authorised person has not submitted a restitution claim until the charges are filed, he/she will be notified that he/she can submit it by the end of the main hearing.<sup>16</sup> If due to the criminal offence or wrongful act stipulated by law as criminal offence public property was damaged, and restitution claim was not submitted, the court is required to inform the competent authority.<sup>17</sup>

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<sup>11</sup>This datum is listed according to the letter of the Ministry of Finance, Tax Administration, Tax Police Sector, Belgrade, No. 031-5/2014-11 of 06/02/2014. The data were submitted at the written request of the author of 03/02/2014.

<sup>12</sup>Person who can file it in civil proceedings is the injured party or his/her legal representative.

<sup>13</sup>Article 252 of the Criminal Procedure Code.

<sup>14</sup>Article 253 of the Criminal Procedure Code.

<sup>15</sup>Article 254 of the Criminal Procedure Code.

<sup>16</sup>Article 254 of the Criminal Procedure Code.

<sup>17</sup>Article 259 of the Criminal Procedure Code.

In case that in criminal proceedings restitution claim is not filed by the injured party or by his/her legal representative, the court can order seizure of proceeds of crime. Seizure of proceeds of crime is a special measure stipulated by the Criminal Code, and its application is justified by the fact that no one can benefit from the commission of criminal offence. The said measure cannot be imposed cumulatively with award of restitution claim, because one excludes the other. However, since in case of fiscal criminal offenses and in deciding on restitution claim and the confiscation of material benefits funds are paid to the budget, it does not matter which of the above measures will be imposed. In order to analyze the actions of the courts in relation to the application of these measures, the paper analyzes the content of the six judgements imposed on perpetrators of criminal offences of tax evasion and non-payment of withholding tax.<sup>18</sup>Of all the judgments whose content was the subject of analysis in this paper, only in one case a restitution claim was awarded, because in that particular case restitution claim was filed by the competent State Attorney's Office as the authorized submitter of the claim.<sup>19</sup>However, none of the judgments contained measure of seizure of proceeds of crime, and the court has an obligation to impose it *ex officio*. In one judgement, the court concluded that the imposition of measure of seizure of proceeds of crime is not necessary, because the perpetrator made the payment of the owed amount after the field control.<sup>20</sup>Only the judgment of the Basic Court in Valjevo states that the restitution claim is not awarded, because legal representative did not file it, but the measure of seizure of proceeds of crime was not imposed. In contrast to that judgment, in other judgments restitution claims were not mentioned, but the measure of seizure of proceeds of crime was not imposed as well. Nevertheless, it seems that when it comes to tax-related criminal offenses, courts more often impose security measures than measure of seizure of the proceeds of crime, even though compensation of damage by payment of its amount in the budget might to a great extent preventively influence potential offenders.

Based on the content analysis of court judgments, it can be concluded that there is no adequate cooperation between the courts and the competent authorities which protect property rights and interests of the Republic of Serbia, if one takes into account the frequency of awarding restitution claim. Although a fine may be imposed to the perpetrators of fiscal criminal offenses, one should keep in mind that they do not have the

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<sup>18</sup>Judgments that have been the subject of the analysis in this paper, were submitted at the request of the author, by the Ministry of Finance, Tax Administration, Tax Police Sector, Belgrade, No. 033-5/2014-11 of 06/02/2014. This paper analyzed the content of the following judgements regarding the criminal offense of tax evasion: Judgment of the Basic Court in Prokuplje 2K. No.807/2010 of 22/03/2011. Judgment of the Basic Court in Smederevo 6K No 1040/2010 of 23/08/2011. Judgment of the Basic Court in Valjevo K No 433/2010 of 07/06/2011. Judgment of the Basic Court in Kikinda No. 1K.427/2011 of 23/08/2011. In connection with the criminal offense of non-payment of withholding tax, content analysis of the following judgement was carried out: Judgement of the Basic Court in Zrenjanin No. of 1K 324/2012 of 09/07/2012, Judgment of the Basic Court in Sombor No. of 1K. 1310/2010 of 20/04/2012.

<sup>19</sup>The judgment of the Basic Court in Smederevo 6K No. 1040/2010 of 23/08/2011 has obliged the perpetrator of criminal offence of tax evasion, by which he/she damaged the budget by 224 091 Dinars, to pay the amount for unpaid taxes in the budget of the Republic of Serbia based on the filed restitution claim, given that the Republic Attorney's Office, as the legal representative of the Republic of Serbia in accordance with Article 206 of the Criminal Procedure Code timely filed restitution claim.

<sup>20</sup>Judgement of the Basic Court in Prokuplje 2K No.807/2010 of 22/03/2011.

same objective as the award of restitution claim and seizure of material benefit. The purpose of punishment is general prevention, while mentioned measures are important for compensation of damages caused to the budget by committing fiscal criminal offences. This, of course, does not diminish their importance for the prevention of fiscal offenses.

## **5. CONCLUSION**

Fiscal criminal offenses represent not only the damage to the budget, but also to citizens. Low inflow of funds in the budget or their illegal or uneconomical use may cause the budget deficit. Such a situation requires the application of measures that negatively reflect on the overall social welfare. Therefore, in order to prevent such criminal offenses, it is necessary to apply a large number of preventive measures. Fiscal criminal offenses belong to the subgroup of property crime, and thus their perpetrators are usually guided by the principle of maximizing the benefits from commission of such criminal offences. In cases of these criminal offences, Becker's economic theory of crime can be applied. Bearing this in mind, one could ask the question what the adequate sanction or measure which may affect the potential perpetrators to refrain from committing a crime is. Fines may as well be imposed on perpetrators of fiscal criminal offences, but they may be lower than the amount for which the budget was damaged. Therefore, for the purpose of both compensation for damage, and the additional influence on preventing the commission of fiscal criminal offenses, two measures could be imposed: an award of restitution claim and seizure of proceeds of crime. The first measure depends on the existence of restitution claim, which is submitted in criminal proceedings by the authorized submitter. In case that restitution claim was not filed, the court has the option to impose the measure of seizure of proceeds of crime. Nevertheless, based on analysis of court judgments which imposed sanctions for tax-related criminal offences, it seems that the courts do not, or very rarely, impose the said measure.

Taking into account the damage to the budget caused by commission of fiscal criminal offenses, in all cases where restitution claim is not awarded courts should impose measure of seizure of proceeds of crime. Application of this measure should have precedence over security measures, because it actually has a dual function – general preventive action and compensation for the damage. If a potential perpetrator of fiscal criminal offenses has the knowledge that the court in most cases, in addition to imposing punishment, also imposes the mandatory seizure of proceeds of crime, that is, orders payment of an amount of money to the budget, it is very likely that he/she will refrain from committing that criminal offence.



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