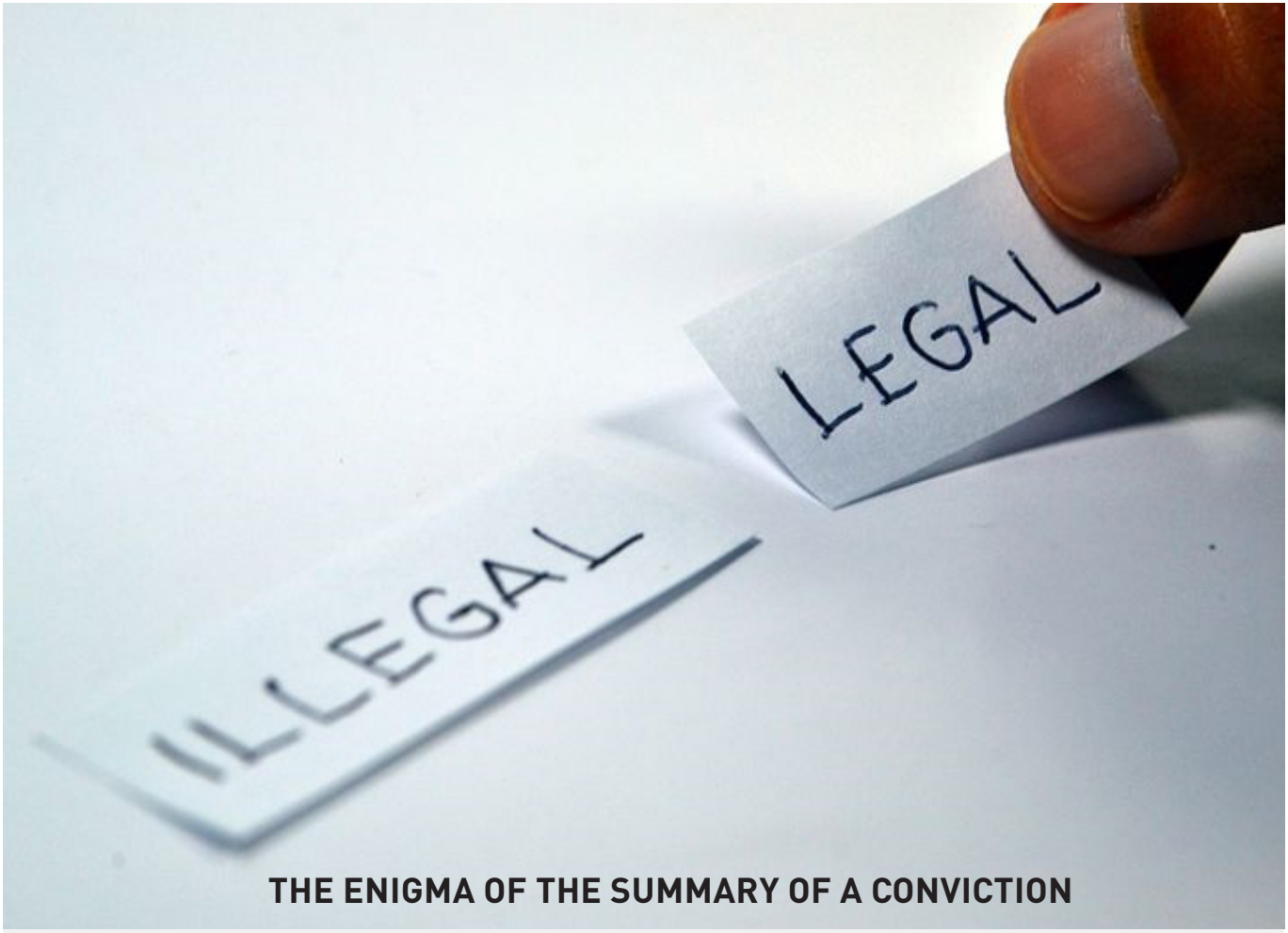

THE ENIGMA OF THE SUMMARY OF A CONVICTION

ENIGMA IZREKE JEDNE OSUĐUJUĆE PRESUDE

JPM | JANKOVIĆ POPOVIĆ MITIĆ

FOREWORD

JPM Partner Jelena Milinović has been, for many years and within her professional engagement in the field of criminal law, paying special attention to, inter alia, specific issue of the phenomenon of convictions, whereby the descriptions of activities of convicted individuals (i.e. descriptions of actions or omissions thereof) in the summary of the respective judgments do not constitute either the criminal offence(s) for which the individuals have been convicted or any other criminal offence and whereby the adequate description in this respect constitutes a legal imperative and one of the most significant issues and indicators of severe infringements of constitutionally guaranteed human rights by violations of criminal proceedings.

JPM Partner Nikola Đorđević is a highly specialized practitioner in the field of tax law, advising daily clients about the numerous tax types, while at the same time taking interest in issues which are not exclusively tax law issues but rather demand a multidisciplinary approach.

Combining their expertise and aiming at an integral approach in the sphere of law popularly called white-collar crime, Mrs. Milinović and Mr. Đorđević have analyzed one, for the time being still non-final, conviction, rendered by one of domestic courts in a criminal proceedings conducted due to alleged perpetration of a criminal offence of Tax Fraud, laid down by the Article 225, Article 1 of the Criminal Code. Their analysis is focused on the relationship between tax regulations, the criminal offence of Tax Fraud and the legal requirement that the summary of each conviction rendered in a criminal proceedings must contain a description of actions actually undertaken by an individual in the reality, and which constitute all of the essential elements of the criminal offence for which an individual has been found guilty. All of that is highlighted from a standpoint of criminal law and law of criminal proceedings as well as from the view of tax law.

UVODNE NAPOMENE

Partner JPM Jelena Milinović se u profesionalnom radu u oblasti krivičnog prava, pored ostalog, posebno i dugi niz godina interesuje za specifično pitanje pojave postojanja pravosnažnih osuđujućih krivičnih presuda kojima su pojedinci osuđivani za ponašanja koja, prema opisima njihovog delovanja, činjenja ili nečinjenja koje je u izrekama tih presuda opisano, nisu predstavljala krivična dela za koja su osuđeni, niti neka druga krivična dela, a što predstavlja imperativ zakona i jedno od najvažnijih pitanja i pokazatelja kako se nepoštovanjem krivičnopravne procedure na najgrublji način krše ustavom zajamčena ljudska prava.

Partner JPM Nikola Đorđević je visoko specijalizovan za pravnu oblast poreskog prava, u okviru koje na dnevnoj osnovi savetuje klijente u pogledu većine vrsta poreza, interesujući se u isto vreme i za pitanja koja ne spadaju isključivo u poreskopravnu problematiku već koja zahtevaju multidisciplinarni pristup.

U ovom kontekstu, kombinujući svoja znanja u cilju sveobuhvatnog pristupa oblasti prava koja se popularno naziva white collar crime, oni su analizirali i jednu, za sada, nepravosnažnu osuđujuću presudu jednog domaćeg suda donetu u krivičnom postupku koji se vodi zbog navodnog izvršenja krivičnog dela poreske utaje iz člana 225 stav 1 Krivičnog zakonika, objašnjavajući, kako sa stanovišta krivičnog i krivičnoprocesnog prava, tako i sa stanovišta poreskog prava, vezu i odnos poreskih propisa, krivičnog dela poreske utaje i zakonskog zahteva da izreka svake osuđujuće presude donete u krivičnom postupku mora da sadrži opis radnji pojedinca koje je on preduzeo u stvarnosti, a iz kojih proizilaze svi bitni elementi krivičnog dela za koje je oglašen krivim.

The Enigma of the Summary of a Conviction

We have recently, in our attorney practice, had a chance to come across a conviction rendered by one of the basic courts in Serbia (hereinafter: Court) in criminal proceedings (hereinafter: Conviction), which took us, despite our long-standing experience in the respective field of law and although we have thus far seen a wide variety of judicial decisions with a wide quality variety, by surprise.

Bearing in mind that the criminal offence of Tax Fraud (hereinafter: Tax Fraud), set out in the Article 225 of the Criminal Code (hereinafter: CC), the alleged perpetration of which was the subject of conducted criminal proceedings resulting in the Conviction, has been present in our criminal law system for several years and taking further into account the extensive case-law as well as a high number of published legal standpoints and summary of courts' decisions rendered at different court instances, and also considering a relatively simple state of facts in the criminal case at hand, one would expect that any court or judge would have no difficulties in rendering a judgment in a Tax Fraud-related criminal proceedings, in particular for the summary judgment as to its substantial and most significant part and at least concerning issues analyzed herein. However, we were wrong and are, therefore, and we cannot put that another way, unpleasantly surprised.

In the Conviction, the sentence thereof being the topic of this paper, the Court has found that the defendant (the director of a Serbian company) has been paying salaries to the employees in such a way as to record them in the company books partly as salaries, taxed by a corresponding withholding tax, and partly as compensation for performed business trips, for which the company had failed to pay a corresponding withholding tax. As per the Court's standpoint, the defendant had in such a way committed one of the alternatively provided criminal acts constituting Tax Fraud, i.e. concealing of information on facts relevant for payment of taxes, social security contributions, and other duties prescribed by law. Finally, the court found the overall amount of withholding tax, the payment of which the company and its director (the defendant) had in such a way evaded, to have exceeded the amount of one million dinars in a one-and-a-half-year period.

Enigma izreke jedne osuđujuće presude

Nedavno smo u našoj advokatskoj praksi imali priliku da se susretnemo sa osuđujućom presudom jednog osnovnog suda u Srbiji (u daljem tekstu: Sud) donetom u krivičnom postupku (u daljem tekstu: Presuda) koja nas je, bez obzira na dugogodišnje iskustvo u konkretnoj pravnoj oblasti i bez obzira na to što smo imali prilike da se susretnemo sa sudskim odlukama najrazličitije vrste i najrazličitijeg kvaliteta, zaista iznenadila.

S obzirom na to da krivično delo poreske utaje (u daljem tekstu: Poreska utaja) koje je propisano odredbom člana 225 Krivičnog zakonika (u daljem tekstu: KZ), zbog čijeg se navodnog izvršenja vodi konkretni krivični postupak, već dugi niz godina postoji u našem krivičnopravnom sistemu, s obzirom na zaista obimnu sudsku praksu i veliki broj objavljenih pravnih stavova i sentenci iz odluka sudova različitog nivoa, kao i s obzirom na relativno jednostavno činjenično stanje u konkretnom krivičnopravnom slučaju, očekivalo bi se da ni jednom sudu i ni jednom sudiji donošenje presude u krivičnom postupku koji se vodi zbog Poreske utaje, naročito kada je u pitanju izreka same presude, kao njen supstancijalni i najvažniji deo, i bar kada je reč o pitanjima koja smo analizirali u ovom tekstu, ne bi trebalo da zadaje bilo kakve probleme. Međutim, pogrešili smo i, ne možemo da izbegnemo da kažemo, prilično smo se neprijatno iznenadili.

Konkretnom Presudom, čija izreka predstavlja temu ovog rada, Sud je utvrdio da je okrivljeni zaposlenima vršio isplatu zarade tako što ju je, u poslovnim knjigama privrednog društva čiji je direktor, delimično prikazivao kao zaradu, na koju je platio odgovarajući porez po odbitku, a delimično ju je prikazao kao naknadu za izvršena službena putovanja, na šta privredno društvo čiji je direktor nije platilo odgovarajući porez po odbitku. Sud je našao da je time okrivljeni izvršio jednu od alternativno predviđenih radnji Poreske utaje, a to je prikrivanje podataka o činjenicama koje su od uticaja na plaćanje poreza, doprinosa i drugih propisanih dažbina. Najzad, Sud je našao i da ukupan iznos poreza po odbitku, čije je plaćanje privredno društvo čiji je okrivljeni direktor izbeglo na ovaj način, u periodu od godinu i po dana, prelazi iznos od milion dinara.

Our further analysis of the Conviction concentrates upon three issues:

(i) defining by the Court of „withholding tax" as a „tax, social security contribution and other duty prescribed by law" the payment of which has been evaded;
(ii) the adopted qualification that the committed acts of the defendant constitute „concealing of information, related to finding/identification of data on revenues, matters and other facts, relevant" for establishing of obligation to pay taxes, social security contributions, and other prescribed duties, as one of alternatively provided criminal acts constituting Tax Fraud, and
(iii) the finding of the Court that the amount of evaded tax exceeds one million dinars.

For the present analysis, it is necessary to underline that the criminal offence of Tax Fraud is, in its basic form (Article 225, Paragraph 1 of CC) incriminated in such a way as to envisage a prison in the duration from one to five years and the pecuniary fine for the one, who, acting with the intention that he/she or other (natural or legal) person entirely or partially evades the payment of taxes, social security contributions, and other prescribed duties, delivers false information on revenues, goods and other facts relevant for establishing of such obligations, or the one, who, acting with the same intention, in case of mandatory reporting fails to report the revenues, matters and other facts, relevant for establishing of such obligations, and the one, who, acting with the same intention, in other way conceals the information, related to establishing of said obligations, whereby the amount of evaded obligations exceeds one million dinars.

To put it simply, the so-called matter of protection (the matter that the lawmaker intends to protect in declaring certain activities as a crime) in the case of the Tax Fraud are obligations related to payment of
(i) taxes, or
(ii) social security contributions, or
(iii) other duties prescribed by law.

Naša dalja analiza Presude se koncentriše na tri pitanja:

(i) određivanje od strane Suda „poreza po odbitku“ kao „poreza, doprinosa i drugih propisanih dažbina“ čije je plaćanje izbegnuto,
(ii) datu kvalifikaciju da opisane radnje okrivljenog predstavljaju „prikrivanje podataka o činjenicama koji se odnose na utvrđivanje podatka o stečenim prihodima, o predmetima ili drugim činjenicama koje su od uticaja“ na utvrđivanje obaveze plaćanja poreza, doprinosa ili drugih propisanih dažbina, kao jednu od alternativno predviđenih radnji mogućeg izvršenja Poreske utaje, i
(iii) zaključak Suda da iznos izbegnutog poreza prelazi milion dinara.

Za potrebe ove analize, neophodno je navesti to da je Poreska utaja, inače, u svom osnovnom obliku, stavom 1 člana 225 KZ, kao krivično delo inkriminisana tako što je predviđeno da će se zatvorom od jedne do pet godina i kumulativno novčanom kaznom kazniti onaj ko, u nameri da on ili drugo (fizičko ili pravno) lice, potpuno ili delimično izbegne plaćanje poreza, doprinosa ili drugih propisanih dažbina, daje lažne podatke o stečenim prihodima, o predmetima ili drugim činjenicama koje su od uticaja na utvrđivanje ovakvih obaveza, ili onaj ko, u istoj nameri, u slučaju obavezne prijave, ne prijavi stečeni prihod, predmete ili druge činjenice koje su od uticaja na utvrđivanje ovakvih obaveza i onaj ko, u istoj nameri, na drugi način prikriva podatke koji se odnose na utvrđivanje navedenih obaveza, a iznos obaveze čije se plaćanje izbegava prelazi iznos od milion dinara.

Dakle, a jednostavnije rečeno, objekat zaštite (šta zakonodavac namerava da zaštiti kad proglasi određena ponašanja kao krivično delo) kod Poreske utaje jesu obaveze koje se odnose na plaćanje ili
(i) poreza, ili
(ii) doprinosa ili
(iii) drugih propisanih dažbina.

The criminal act constituting Tax Fraud is laid down alternatively, and it can consist of:

(i) delivering false information on facts relevant for establishing of obligation to pay taxes, social security contributions or other duties prescribed by law, or

(ii) failure to, in case of mandatory reporting, report the revenues, goods, and other facts relevant for establishing of obligation to pay taxes, social security contributions or other duties prescribed by law, or

(iii) concealing of information related to establishing of obligation to pay taxes, social security contributions, or other duties prescribed by law in another manner.

The consequence of the respective criminal offence consists of evaded payment of :
(i) taxes, or
(ii) social security contributions, or
(iii) other duties prescribed by law.

Radnja izvršenja Poreske utaje je određena alternativno, i ona se može sastojati:

(i) u davanju lažnih podataka o činjenicama koje su od uticaja na utvrđivanje obaveze plaćanja poreza, doprinosa ili drugih propisanih dažbina ili,

(ii) u neprijavljivanju, u slučaju obavezne prijave, stečenog prihoda, predmeta ili drugih činjenica koje su od uticaja na utvrđivanje obaveze plaćanja poreza, doprinosa ili drugih propisanih dažbina ili

(iii) u prikrivanju na drugi način podataka koji se odnose na utvrđivanje obaveze plaćanja poreza, doprinosa ili drugih propisanih dažbina.

Posledicu ovog krivičnog dela čini izbegnuto plaćanje ili :
(i) poreza, ili
(ii) doprinosa ili
(iii) drugih propisanih dažbina.

Tax Fraud can merely be committed by a direct intent, as a form of guilt, given that Tax Fraud can only exist in case the subjective element of the respective criminal offence exists, i.e. the perpetrator's special intention that he or some other natural or legal person entirely or partially evades payment of taxes, social security contributions or other prescribed duties. We shall, for the present analyses, not be dealing with the issue of whether the direct intent exists in the case at hand. In other words, we shall in this respect assume that the public prosecutor in charge has demonstrated the existence of the intention on the side of the defendant.

As mentioned, for the actions provided by the law as criminal acts constituting Tax Fraud to be considered as a criminal act constituting the subject criminal offence, the amount of evaded obligations (whether taxes, social security contributions, or other prescribed duties) must exceed one million dinars. If that is not the case, i.e. if the amount of evaded obligations remains below the respective threshold provided by the law, the actions of an individual cannot be treated as a criminal offence of Tax Fraud, albeit such actions are taken in the reality and could be qualified as (some of the) criminal acts constituting Tax Fraud. In that case, we could eventually be dealing with some sort of misdemeanor or some other action sanctioned by other, non-criminal, field of law. This is the so-called objective condition of incrimination, which limits/restricts the crime zone. Should that condition not be fulfilled, there is no criminal offence and the perpetrator cannot be penalized with a criminal sanction.

Bearing in mind the above in respect of Tax Fraud, let us first take a look at the defendant's actions, which he, according to the Court's standpoint, has allegedly taken in the reality, and which should constitute one of the alternatively provided criminal acts constituting Tax Fraud. It is apparent at first glance that the defendant's actions (payment of incomes to the employees partly as salaries and partly as compensation for business trips and recording such payments in books of the company the director of which is the defendant) could have been qualified as criminal acts constituting Tax Fraud consisting of „delivering false information on facts, relevant for establishing of obligations to pay taxes, social security contributions and other duties prescribed by law", rather than criminal act described as „other way of concealing information, related to establishing of obligations to pay taxes, social security contributions and other duties prescribed by law".

Poreska utaja se može izvršiti samo sa direktnim umišljajem, kao oblikom vinosti, s obzirom na to da je za njeno postojanje potrebno ispunjenje i jednog subjektivnog elementa ovog krivičnog dela koji se ogleda u postojanju posebne namere kod učinioca da on ili drugo (fizičko ili pravno) lice potpuno ili delimično izbegne plaćanje poreza, doprinosa ili drugih propisanih dažbina. Za potrebe ove analize nećemo se baviti pitanjem postojanja direktnog umišljaja u konkretnom slučaju, odnosno, pretpostavićemo da je nadležni tužilac dokazao postojanje namere kod okrivljenog.

Kao što je rečeno, bilo da je reč o porezu, doprinosu ili nekoj drugoj propisanoj dažbini, čije se plaćanje izbegava, da bi se radnje koje su zakonom na ovaj način propisane kao radnje izvršenja Poreske utaje mogle smatrati radnjama izvršenja ovog krivičnog dela, iznos obaveze čije se plaćanje izbegava mora prelaziti milion dinara. Ukoliko to nije slučaj, čak i kada su u stvarnosti od strane nekog lica preduzete takve aktivnosti koje bi se, podvedene pod konkretnu apstraktnu normu KZ, mogle kvalifikovati kao neka od radnji izvršenja Poreske utaje, ukoliko iznos obaveze čije se plaćanje izbegava ne prelazi navedeni zakonom određeni iznos, tada se takve aktivnosti tog lica ne mogu smatrati Poreskom utajom kao krivičnim delom. U takvom slučaju se, eventualno, može raditi o nekom prekršaju ili nekoj drugoj radnji sankcionisanoj odredbama neke druge oblasti prava, koja nije krivična. Ovde se radi o vrsti takozvanog objektivnog uslova inkriminacije koji ograničava kriminalnu zonu i bez čijeg ispunjenja krivično delo ne postoji i njegov učinilac ne može biti kažnjen krivičnom sankcijom.

Imajući u vidu navedeno o Poreskoj utaji, pozabavimo se na početku radnjama okrivljenog, koje je on, prema zaključku Suda, navodno preduzeo u stvarnosti, a koje bi trebalo da predstavljaju jednu od alternativno predviđenih radnji izvršenja Poreske utaje. Već na prvi pogled se dolazi do zaključka da bi radnje okrivljenog (plaćanje dela zarade zaposlenima kao zarade, a drugog dela kao naknade za službena putovanja i evidentiranje takvog načina plaćanja u poslovnim knjigama privrednog društva čiji je direktor) pre mogle biti kvalifikovane kao radnja izvršenja Poreske utaje koja se sastoji u „davanju lažnih podataka o činjenicama koje su od uticaja na utvrđivanje obaveze plaćanja poreza, doprinosa ili drugih propisnih dažbina“, nego radnja izvršenja „prikrivanja na drugi način podataka koji se odnose na utvrđivanje obaveze plaćanja poreza, doprinosa ili drugih propisanih dažbina„.

Proper qualification, i.e. proper subsumption of actions taken in the reality by any defendant, under one of the alternatively provided criminal acts constituting Tax Fraud (or any other criminal offence) is of importance for the very assessment with regard to (in)existence of criminal offence of Tax Fraud in general, as well as for assessment about (in)existence of the special intention on the side of the defendant, being the subjective element of Tax Fraud. That is a legal imperative, set out by Article 424, Paragraph 1, Item 1 of the Law on Criminal Proceedings (hereinafter: LCP).

Namely, the subject LCP provision explicitly stipulates that the court shall in a conviction, i.e. in judgment, by which a defendant is found guilty, inter alia, define the criminal offence for which a defendant is found guilty, mark facts and circumstances constituting the elements of the criminal offence, as well as facts and circumstances upon which the application of particular CC provision depends on. To put in simple, the sentence of each and every conviction must contain a description of an event, which needs to be outlined in such a way that it, when being subsumed under a corresponding material criminal law provision, comprises all legal elements of the very criminal offence for which the defendant has been found guilty and this description must be of such quality that the event at hand differs from any other similar events, which might as well constitute a criminal offence. This part of the conviction presents its essence. It represents the subject of the proceedings and the court's judgment, rendered after conducted proceedings. The description of actions taken by the defendant in the reality, is to be provided by the competent public prosecutor in the act of indictment, and the court is bound thereto.

As opposed to that, if the actions taken in the reality by the defendant, in the indictment act are not described in such a way as to comprise the elements of the criminal offence for which the defendant is charged by the indictment act, the court shall be, according to the Article 423, Item 1 of LCP, obliged to render a judgment acquitting the defendant of charges because the actions for which he has been indicted do not constitute a criminal offence, while the security measures cannot be applied either.

Another issue is whether the Conviction`s summary properly defines „withholding tax" as a type of tax, social security contribution, or other prescribed duties, the payment of which can be evaded and thus constituting a criminal offence of Tax Fraud.

Pravilno određenje, odnosno, podvođenje konkretnih u stvarnosti preduzetih radnji bilo kog okrivljenog pod jednu od alternativno određenih radnji Poreske utaje (i svakog drugog krivičnog dela) je značajno, kako za samu ocenu o postojanju krivičnog dela Poreske utaje uopšte, tako i za ocenu postojanja kod određenog okrivljenog posebne namere, kao subjektivnog elementa Poreske utaje. Ovo je i zakonski imperativ predviđen odredbom člana 424 stav 1 tačka 1 Zakonika o krivičnom postupku (u daljem tekstu: ZKP).

Naime, ova odredba ZKP izričito predviđa to da će sud u osuđujućoj presudi, tj. onoj kojom se neki okrivljeni oglašava krivim, pored ostalog, izreći i to za koje se krivično delo on oglašava krivim uz naznačenje činjenica i okolnosti koje čine obeležja krivičnog dela, kao i onih od kojih zavisi primena određene odredbe krivičnog zakona. Ovo običnim jezikom rečeno znači to da izreka svake osuđujuće presude mora sadržati opis životnog događaja koji mora biti formulisan tako da iz njega, kada se podvede pod odgovarajuću odredbu krivičnog materijalnog prava, proizilaze zakonska obeležja onog krivičnog dela za koje je određeni okrivljeni oglašen krivim i taj opis mora biti takav da taj životni događaj razlikuje od svakog drugog sličnog životnog događaja koji, takođe, može prestavljati krivično delo. Ovaj deo svake osuđujuće presude čini njenu suštinu, on predstavlja ono o čemu je sudu sudio i o čemu je, nakon sprovedenog postupka, i doneo presudu. Ovaj opis radnji koje je neki okrivljeni u stvarnosti preduzeo daje nadležni tužilac u optužnom aktu i sud je za njega vezan.

Suprotno ovome, ukoliko te životne radnje koje je neki okrivljeni u stvarnosti preduzeo u optužnom aktu nisu opisane tako da iz tog opisa proizilaze zakonska obeležja onog krivičnog dela koje je tom okrivljenom stavljeno na teret optužnim aktom, sud je u obavezi da, shodno odredbi člana 423 tačka 1 ZKP, donese presudu kojom će tog okrivljenog osloboditi od optužbe jer delo za koje je optužen po zakonu nije krivično delo, a nema uslova za primenu mere bezbednosti.

Drugo pitanje koje se postavlja jeste da li izreka Presude dobro definiše „porez po odbitku“ kao vrstu poreza, doprinosa ili drugih propisanih dažbina čije se plaćanje može izbeći da bi se moglo smatrati da je učinjeno krivično delo Poreske utaje.

Tax Fraud is a criminal offence of a so-called blanket character, since the CC, as it is visible from its Article 225, does not set out a specific type of tax, social security contribution, or other prescribed duties which may be subject of this criminal offence. Instead, the types and forms thereof are provided in other regulations. Furthermore, laws, which lay down particular taxes, contributions, and other prescribed duties, also provide the methods of establishing, i.e. calculation and manner of payment thereof.

For instance, the Article 3 of the Law on Individual Income Tax stipulates that the following incomes are subject to taxation with individual income tax:
(i) salaries,
(ii) income from self-employment activities,
(iii) copyrights income, income from rights related to copyrights and income from industrial property rights (hereinafter: intellectual property rights),
(iv) capital income,
(v) real estate income,
(vi) capital gains and
(vii) other incomes.

The respective Law further elaborates these types of income in such a way as to set out the following types of taxes:
(i) tax on salaries,
(ii) tax on income from a self-employment activity,
(iii) tax on income from intellectual property rights,
(iv) capital income tax,
(v) real estate income tax,
(vi) tax on capital gains,
(vii) tax on income from leasing movables,
(viii) tax on income from games of chance,
(ix) tax on personal insurance income,
(x) tax on the income of sportsmen(women) and sports experts and
(xi) tax on other income.

Poreska utaja je krivično delo takozvanog blanketnog karaktera, iz razloga što, kao što se vidi, KZ u svojoj odredbi člana 225 ne određuje specifikaciju vrsta poreza, doprinosa ili drugih propisanih dažbina koji mogu biti predmet njenog izvršenja, već su njihove vrste i oblici predviđene u drugim propisima. Takođe, pojedinim zakonima koji predviđaju određene vrste poreza, doprinosa ili drugih propisanih dažbina, predviđen je i način njihovog utvrđivanja, odnosno, obračuna i način njihovog plaćanja.

Primera radi, Zakon o porezu na dohodak građana u svom članu 3 predviđa to da porezu na dohodak građana podležu sledeće vrste prihoda:
(i) zarade,
(ii) prihodi od samostalne delatnosti,
(iii) prihodi od autorskih prava, prava srodnih autorskom pravu i prava industrijske svojine (u daljem tekstu: prava intelektualne svojine),
(iv) prihodi od kapitala,
(v) prihodi od nepokretnosti,
(vi) kapitalni dobici i
(vii) ostali prihodi.
Ove vrste prihoda su ostalim članovima predmetnog Zakona dalje razrađene tako da Zakon o porezu na dohodak građana poznaje sledeće vrste poreza:
(i) porez na zarade,
(ii) porez na prihode od samostalne delatnosti,
(iii) porez na prihode od prava intelektualne svojine,
(iv) porez na prihode od kapitala,
(v) porez na prihode od nepokretnosti,
(vi) porez na kapitalne dobitke,
(vii) porez na prihode od davanja u zakup pokretnih stvari,
(viii) porez na dobitke od igara na sreću,
(ix) porez na prihode od osiguranja lica,
(x) porez na prihode sportista i sportskih stručnjaka i
(xi) porez na druge prihode.

In other words, the Law on Individual Income Tax does not provide „withholding tax“ as a type of tax. On the other hand, the Articles 4 and 99 of the respective Law envisage methods of determining and payment of taxes under the subject Law and, inter alia, provides that the incomes from the Article 3 of the Law are subject to payment of the individual income tax in the following manner:

(i)as withholding tax from each individual income,
(ii) based upon a resolution of a competent authority and
(iii)by self-taxation.

Similar to the said Law, other tax laws also differentiate individual tax forms i.e. types of taxes, from payment methods applicable to those tax types. The Law on Property Taxes , inter alia, sets out in its Articles 1, 2, 14 and 23 that property taxes within the meaning of the respective Law are the following:

(i) property tax, payable on real estate (construction, agricultural, forest and other land, residence, business and other buildings, flats, business premises, garages and other superterrestrial and underground construction facilities, i.e. parts thereof), located in the territory of the Republic of Serbia,

Drugim rečima, Zakon o porezu na dohodak građana ne poznaje „porez po odbitku“ kao vrstu poreza. S druge strane, u svojim članovima 4 i 99 ovaj zakon predviđa načine utvrđivanja i plaćanja poreza u skladu sa tim zakonom i, pored ostalog, propisuje to da se na prihode iz člana 3 tog zakona porez na dohodak građana plaća:

(i) po odbitku od svakog pojedinačnog prihoda
(ii) na osnovu rešenja nadležnog organa
i
(iii) samooporezivanjem.

Slično navedenom i drugi poreski zakoni razlikuju pojedine poreske oblike tj. vrste poreza od načina plaćanja tih istih vrsta poreza. Tako Zakon o porezima na imovinu u svojim odredbama članova 1, 2, 14 i 23, između ostalog, predviđa da se porezima na imovinu u smislu tog zakona smatraju:

(i) porez na imovinu, koji se plaća na nepokretnosti (građevinsko, poljoprivredno, šumsko i drugo zemljište, stambene, poslovne i druge zgrade, stanove, poslovne prostorije, garaže i druge nadzemne i podzemne građevinske objekte, odnosno, njihove delove) koje se nalaze na teritoriji Republike Srbije,


TAX

(ii) inheritance and gift tax, payable on property and other rights over real estate inherited by heirs or received as gift by donees, as well as on cash, saving deposits, bank deposits, pecuniary receivables, intellectual property rights and property rights over used motor vehicles, used vessels or used aircraft and over other movables, and

(iii) tax on transfer of absolute rights, payable on transfer of property rights over real estate, intellectual property rights, property rights over used motor vehicles, used vessels and used self-propelled aircraft, save for state rights and rights of use of construction land, if such transfer is performed in return for consideration.

The Articles 32 and 33 of the Law on Property Taxes regulate establishing and payment of property tax, inheritance and gift tax as well as tax on transfer of absolute rights. The subject provisions lay down that a taxpayer for property tax, who/which maintains books, shall determine the tax by self-taxation, whereas the competent body of a local self-government unit where the real estate which is subject to taxation is located, shall determine the property tax by rendering a resolution - in relation to a taxpayer not maintaining the books, as well as, during the tax control, in relation to a taxpayer maintaining the books, should the latter not have determined its tax obligation or have not determined it correctly or entirely.

The Law on Corporate Income Tax envisages that the income of non-residents, set out in the Article 40, Paragraphs 1, 2, 3 and 14 of the respective Law shall be taxed as withholding tax, whereas the following incomes shall be taxed on the basis of a resolution:

(i) income from capital gains of a non-resident legal person from a resident legal person, other non-resident legal person, resident or non-resident natural person, or from an open-end investment fund in the territory of the Republic of Serbia,
(ii) income from considerations for lease and sublease of real estate and movables in the territory of the Republic of Serbia, realized by a non-resident legal person from a payer not obliged to calculate, withhold and pay withholding tax, and

(ii) porez na nasleđe i poklon, koji se plaća se na pravo svojine i druga prava na nepokretnostima koje naslednici naslede, odnosno, koje poklonoprimci prime na poklon, kao i na gotov novac, štedne uloge, depozite u banci, novčana potraživanja, prava intelektualne svojine i pravo svojine na upotrebljavanim motornim vozilima, upotrebljavanim plovilima, odnosno, upotrebljavanim vazduhoplovima i drugim pokretnim stvarima i

(iii) porez na prenos apsolutnih prava koji se plaća kod prenosa uz naknadu prava svojine na nepokretnostima, prava intelektualne svojine, prava svojine na upotrebljavanim motornim vozilima, upotrebljavanim plovilima i upotrebljavanim vazduhoplovima sa sopstvenim pogonom, osim državnih i prava korišćenja građevinskog zemljišta.

Odredbe članova 32 i 33 Zakona o porezima na imovinu regulišu utvrđivanje i naplatu poreza na imovinu, poreza na nasleđe i poklon i poreza na prenos apsolutnih prava i njima je predviđeno da obveznik poreza na imovinu koji vodi poslovne knjige porez na imovinu utvrđuje samooporezivanjem, a da organ jedinice lokalne samouprave na čijoj teritoriji se nalazi nepokretnost za koju se utvrđuje porez utvrđuje rešenjem porez na imovinu obvezniku koji ne vodi poslovne knjige i obvezniku koji vodi poslovne knjige, u postupku kontrole, ako taj obveznik nije utvrdio ili je poresku obavezu utvrdio netačno ili nepotpuno.

Zakon o porezu na dobit pravnih lica predviđa da se po odbitku plaćaju porezi na prihode nerezidenata predviđeni stavovima 1, 2, 3, i 14 njegovog člana 40 , a da se na osnovu rešenja plaćaju porezi:

(i) na prihode po osnovu kapitalnih dobitaka koje ostvari nerezidentno pravno lice od rezidentnog pravnog lica, drugog nerezidentnog pravnog lica, fizičkog lica, nerezidentnog ili rezidentnog, ili od otvorenog investicionog fonda na teritoriji Republike Srbije,
(ii) na prihode od naknada od zakupa i podzakupa nepokretnosti i pokretnih stvari na teritoriji Republike Srbije koje nerezidentno pravno lice ostvaruje od isplatioca koji nije dužan da obračunava, obustavlja i plaća porez po odbitku i

(iii) income of a non-resident legal person, realized on the basis of satisfaction of claims in the enforcement proceedings i.e. in any other proceedings aimed at claims' satisfaction in accordance with the law, income from copyrights and related rights considerations as well as industrial property rights considerations, income from interest, income from consideration for lease and sublease of real estate and movables in the territory of the Republic of Serbia as well as income from fees for market research services, bookkeeping and auditing as well as other services in the field of legal and business consulting, regardless of the place of their rendering or receiving, i.e. place where those services will be rendered or received.

Finally, the Article 3 of the Law on Mandatory Social Security Contributions stipulates that social security contributions, within the meaning of the respective law, are the following:

(i) contributions for pension and disability insurance, which consist of:
-contribution for mandatory pension and disability insurance,
-additional contribution for the insurance period with prolonged duration, calculated in accordance with the law, and
-contribution for the case of disability or body injuries, based upon an injury at work or upon a professional disease, all in accordance with the law;
(ii) health insurance contributions, which consist of:
-contribution for mandatory health insurance and
-contribution for the case of injury at work or professional disease, in accordance with the law, and
(iii) contribution for unemployment insurance – contribution for mandatory unemployment insurance.

The Law on Mandatory Social Security Contributions sets out different modes of payments of the said social security contributions, depending on who is obliged to pay the contributions and depending on how that person makes the earnings or consideration being the base for payments of mandatory contributions. For instance, the Article 51 of the respective Law, inter alia, envisages that the person obliged to calculate and pay social security contributions from the base and on the base for employees, elected, appointed and delegated persons and persons, performing temporary and periodical jobs, is the employer.

(iii) na prihode koje nerezidentno pravno lice ostvari po osnovu namirenja potraživanja u postupku izvršenja, odnosno u svakom drugom postupku namirenja potraživanja, u skladu sa zakonom od naknada od autorskog i srodnih prava i prava industrijske svojine, prihode od kamata, prihode od naknada od zakupa i podzakupa nepokretnosti i pokretnih stvari na teritoriji Republike Srbije i prihode od naknada od usluga istraživanja tržišta, računovodstvenih i revizorskih usluga i drugih usluga iz oblasti pravnog i poslovnog savetovanja, nezavisno od mesta njihovog pružanja ili korišćenja, odnosno, mesta gde će te usluge biti pružene ili korišćene.

Najzad, Zakon o doprinosima za obavezno socijalno osiguranje u svojoj odredbi člana 3 propisuje to da su doprinosi u smislu tog zakona:

(i) doprinosi za penzijsko i invalidsko osiguranje u koje spadaju:
-doprinos za obavezno penzijsko i invalidsko osiguranje,
-dodatni doprinos za staž osiguranja koji se računa sa uvećanim trajanjem u skladu sa zakonom
i
-doprinos za slučaj invalidnosti i telesnog oštećenja po osnovu povrede na radu i profesionalne bolesti u slučajevima utvrđenim zakonom;
(ii) doprinosi za zdravstveno osiguranje u koje spadaju:
-doprinos za obavezno zdravstveno osiguranje i
-doprinos za slučaj povrede na radu i profesionalne bolesti u slučajevima utvrđenim zakonom i
(iii) doprinos za osiguranje za slučaj nezaposlenosti - doprinos za obavezno osiguranje za slučaj nezaposlenosti.

Zakon o doprinosima za obavezno socijalno osiguranje propisuje različite načine plaćanja navedenih doprinosa u zavisnosti od toga koji je obveznik plaćanja doprinosa u pitanju i u zavisnosti od toga kako ostvaruje zaradu ili naknadu koja predstavlja osnovicu za plaćanje obavezne vrste doprinosa.
Primera radi, ovaj zakon u svom članu 51 predviđa i to da je obveznik obračunavanja i plaćanja doprinosa iz osnovice i na osnovicu za zaposlene, izabrana, imenovana i postavljena lica i lica koja obavljaju privremene i povremene poslove poslodavac.

On the other side, the Article 58 of the respective Law stipulates that the obligation to pay social security contributions in respect of flat-rate entrepreneurs, independent artists, priests, church servants and farmers with income from a self-employment activity, shall be established by the Tax administration by means of rendering a resolution.

Sa druge strane, ovaj zakon u svom članu 58 predviđa to da obavezu plaćanja doprinosa utvrđuje rešenjem Poreska uprava za preduzetnike koji porez plaćaju na paušalno utvrđeni prihod, za samostalne umetnike, za sveštenike i verske službenike i za poljoprivrednike koji isplaćuju ličnu zaradu.

Hence, social security contributions, which are to be paid pursuant to the said Law on Mandatory Social Security Contributions, may as well be paid in the manner of withholding tax (along with the salary, according to the law governing individual income tax), by virtue of self-taxation (persons, obliged to pay tax on income from self-employment activities), and on the basis of a resolution (e.g. independent artists, priests, church servants, etc.).

Dakle, i doprinosi čija je obaveza plaćanja predviđena navedenim Zakonom o doprinosima za obavezno socijalno osiguranje mogu se plaćati po odbitku (uz zaradu, u skladu sa zakonom koji uređuje porez na dohodak građana), samooprezivanjem (obveznici poreza na prihode od samostalne delatnosti) i na osnovu rešenja (npr. samostalni umetnici, sveštenici i verski službenici i dr.).

If we now return to the Conviction which is the topic of this work and the summary thereof, bearing in mind everything elaborated above with regard to Tax Fraud and elements required for its existence as a criminal offence and, further taking into account everything explained above with respect to various types of taxes, social security contributions and different payment methods of those taxes or contributions, it is at first glance apparent that the Conviction`s summary does not state at all which taxes or social security contributions or other prescribed duties defendant has evaded to pay, while allegedly performing the criminal act constituting Tax Fraud.

Vraćajući se na Presudu koja je tema ovog rada i na njenu ranije navedenu izreku, a u kontekstu svega navedenog što se tiče Poreske utaje i elemenata neophodnih za njeno postojanje kao krivičnog dela i, dalje, u kontekstu svega navedenog o različitim vrstama poreza i doprinosa i različitim načinima plaćanja tih istih vrsta poreza, odnosno, doprinosa, na prvi pogled upada u oči to da u izreci Presude uopšte nije navedeno koje je to, ili poreze, ili doprinose, ili druge propisane dažbine okrivljeni izbegao da plati navodno preduzimajući radnju izvršenja Poreske utaje.

The Court in the Conviction has been obviously copying the sentence of the indictment act, simply stating that the subject matter is „withholding tax". Such tax simply does not exist and it is a term applied by tax regulations for collective denotation of a method of payment of various types of taxes.

As opposed to that, a legitimate Conviction i.e. its summary, would have to be worded in such a way as to state that the defendant failed to pay tax on salaries as well as contributions for pension and disability insurance, contributions for health insurance and contributions for unemployment insurance. In addition to that, the Conviction/summary also must encompass the amount of evaded payments in respect of tax on salaries as well as in respect of each kind of social security contributions.

This leads us to the third issue which is the topic of this paper, i.e. – may amounts of different allegedly evaded taxes, amounts of taxes and social security contributions and different tax periods be added up in order to exceed the threshold of one million dinars of evaded obligations.

It is above all to highlight that concrete amounts of tax on salaries i.e. amounts of social security contributions, payment which has allegedly been evaded by the defendant's actions, as described in the Conviction, individually do not exceed the objective condition of incrimination – neither the tax on salary, nor any of the social security contributions individually, nor all of the social security contributions together exceed the amount of one million dinars. The respective amount is in the case at hand exceeded only by addition of the amount of allegedly evaded tax on salaries and the amount of every kind of social security contributions, and only if such addition is done under consideration of a one-and-a-half year period.

To be precise, the amount of one million dinars is by way of such addition reached in a slightly shorter period than one and a half years. However, the Conviction comprehends the overall period being subject to the tax control as one single period. Such approach is contrary to already established and correct practice that, for existence of the criminal offence of Tax Fraud, it is necessary the objective condition of incrimination to be fulfilled within a tax period applicable for a particular type of tax or social security contribution.

Sud je, očigledno prepisujući izreku optužnog akta, u Presudi jednostavno naveo to da je u pitanju „porez po odbitku“. Ovakav porez, jednostavno rečeno, ne postoji, već je ovo termin koji poreski propisi koriste za zbirno označavanje načina plaćanja različitih vrsta poreza.

Umesto toga, na zakonu zasnovana Presuda, odnosno, njena izreka bi morala da bude formulisana tako što bi u njoj bilo navedeno da je okrivljeni izbegao da plati porez na zarade, kao i doprinose za penzijsko i invalidsko osiguranje, doprinose za zdravstveno osiguranje i doprinose za osiguranje za slučaj nezaposlenosti. Takođe bi, kako za porez na zarade, tako i za svaku vrstu doprinosa, morao da bude naveden iznos čije je plaćanje izbegnuto.

To nas dovodi i do trećeg pitanja koje je predmet ovog rada, a to je - mogu li se zbrajati iznosi različitih navodno utajenih vrsta poreza, iznosi poreza i doprinosa i različiti poreski periodi kako bi se došlo do toga da iznos obaveze čije se plaćanje izbegava pređe milion dinara.

Pre svega treba reći da konkretni iznosi poreza na zaradu, odnosno, iznosi doprinosa čije je plaćanje navodno izbegnuto radnjama okrivljenog, a kako je to opisano u Presudi, ne prelaze pojedinačno objektivni uslov inkriminacije – ni porez na zaradu, ni jedan od doprinosa pojedinačno, niti svi doprinosi zajedno prelaze iznos od milion dinara. Iznos od milion dinara se, u konkretnom slučaju, prelazi tek sabiranjem iznosa navodno izbegnutog poreza na zarade i iznosa svake vrste doprinosa, i to tek kada se sabere njihovo navodno izbegnuto plaćanje u periodu od godinu i po dana.

Tačnije, do iznosa od milion dinara se sabiranjem na ovakav način dolazi nešto ranije od godinu i po dana, ali je Presudom obuhvaćen celokupan period koji je bio predmet poreske kontrole kao jedan jedinstven period. Ovo je suprotno već ustanovljenoj i ispravnoj praksi da je za postojanje krivičnog dela Poreske utaje neophodno da objektivni uslov inkriminacije bude ispunjen u poreskom periodu koji važi za tačno određenu vrstu poreza ili doprinosa.

When we are dealing with a tax period, we are dealing with a time interval in which the taxpayer is obliged to submit a tax return or pay a tax. In this respect it has to be taken into consideration that tax payment never presents a sole action of a perpetrator, convicted for Tax Fraud.
This is so for two reasons:
(i) every tax payment is linked to submission of a certain tax return, irrespective of the relationship between the payment and submission of the return in sense of moment in time when one i.e. other action is taken
and
(ii) failure to pay the tax (without concealing, delivering false information, etc.) does not per se constitute a perpetration act of the criminal offence of Tax Fraud. Therefore, when we are talking about a tax period, we are talking about a tax period for submitting a tax return.

The tax period for some tax types is a period of one year. Hence, a tax return for the corporate income tax or a tax return for the property tax is to be submitted annually (once a year). A tax return for VAT is to be submitted once a month or once every three months, consequently a tax period for VAT is either the calendar month or quarter of a year. A tax return for each kind of tax, which pursuant to the Law on Individual Income Tax is paid by virtue of withholding tax, is to be submitted at the moment of income's payment. In this sense it could be said that there is actually no particular time interval defined by the law for submission of the respective tax returns. Nevertheless, when it comes to payment of salaries, they are usually paid monthly, which is why a submission of a tax return for tax on salaries and for all three kinds of social security contributions is usually to be made once a month.

Such a standpoint of the courts is correct, and it corresponds to requirements of the law. If, namely, a certain individual in reality performs activities which may be qualified as one of Tax Fraud perpetration acts, within one tax period and in relation to a certain kind of tax or social security contribution or other prescribed duty, he/she is actually taking one action, which in case of existence of the remaining elements of the respective criminal offence, constitutes a particular perpetration act of Tax Fraud, whereas in every subsequent tax period he/she eventually takes another (one) action (which constitutes another perpetration act). And so on and so forth.

Kada govorimo o poreskom periodu, govorimo o vremenskom intervalu u okviru koga je poreski obveznik obavezan da podnese poresku prijavu ili plati porez. Pri tome treba imati u vidu da se plaćanje poreza nikad ne pojavljuje kao jedina radnja učinioca koji se osuđuje za Poresku utaju.
Ovo iz dva razloga:
(i) svako plaćanje poreza je vezano za podnošenje neke poreske prijave, bez obzira na odnos plaćanja i podnošenja prijave u smislu vremenskog trenutka kada se vrši jedno odnosno drugo
i
(ii) samo neplaćanje poreza (bez prikrivanja, lažnog prikazivanja i dr.) nije radnja izvršenja krivičnog dela Poreske utaje. Stoga, kada govorimo o poreskom periodu govorimo o poreskom periodu za podnošenje poreske prijave.

Poreski period za neke vrste poreza jeste godina dana. Tako se poreska prijava za porez na dobit pravnih lica ili poreska prijava za porez na imovinu podnosi jednom godišnje. Poreska prijava za PDV se podnosi ili jednom mesečno ili jednom u tri meseca, te je poreski period za PDV ili kalendarski mesec ili kvartal. Poreska prijava za svaku vrstu poreza koji se u skladu sa Zakonom o porezima na dohodak građana plaća po odbitku se podnosi prilikom isplate prihoda. U tom smislu bi se moglo reći i da ne postoji zakonski određen vremenski interval za podnošenje ovih prijava. Ipak, kada govorimo o isplati zarade, one se, po pravilu, isplaćuju jednom mesečno, te i obaveza podnošenja poreske prijave za porez na zaradu i za sve tri vrste doprinosa po pravilu nastaje jednom mesečno.

Ovakav stav sudova je ispravan i odgovara zahtevima zakona iz razloga što određeno lice, ako u stvarnosti preduzima aktivnosti koje mogu biti kvalifikovane kao neka od radnji izvršenja Poreske utaje, u jednom poreskom periodu, u odnosu na određenu vrstu poreza ili doprinosa ili druge propisane dažbine, čini jednu radnju koja, uz postojanje ostalih uslova za postojanje ovog krivičnog dela, predstavlja određenu radnju izvršenja Poreske utaje, a u svakom sledećem poreskom periodu čini, eventualno, drugu radnju. I tako redom.

Should that second action be identical to the first, is still not allowed for the amounts to be added up in order to fulfil the objective condition of incrimination, even if we are dealing with the same tax type, which is being evaded. Instead, if in every tax period the amount of evaded payments would at least equal the objective condition of incrimination, we would be dealing with a continuous criminal offence of Tax Fraud, provided that the obligation, which is entirely or partially evaded, presents the same kind of tax or social security contribution or other prescribed duty.

Any other approach, including the one, taken by the Court in the herein analyzed Conviction, inevitably leads to illegal and prohibited extension of crime zone and incrimination of individual's actions, which cannot constitute Tax Fraud.

Such viewpoint is also represented in a uniform legal opinion, adopted at a joint session of representatives of criminal departments of the Supreme Cassation Court and Appellate Courts in Belgrade, Kragujevac, Novi Sad and Niš, held on 06 December 2018.

To što je, možda, ta druga radnja identična prvoj radnji, ne može da dovede do toga da se iznosi zbrajaju, pa čak i kada se radi o istoj vrsti poreza čije se plaćanje izbegava, kako bi se došlo do objektivnog uslova inkriminacije već bi, u slučaju da u svakom poreskom periodu bude izbegnuto plaćanje najmanje u visini objektivnog uslova inkriminacije, postojalo produženo krivično delo Poreske utaje, pod uslovom da se, kako smatramo, radi o istoj vrsti poreza ili doprinosa ili druge propisane dažbine čije je plaćanje, potpuno ili delimično, izbegnuto.

Svaki drugačiji način postupanja, pa i ovakav kako je to učinio Sud donoseći Presudu koju analiziramo, dovodi do nezakonitog i zabranjenog proširivanja kriminogene zone i na radnje pojedinaca koje ne bi mogle predstavljati Poresku utaju.

Ovakvo stanovište je izraženo i u usaglašenom pravnom shvatanju koje je zauzeto na zajedničkoj sednici predstavnika krivičnih odeljenja Vrhovnog kasacionog suda i Apelacionih sudova u Beogradu, Kragujevcu, Novom Sadu i Nišu održanoj dana 06.12.2018. godine .

According to that opinion a perpetration act of Tax Fraud is to be assessed within an accounting period, for which a taxpayer is obliged to calculate, declare and pay the tax, and if the amount of evaded tax for that accounting period does not exceed the prescribed threshold (objective condition of incrimination), there shall be no room for criminal offence of Tax Fraud.

Given that the relevant tax period for tax on salary as well as for all three types of social security contributions is a calendar month, it is for fulfillment of the objective condition of incrimination for the existence of Tax Fraud as a criminal offence necessary that the amount of at least one million dinars of evaded tax on salaries respectively of each individual type of social security contributions is reached in every single month.

Since in the case at hand those amounts are way below one million dinars, the Conviction is also in this respect – in relation to addition of allegedly evaded payments of different kinds of social security contributions and one type of taxes, as well as in relation to addition of the respective allegedly evaded taxes and social security contributions from different tax periods – incorrect and unlawful.

In light of everything elaborated thus far, it is clear that the Court has, by rendering the Conviction, „missed the point". Neither has the Court correctly qualified, which of the alternatively envisaged perpetration acts of Tax Fraud the defendant has performed by doing activities described in the Conviction, which allegedly he has undertaken in reality, nor it has determined which exact type of taxes i.e. social security contributions have not been paid. On the contrary, the Court has „created" a new „type" of withholding tax, which no tax regulation recognizes as a type of tax. The Court has finally failed to correctly establish the (in)existence of the objective condition of incrimination. In our view, simply by taking into account the Conviction`s summary which is based upon an incorrect indictment act of the competent public prosecutor, it is clear that in the matter at hand the only possible and lawful decision would, regardless of the situation with evidences, have to be an acquittal, given that the actions for which the defendant was found guilty (and indicted), according to the law does not constitute a criminal offence, while the security measures can neither be applied.

Prema tom mišljenju radnju izvršenja Poreske utaje treba ceniti prema obračunskom periodu za koji je poreski obveznik bio dužan da obračuna, prijavi i plati porez i ako visina utajenog poreza za određeni obračunski period ne prelazi zakonom propisani objektivni uslov inkriminacije neće postojati krivično delo Poreske utaje.

S obzirom da je poreski period, kako za porez na zaradu, tako i za sve tri vrste doprinosa, kalendarski mesec, za ispunjenost objektivnog uslova inkriminacije za postojanje Poreske utaje, kao krivičnog dela, potrebno je da u svakom mesecu dođe do izbegavanja najmanje milion dinara poreza na zarade, odnosno, najmanje milion dinara svakog od tri vrste doprinosa.

Kako su u konkretnom slučaju ovi iznosi daleko ispod milion dinara, to je Presuda i u ovom smislu, i to kako u odnosu na zbrajanje iznosa navodno izbegnutog plaćanja različitih vrsta doprinosa i jedne vrste poreza, tako i u odnosu na zbrajanje iznosa iste vrste tog navodno izbegnutog poreza i doprinosa iz različitih poreskih perioda, pogrešna i nezakonita.

Imajući u vidu sve navedeno, jasno je da je Sud izrekom Presude, sportskim rečnikom rečeno, „promašio fudbal". Niti je pravilno kvalifikovao koju bi to od alternativno predviđenih radnji izvršenja Poreske utaje okrivljeni mogao izvršiti aktivnostima koje su opisane, a koje je on, navodno, preduzeo u stvarnosti, niti je utvrdio koje tačno vrste poreza odnosno doprinosa nisu plaćene, čak je, naprotiv, „stvorio" novu „vrstu" porez po odbitku, koju ni jedan poreski propis ne poznaje, niti je pravilno utvrdio postojanje objektivnog uslova inkriminacije. Kako smatramo, već je na osnovu same izreke Presude, koja je proistekla iz nepravilno sastavljenog optužnog akta nadležnog tužioca, jasno da bi, u konkretnom slučaju, jedina moguća i na zakonu zasnovana odluka, bez obzira ne eventualno stanje dokaznog materijala, mogla i morala biti oslobađajuća presuda jer delo za koje je okrivljeni oglašen krivim (a prethodno optužen) po zakonu nije krivično delo, a nema uslova za primenu mere bezbednosti.

Correct and lawful decision rendering by criminal courts in matters which fall under the scope of the so-called white collar crime is of significant importance for the country's economy, since low-quality decision, as the Conviction is, from the perspective of businessmen enhance the risk of performing business operations in Serbia.

This particularly stands for situations as the one analyzed herein, where individuals were convicted for conducts, which according to descriptions of their actions and omissions, encompassed in the sentences of these judgments, do not constitute criminal offences for which the individuals were found guilty, nor any other criminal offence, even though adequate description in this respect presents a legal imperative and one of the most significant issues, as well as indicator of severe infringements of constitutionally guaranteed human rights by virtue of violations of criminal proceedings.

In this regard lawyers, who primarily practice criminal law (including judges, prosecutors and attorneys at law), would have to cooperate with lawyers, who are primarily active in spheres of law which governs matters whose violations constitute white collar crime, and to enhance the expertise necessary for successful performing of their professional legal activities in this way.

Such a cooperation is of a help also for this second group of lawyers in order for them to be able to identify traps and avoid dangers/risks, which in some cases may lead to perpetration of a certain criminal offence.

Pravilno i zakonito odlučivanje krivičnih sudova u stvarima koje spadaju u takozvani white collar crime jeste od velikog značaja za ekonomiju jedne zemlje, jer loše odluke poput Presude povećavaju, gledajući iz ugla poslovnih ljudi, rizik poslovanja u Srbiji.

Ovo pre svega važi za situacije kao što je ova koju smo analizirali, a u kojima su pojedinci bivali osuđeni za ponašanja koja, prema opisima njihovog delovanja, činjenja ili nečinjenja koje je u izrekama tih presuda opisano, nisu predstavljala krivična dela za koja su osuđeni, niti neka druga krivična dela, a što predstavlja imperativ zakona i jedno od najvažnijih pitanja i pokazatelja kako se nepoštovanjem krivičnopravne procedure na najgrublji način krše ustavom zajamčena ljudska prava.

U tom smislu pravnici koji se primarno bave krivičnim pravom (uključujući tu i sudije, i tužioce i advokate) bi morali da sarađuju sa pravnicima koji se primarno bave oblastima prava koja uređuju materiju čije kršenje predstavlja white collar crime i da na taj način produbljuju znanja koja su im neophodna za uspešno obavljanje svojih poslova.

Takva saradnja pomaže i ovoj drugoj grupi kako bi mogla da prepozna zamke i izbegne opasnosti koje u određenim slučajevima mogu dovesti do izvršenja nekog krivičnog dela.

Jelena Milinović

Jelena is a Partner at JPM. She heads the firm's corporate crime practice.

She is an expert with over 20 years of experience in criminal law and dispute resolution. Prior to joining the JPM team Jelena served for 16 years as judge including 10 years in criminal law field and 6 years in the civil law field, respectively.

Jelena focuses her practice on complex defense clients in criminal investigations and criminal proceedings, proceedings involving administrative fines, misdemeanors, and other penalties. She advises clients facing exposure to civil and criminal liability and represents clients and companies which have been the victims of criminal behaviors. She also supports companies when criminal offenses have been committed by employees or third parties.

Her clients include banks, multinational companies, and their decision-makers, and her experience and in-depth knowledge in criminal law and criminal proceedings are usefully complemented by her knowledge and experience in civil, corporate, commercial, tax, and environmental law.

Nikola Đorđević

Nikola is a Partner at JPM specialising in complex corporate, tax, M&A and energy law matters.

Nikola joined the firm in 2006. His practice concentrates on corporate, tax, M&A, banking & insurance and energy law advisory work.

He graduated from the Faculty of Law at the University of Belgrade in 2005. Nikola is well recognised by his special expertise in various industries and consistently provides clients with sound and commercially-minded legal advice.

Among Nikola's portfolio of clients are leading international and Serbian companies.

He is recommended by clients in the Legal 500 EMEA and IFLR 1000 for corporate and M&A law and Projects and energy.

JPM | JANKOVIĆ POPOVIĆ MITIĆ

6 Vladimira Popovića,
NBGP Apartments
11070 Belgrade, Serbia
T:+ 381/11/207-6850
E: office@jpm.rs

www.jpm.rs