

Svetislav V. Kostić*

Jelena Jerinić**

THE EFFECTS OF MODERN TECHNOLOGY ON LEGAL CERTAINTY IN TAX LAW: THE NEW FRONTIER

Abstract: *The speedy reforms of Serbia's tax legislation, often introduced on the basis of comparative sources, has created a significant body of dormant legislation, due to the lack of knowledge and experience to implement them. The article explores some aspects of legitimacy of Serbian tax legislation, namely the consequences of the misalignment of tax law provisions with taxpayers behavior, using the example of unregistered freelancer taxation. The authors address fundamental legal certainty issues arising from the clash between changes brought on by innovation and imposition of static tax legislation to circumstances unimaginable at the time the legislation was enacted. Analysis has shown that Serbian legislation and caselaw do not provide an effective remedy for these cases, since the principle of legitimate expectations, as developed elsewhere in Europe, is still distant. The authors propose a specific institutional mechanism for overcoming uncertainty in similar situations.*

Key words: legal certainty, legitimate expectations, right to good administration, tax administration, tax law, dormant legislation, public hearing.

1. INTRODUCTION

Legal certainty is considered a general principle of law and, as such is self-evident to any lawyer, as well as others interpreting legislation. It is often described as a component of the notion of *Rechtstaat* and includes no less than the prohibition of retroactivity and the protection of legitimate expectations.¹ The gist is that those who the law affects should be able to understand what the law is, in order to adapt their actions accordingly.

* Associate Professor, University of Belgrade Faculty of Law; e-mail: skostic@ius.bg.ac.rs

** Professor, Union University Law School, Belgrade; e-mail: jelena.jerinic@pravni-fakultet.edu.rs

1 For example, Koopmans, T., 2003, *Courts and Political Institutions: A Comparative View*, Cambridge, Cambridge University Press, pp. 213–214.

On the other hand, the administration is bound by the principle of legality, obligated to respect and apply the law and, if in breach, its acts can be reviewed by the courts.

However, in the absence of this perfect automation, which would provide all those involved with the necessary predictability, a more nuanced understanding of legal certainty is needed, and other principles have to come into play, as a corrective. As Popelier correctly explains, the above described simplified understanding of legal certainty is obsolete and relies on the 19th-century idea of a rational lawmaker that makes perfect laws, which the administration and the courts then execute and apply.² Explaining legal certainty as a dynamic concept, she begins by stressing the reason and aim of the principle of legal certainty, which is essentially the protection from arbitrariness, allowing people to make decisions, *inter alia*, based on their legal options and the entailed legal consequences, or “to help [them] deal with the inevitable uncertainty”.³ In caselaw of both national constitutional and European courts (e.g., in the established caselaw of the European Court of Human Rights),⁴ legal certainty is often tied to the characteristics of the law, requiring its accessibility, clarity, and

2 Popelier, P., 2008. Five Paradoxes on Legal Certainty and the Lawmaker, *Legisprudence*, Vol. 2, No. 1, pp. 47–66.

3 *Ibid.*

4 ECtHR, *The Sunday Times v. United Kingdom*, Case 6538/74, 26 April 1979, para. 49: “In the Court’s opinion, the following are two of the requirements that flow from the expression ‘prescribed by law’. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.” In a more recent tax case (ECtHR, *Shchokin v. Ukraine*, 23759/03 and 37943/06 14 October 2010) the ECtHR concluded that it was not satisfied with the overall state of domestic tax law on the matter in question, at the relevant time. It noted that the relevant legal acts had been manifestly inconsistent with each other. As a result, the domestic authorities applied, at their own discretion, opposite approaches to the correlation of those legal acts. In the Court’s opinion, the lack of the required clarity and precision of the domestic law, offering divergent interpretations on such an important fiscal issue, upset the requirement of the “quality of law” under the Convention and did not provide adequate protection against arbitrary interference by public authorities with the applicant’s property rights.

predictability. In that vein, the principle of legal certainty is sometimes referred to as the principle of proper lawmaking.⁵

Traditionally, the accessibility of legislation is secured by the obligation to publish legislation in official gazettes and, in recent years, by the obligation for these to be freely accessible online. However, in the modern world covered by a sea of regulations, this might not suffice, and this has already been recognized by some. In 2007, the Belgian Constitutional Court recognized that access to the official gazette “does not acknowledge sociological research stating that persons become acquainted with the law through personal, formal and informal networks and imitation, not through lecture of the law as published in the Official Gazette” and upheld the law charging the government with extra efforts in the form of a telephonic helpdesk.⁶ For the time being, this seems unimaginable in Serbian caselaw.

Moreover, the requirements of good administration demand that not only the law be accessible and predictable, but that it is applied in a manner that recognizes and respects the legitimate expectations of those to whom the law applies. For some authors, legal certainty has an objective aspect, which relates to the legal framework, while there is also a subjective aspect to it, leading to the protection of legitimate expectations.⁷

The issue of legal certainty in tax law has long been present. Various issues have been debated in Serbian legal scholarship, with particular attention given to retroactive application of laws⁸ and their retrospective interpretation.⁹

Furthermore, a significant regarding the legitimacy of tax legislation has been noted, stemming from the inadequacies of the parliamentary procedure by which it is enacted and in particular the evident lack of awareness of members of Parliament of even the basic implications of the tax laws they are voting for.¹⁰ The speed at which certain reforms have been implemented in Serbia has led to the existence of so-called *dormant legislation*. Namely, the Serbian legislator would introduce (in most cases

5 Popelier, P., 2008.

6 *Ibid.*, p. 58.

7 *Ibid.*, p. 64.

8 See Popović, D., Ilić-Popov, G., 2015, Retroaktivnost zakona u poreskom pravu, *Analiti Pravnog fakulteta u Beogradu*, Vol. 63, No. 1, pp. 5–22.

9 See Popović, D., Kostić, S., 2018, Legal Certainty and Taxation: The Problem of Retroactive Interpretation, *Annals of the Faculty of Law in Belgrade*, Vol. 66, No. 4, pp. 38–55.

10 See Kostić, S., Vuković, D., 2019, The Perfect Silence: An Empirical Study on How Ignorance and Lack of Critical Debate Effect the Process of Enacting Tax Legislation in Serbia, *Annals of the Faculty of Law in Belgrade*, Vol. 67, No. 1, pp. 67–92.

on the basis of comparative sources)¹¹ certain provisions, for which the domestic system was absolutely unprepared, due to the lack of knowledge and experience related to their application. However, despite the evident need to prepare the tax authorities, the judiciary, as well as the taxpayers for the application of the newly introduced measures, such efforts would not be undertaken, leading to the practice of simply ignoring the existence of such norms or at the very best paying them lip service in terms of minimum compliance. After several years, or sometimes even decades, application would commence, often with notable conflicts between the taxpayers and the tax authorities.¹²

For some time now, we have become aware of a growing disparity, in various aspects of Serbian tax law, between the wording of the norms and the circumstances to which they apply. In essence, the increasing number of solutions no longer provides adequate or even logical results as they are simply not aligned with reality, in most part due to the impact of modern technology. We are forced to take rules tailored to an economy of steam engines, huge factory compounds and coal, and apply them to one based on digitalization and the Internet.¹³ A decade ago the leaders of the G 20 stated the following:

“International tax rules, which date back to the 1920’s, have not kept pace with the changing business environment, including the growing importance of intangibles and the digital economy.”¹⁴

The COVID-19 pandemic in 2020 and 2021 only accelerated the need to come to grips with the problem that the tax legislation faced, as it has led to an exponential growth in the platform economy, remote work

-
- 11 Barak-Erez noted that “[t]he most dramatic uses of comparative law in legislation concern transitional phases of national history. At such times, legal systems undergo transformation and the most effective tool for general change is legislation.” See Barak-Erez, D., 2008, *The Institutional Aspects of Comparative Law*, *Columbia Journal of European Law*, Vol. 15, No. 3, p. 481. Serbian society has been in transition, both economic and political, since the beginning of the century, while also endeavoring on the path toward European Union membership. Such circumstances lead to a very high degree of reliance on and adoption of comparative law.
 - 12 The best example of “dormant” legislation in Serbian tax law can probably be found in its transfer pricing provisions, which were introduced in 1991 but saw their first effective application in 2009. See Kostić, S., 2017, *Transfer Pricing in Serbia: Facing a Sobering Reality*, *Annals of the Faculty of Law in Belgrade*, Vol. 65, No. 4, pp. 76–77.
 - 13 See Szczepanski, M., 2021, *Taxing the Digital Economy: New Developments and the Way Forward*, European Parliament Briefing ([https://www.europarl.europa.eu/think-tank/en/document/EPRS_BRI\(2021\)698761](https://www.europarl.europa.eu/think-tank/en/document/EPRS_BRI(2021)698761)), pp. 2–3.
 - 14 G20, 2013, *Tax Annex to the Saint Petersburg G20 Leaders Declaration*, Saint Petersburg, September, (<https://www.oecd.org/g20/summits/saint-petersburg/Tax-Annex-St-Petersburg-G20-Leaders-Declaration.pdf>, 18. 11. 2023).

and dependance on the ability to communicate from and with any point on the planet, as well as the more mundane aspects of our everyday lives, such as online shopping and reliance on delivery services.

Usually, the consequence of the misalignment between tax law provisions and the way in which taxpayers behave (e.g., perform their business activities) lies in the lowering of fiscal revenues, i.e., in the failure of some jurisdictions to tax income that they feel is strongly connected to them and over which they should have taxation rights, but are prevented by their own tax laws to collect that which is felt is economically due. The crucial problem is that this failure to tax does not arise from the taxpayer's evasive actions but is the result of the application of tax legislation as it stands at the moment. For example, the basic principle in international taxation is that a country may tax the profits generated by nonresident enterprises only if they have a relevant physical presence in its territory.¹⁵ The existence of such a rule prohibits countries from taxing the income of digital businesses (such as Google, YouTube, Netflix, Facebook), as they do not need a physical presence in order to generate revenue from clients/users located in their respective territories. Furthermore, their business presence is virtual and not physical, although they are deeply immersed in the economic life of almost every society on the planet.¹⁶ Taxation prerogatives are left solely to the state where the relevant digital company is resident.

Such a state of affairs does not raise notable issues of legal certainty, apart from those related to overly aggressive interpretations of existing provisions by the tax authorities. It primarily places significant pressure on policy makers to come up with more appropriate solutions and invites taxpayers to lobby for their interest within the legislative process.

However, the COVID-19 epidemic demonstrated notable contrary examples in Serbia (but not only in Serbia). Namely, the matter of taxing the income of the so called "freelancers" or, to be more precise in line with Serbian legal definition, are individuals not registered as entrepreneurs but who generated income by providing independent professional services to foreign clients) brought to light the issue where changes to the taxpayers' business model of taxpayers, made possible by digital transformation, lead to them being exposed to the application of tax rules that were never intended for

15 See OECD, 2017, Model Tax Convention on Income and on Capital, Art. 7; United Nations, 2021, UN Model Double Taxation Convention between Developed and Developing Countries, Art. 7.

16 See Brauner, Y., 2014, BEPS: An Interim Evaluation, *World Tax Journal*, Vol. 6, No. 1, sec. 1; Avi-Yonah, R., Haiyan, X., 2017, Evaluating BEPS, *Erasmus Law Review*, 1, pp. 3–4; Baez Moreno, A., Brauner, Y., 2018, Policy Options Regarding Tax Challenges of the Digitalized Economy: Making a Case for Withholding Taxes, pp. 3–8 (<https://ssrn.com/abstract=3167124>, 18. 11. 2023).

such purposes. In other words, modern technology changed the way in which individuals worked and engaged with their clients, but this did not lead to the underpayment of taxes, but rather enabled the imposition of tax obligations that were not envisaged for such use. Thus, in this paper we intend to, based on the empirical example (case study) of “freelancer” taxation in Serbia, deal with the fundamental legal certainty issues that arise in the aforementioned collision between changes brought about by innovation and the unexpected imposition of rather static tax legislation on circumstances unimaginable at the time the respective legislation was drafted and enacted.

2. THE “FREELANCER” CONUNDRUM IN THE TIME OF THE COVID 19 PANDEMIC

On 13 October 2020 the Serbian Tax Administration published a Communique on the taxation of income generated by individuals not registered as entrepreneurs from foreign clients, in which it stated:

The Serbian Tax Administration has, on the basis of available information regarding inbound financial transactions and comparing them with tax returns on the self-assessed and paid tax on employment/other income and corresponding compulsory social security contributions by natural persons as taxpayers, determined a high prevalence of disregard of tax obligations and has identified those natural persons.

These types of income are generated on the basis of the provision of various services, most commonly those of software development, translation, foreign language tutoring, promotion, graphic design, etc. A disregard of tax obligations has been determined also in relation to natural persons who generate income via social networks (“YouTubers”, “influencers”), online gambling, and similar activities, as well as those who rented their real estate for periods of under 30 days (short-term rental).

The Serbian Tax Administration invites all natural persons who have so far failed to submit tax returns on their own initiative, i.e., to self-assess the tax and compulsory social security contributions, increased for the penalty interest, and settle their legal obligations, prior to the commencement of any action by the tax authority pertaining to the performed action or infringement, i.e., prior to the initiation of the audit proceedings or the filling of the submission for the commencement of misdemeanor proceedings, so as to avoid misdemeanor liability.

The Serbian Tax Administration will continue to conduct audits of natural persons.¹⁷

17 Tax Administration of the Republic of Serbia, 2020, Samoinicijativno prijavljivanje prihoda ostvarenog iz inostranstva, 13 October, translated by authors (<https://www.purs.gov.rs/sr/biro-za-informisanje/novosti/6640/samoinicijativno-prijavljivanje-prihoda-ostvarenog-iz-inostranstva-.html>, 18. 11. 2023).

In addition to the Communiqué, the Serbian Tax Administration provided basic guidance on how to self-assess due tax and compulsory social security contributions, as well as on how to complete and file the appropriate tax return.

Despite the fact that the Communiqué and supporting guidance simply stated the provisions that had been present in the Serbian Personal Income Tax Law¹⁸ for nearly two decades, it caused public outcry, which resulted in street demonstrations several months later. One must raise the question how is it possible that legislation that was absolutely not new (it had been introduced in 2001,¹⁹ while its origins can be traced back to 1991²⁰) could have such an effect?

The Communiqué and its timing showed that during the COVID-19 pandemic the Serbian Tax Administration, similarly to tax administrations across the globe,²¹ began to notice that a very large number of individuals were generating considerable revenue from abroad while never reporting or paying any tax on such income. The sources of the transfers of funds clearly showed that they were not witnessing the rather common remittances from abroad, which usually take place between family members and are thus difficult to tax,²² but that numerous Serbian individuals were providing services to foreign clients. The COVID-19 pandemic led to an exponential increase in remote work and the provision of services online, including those to cross-border clients.²³ At the same time, tax

18 *Official Gazette of the Republic of Serbia*, Nos. 24/01, 80/02, 80/02, 135/04, 62/06, 65/06, 31/09, 44/09, 18/10, 50/11, 91/11, 93/12, 114/12, 47/13, 48/13, 108/13, 57/14, 68/14, 112/15, 113/17, 95/18, 86/19, 153/20, 44/21, 118/21, 138/22.

19 See Art. 85, para. 1 of the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 24/01.

20 See Art. 87, para. 1 of the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 76/91.

21 See e.g. CEO Times, 2021, *FBR Targeting Payoneer, Freelancers More Than Billions of Rupees Transferred From Abroad*, 11 March, (<https://ceotimes.net/2021/03/11/fbr-targeting-payoneer-freelancers-more-than-billions-of-rupees-transferred-from-abroad/>, 18. 11. 2023).

22 These remittances made by Serbians living and working abroad to their family members, who still reside in the country, do not represent income but can only be classified as charitable gifts, as they are intended to help and improve the economic status of the relatives of the individual making the transfer (remittance). While such remittances would in principle fall under the provisions of the Serbian gift and inheritance tax, the broad nature of exemptions provided from the payment of this tax, as well as the extremely politically sensitive nature of taxing such intrafamily assistance, makes the notion of applying taxation to them in essence theoretical in Serbia.

23 Eurofound, 2020, *Living, Working and COVID-19*, Luxembourg, Publications Office of the European Union, (<https://www.eurofound.europa.eu/en/publications/2020/living-working-and-covid-19>, 18. 11. 2023).

authorities worldwide were hard-pressed to find new sources of revenue, not only to meet the drop in the public revenues usually relied on (e.g., the fall in VAT due to lower consumption), but also to fund the various crisis measures introduced by most governments around the world.²⁴

Although the matter at hand may appear as a simple case of rather widespread tax evasion, the situation is far more complicated and rather clearly illustrates the impact that the pace of technological development has on our everyday lives and the inability of the legislator to keep up with the change.

The Serbian personal income tax system is based on a dichotomy wherein active income of individuals is classified as either employment income or as entrepreneurial income. In other words, the tax system relies on the premise that an individual who works for a living will either be in an employment relationship, or will be an entrepreneur/farmer.²⁵ However, at this point we come to a rather peculiar trait of the Serbian tax administrative culture, which is (to put it mildly) overly formalistic, and which in the case of taxing entrepreneurial income, i.e., income from performing professional activities in an independent capacity, was introduced into legislation. Namely, the Serbian Tax Administration has always been reluctant to independently assess the taxpayer's circumstances in case they may lead to them having certain rights or obligations relevant for taxation, and has preferred that some other public body, competent in the respective circumstances, verify their existence.²⁶ In the case of taxation of entrepreneurial income, such an attitude lead to the specific tax

24 Collier, R., Pirlot, A., Vella, J., 2020, Tax Policy and the COVID-19 Crisis, *Intertax*, Vol. 48, Nos. 8–9, pp. 794–795.

25 Kostić, S., 2022, Tax Treatment of Flexible Forms of Work in Serbia in Light of the COVID-19 Global Pandemic, *Annals of the Faculty of Law in Belgrade*, Vol. 70, No. 4, pp. 1156–1157.

26 The described attitude sometimes leads to even comical situations. For example, under Serbian corporate income tax legislation, as well as Serbia's double taxation treaties, Serbia is entitled to tax the profits of nonresidents generated through a qualified level of business presence in its territory. The technical term for the qualified level of business presence (i.e., the threshold for Serbia's claim taxation rights over the non-resident's profits) is the permanent establishment. Under the law, a permanent establishment of a nonresident taxpayer exists when their level of presence meets certain criteria. Despite these criteria not being related to any formal legal requirement, the Serbian Tax Administration refused to recognize the existence of permanent establishments that are not officially registered and recognized for corporate law purposes. Prior to 2005 the Serbian corporate legislation did not provide the possibility for the registration of the business presence of nonresidents in Serbia (as of 2005 it allowed the registration of branches of foreign companies), the Serbian Tax Administration simply refused to recognize the taxable presence of nonresidents and did not impose tax on them, despite the clear statutory authority to do so. The Serbian tax community

on income from independent (professional) activities being applied to the income of only those individuals who are duly registered as entrepreneurs, in accordance with the relevant corporate legislation.²⁷

The reason for the described approach to interpretation and, in the case of the tax on income from independent (professional) activities, to drafting tax legislation lies primarily in the rather limited capacities of the Serbian Tax Administration. The most recent data provided by the Serbian Fiscal Council shows that the Serbian Tax Administration does not have the cannot afford to devote too much time to sophisticated and nuanced interpretation. For example, the number of full-time employees of the Serbian Tax Administration is bellow 4,000, while in order to reach the European average in terms of the number of tax administration employees in relation to its population, this institution would have to almost double its staff.²⁸ Furthermore, the age demographics of the Serbian Tax administration are quite extreme, with it being the oldest tax authority in Europe in terms of the average age of its employees. More than half of all Serbian Tax Administration employees are over the age of 55, while less than 2% are below 35. Furthermore, even within such a depleted structure, the Serbian Tax Administration is able to fill just over half of the required field tax inspector positions.²⁹

The Personal Income Tax Law provides a specific tax category for all individuals who do generate income from independent professional activities, but are not registered as entrepreneurs: tax on other income, a tax form intended for the types of income that do not fall within one of the explicitly enumerated categories of income to whom a specific tax form is assigned.³⁰

Historically, the application of the tax on other income to the income of individuals generated from independent professional activities provided

responded to such an attitude by paraphrasing the slogan of the American Revolution of “no taxation without representation” into “no taxation without registration”.

27 See Art. 32, para. 2 of the Personal Income Tax Law. The formalistic approach under which only the income of registered entrepreneurs is subject to the tax on independent professional activities, dates back to 1996. See Art. 15 of the Law and the Changes and Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 54/96.

28 For example, Bulgaria, which has an almost identical population and is at a similar level of economic development as Serbia, has almost double the number of employees in its tax administration. Croatia, which has a notably smaller population than Serbia, has an almost equal number of employees in its tax administration.

29 See Fiscal Council of Serbia, 2023, *Mišljenje na nacrt Fiskalne strategije za 2024. sa projekcijama za 2025. i 2026. godinu*, 31 May, pp. 39–43, (https://www.fiskalnisavet.rs/doc/FS_%20Misljenje-na-Nacrt-Fiskalne-strategije-2024-2026_090623.pdf, 18. 11. 2023).

30 See Art. 85 of the Personal Income Tax Law.

to other private persons was a rare occurrence. Such a type of income was seen as an incidental or complementary source of income for in the vast majority of cases already employed individuals, as well as income which was in most cases effectively impossible to tax. A typical example of other income would be the income of a teacher employed at a public school who in their spare time gives private lessons to students in need of additional tutoring, or of a janitor who outside of working hours privately provides plumbing services to clients. Customarily, such individuals would be remunerated by their clients in cash and would never report or pay tax on such income. As they would have social security insurance through their employment, there was nothing forcing them to register their entrepreneurial activity. Only those individuals who provided services to legal entities and entrepreneurs would suffer taxation, as the law imposed withholding tax obligations when they were the payers of the income.

Cross-border aspects of the tax on other income were not common and were mostly limited to consultancy fees generated by experts, as well as to foreign source income of expatriates who had moved to Serbia.

In more recent times modern technology enabled the creation of a global market for many types of services wherein clients and service providers could interact despite being located in different countries or even different continents. Thousands of Serbian residents grasped the opportunities provided by this global market. The one crucial aspect of their business model, which enabled the Serbian Tax Administration to notice them, is the fact that payments must be made through easily traceable bank transfers.

However, within this stratum of society (often referred to as the workers in the gig economy)³¹ we can see the impact of societal developments that were not taken into account by the Serbian legislator when drafting the provisions on the taxation of other income and, perhaps more importantly, those regulating compulsory social security contributions obligations related to the generation of such income. Namely, one of the reasons that drove the legislator to think of other income as an incidental category may lie in the way in which healthcare coverage is understood in Serbia. In the 1990s, as well as in the early 2000s, healthcare in Serbia was almost exclusively within the public sector domain. Private healthcare was rare,

31 See Dokko, J., Mumford, M., Schanzenbach, D. W., 2015, *Workers and the Online Gig Economy*, Hamilton Project, December, pp. 1–3, (https://www.hamiltonproject.org/wp-content/uploads/2023/01/workers_and_the_online_gig_economy.pdf, 18. 11. 2023); Vallas, S., Schor, B. J., 2020, What Do Platforms Do? Understanding the Gig Economy, *Annual Review of Sociology*, Vol. 46, pp. 274–275.

expensive and usually limited to specific medical areas.³² Thus, it was difficult to imagine how an individual would exist in society, at least in the long term, unless covered by public healthcare insurance. Incidental generation of other income did not lead to public healthcare coverage (despite leading to an obligation to pay compulsory social security contributions) which may have strengthened the dichotomous view of active income for the purposes of taxation – in terms of categories that did give rise to public healthcare coverage (employment income/income from independent professional services). On the other hand, in more recent years, private healthcare in Serbia has become widespread and relatively affordable, which has led a number of individuals, particularly those from the younger segments of society, to be able to fully function without being a part of the public healthcare insurance system. Together with the decrease in the trust in Serbia's public pension system, such a state of affairs made it quite acceptable for numerous individuals to choose a lifestyle outside of the public social security insurance system – at least for a significant period of their productive years.

We will not dwell into the technical aspect of the tax on other income and material issues that arise in relation to it, as they are not crucially relevant for the topic of legal certainty. What we will focus on are several related issues. Firstly, the issuance of the Communiqué quickly led to the realization that thousands of Serbian taxpayers never reported or paid tax on their foreign sourced income from the provision of independent professional services as unregistered entrepreneurs. Formally speaking, the Serbian Tax Administration was entirely within its rights to go after all these taxpayers as they were in clear violation of the law. Actually, the Communiqué could be seen as an example of good administrative practice as it gave advance notice to taxpayers to avoid penalties by settling the unpaid amounts on their own. However, the Serbian Tax Administration failed to address the issue of how it is possible that so many taxpayers – a vast majority of all those who generated the respective type of income from foreign sources – never paid tax. It appeared that a good number of them were genuinely unaware of the existence of the obligation to do so. Furthermore, many taxpayers publicly stated that they sought advice on what to do from their local Tax Administration offices and that they were given oral instructions that they had no obligations stemming from the income in question.³³ Again, in the absence of written evidence, such

32 Adžić, S., Adžić, J., 2009, The Public Healthcare System in the Transition Countries: The Case Study of Serbia, *Interdisciplinary Management Research*, 5, pp. 517–521.

33 In 2023 the Serbian Tax Administration also launched a designated portal <https://frilenseri.purs.gov.rs/> (18. 11. 2023), which includes a tax calculator and a guidebook

statements do not have any effect on the taxpayer's situation, but their number does testify to the existence of a fundamental lack of knowledge and awareness at the level of the Serbian Tax Administration regarding the taxation of income from independent professional activities. Such a state of affairs can easily be explained by the previously described environment in Serbia, for which the tax on other income was envisaged. While the application of decades-long standing provisions, within the statute of limitations, by the Serbian Tax Administration cannot be recognized as retroactive application of legislation, one cannot ignore the fact that the reason why it waited for so long to commence the first audits does lie in the fact that its own inspectors were unaware of the full implications of the relevant legal norms.

This raises the question of the appropriate response to a situation where technological development allows for the rapid spread of a business model that, for taxation purposes, falls under the provisions the legislator never imagined possible for performing business activity (the basic concept of the tax on other income was initially conceived in the early 1990s), which thus inadequate for reasonable tax liabilities for many taxpayers. Due to such circumstances even the tax authorities failed to notice the existence of tax obligations at the time the taxable events took place. In situations where rapid modernization and digitalization enable taxpayers to legally avoid taxation, on account of the relevant legislation not prescribing the existence of tax liabilities in the case of their business models, the primary burden is on the legislator to provide an adequate response. As a rule, such situations arise in relation to the rights of taxation of the income of nonresidents. In the case of resident taxpayers, whose tax liability in their state of residence is unlimited, the question is rarely (if ever) does the state have the right to tax, but rather how it should to tax.

The “freelancer” conundrum in Serbia also clearly illustrated the need for the introduction of systemic, institutional solutions to such problems. Namely, the mandate of the Serbian Tax Administration is quite clear and it has no right to waiver from its primary obligation to collect taxes due by taxpayers in Serbia. It must strictly abide by the Latin maxim *dura lex sed lex* and is not authorized to question the policy rationale behind the legislation enacted by Parliament or the bylaws issued by the executive branch of the government on the basis of statutory authorization. The Serbian Government Ministry of Finance got involved only once the association of “freelancers” staged vociferous street demonstrations and attracted significant sympathetic publicity. In other words, the issue was addressed only

for freelancers, to help them calculate and report their taxes and compulsory social security contributions.

once vested political interests were sufficiently affected, while the adopted solutions can only be seen as intermediary measures, with the primary purpose of pacifying the rebellious taxpayers and public opinion, and not as a comprehensive solution to a problem that has broader importance.

Our current legal culture and practices do not provide us with guidance on how to address similar situations which are bound to become increasingly common due to the unstoppable pace of technological development. Therefore, the task before us is to determine which legal principles (whose application we may not yet be fully accustomed to, but which have seen border employment in comparative legal systems) should we rely on and then ascertain the proper procedural and institutional path(s) for prospective measures. Finally, we will provide a proposal for the basic outline of such measures.

3. LEGAL CERTAINTY AND LEGITIMATE EXPECTATIONS

As explained in the introduction, the contemporary view of legal certainty, adhering to the requirements of good administration, require not only that the law is accessible and predictable, but that it is applied in a manner that recognizes and respects the parties' legitimate expectations.

In many spheres of our daily lives, the administration acts as the link between the law, as passed by legislators, and the citizens subject to it, creating a space in which legal certainty can either be upheld or shaken. This creates expectations regarding what the law actually is, how it will be interpreted and applied, and whether it will be applied at all.

The protection of legitimate expectations, as an element of legal certainty, is a topic that has been widely debated in European administrative law literature for decades and it is accepted in the caselaw of most national³⁴ and European courts, yet it is still a novel and elusive concept

34 Its origins are usually in the German jurisprudence, but it has spread to other jurisdictions as well. For example, Dutch courts recognized it as a general principle of law as early as the end of the Second World War, see Widdershoven, R., Remac, M., 2012, *General Principles of Law in Administrative Law Under European Influence, European Review of Private Law*, Vol. 20, No. 2, pp. 383–384. In Germany it was recognized in 1959 by the Federal Administrative Court and was later introduced through legislation on administrative procedure (Kunnecke, M., 2006. *Tradition and Change in Administrative Law: An Anglo-German Comparison*. Berlin, Springer, pp. 125–126). It first appeared in British caselaw in 1969 as “something less than a right which may nevertheless be protected by the principles of natural justice” (Parpworth, N., 2008. *Constitutional and Administrative Law*. 5th ed. Oxford, Oxford University Press, p. 319), while the Belgian State Council included it into the principle of legal certainty in the late 1980s (Popelier, P., 2000. *Legal Certainty and Principles of Proper Law*

for Serbian lawmakers and practitioners.³⁵ Even though scholars have presented varying arguments to justify this principle,³⁶ there is a belief that administrative authorities should, where possible, fulfill the legitimate expectations that they themselves have created.³⁷

In this sense, legitimate expectations can be seen as a corrective to the classical understanding of the bare principle of legality of administration. Public authorities are obliged to take action in the public interest, but in doing so cannot cause harm to individuals, which has formed a reliance, based on the previous conduct and practice of the authority, making them believe it “to be a real possibility.”³⁸ From this flows the obligation of the authority to respect such an expectation or to compensate those affected by the reliance on it. Moreover, in recent literature, this has been strengthened by the idea that citizens need to be able to trust authorities.³⁹

The principle of legitimate expectations has a procedural and a substantive aspect. Initially, it was seen exclusively as a procedural guarantee (e.g., in the context of natural justice or the right to a hearing),⁴⁰ but it later developed as an obligation for the authorities to act in a certain direction (substantial protection of legitimate expectations) or even toward compensational protection in case of expenses incurred due to expectations that the administration created.⁴¹ In some jurisdictions we have even seen the *contra legem* effect of this principle, emerging from the so-called principle of good faith.⁴²

Making, *European Journal of Law Reform*, Vol. 2, No. 3, p. 327). On the other hand, Tomlinson states that “doctrine of legitimate expectations has been consistently rejected by French courts, as it is understood to be incompatible with French law’s absolute insistence on the *principe de sécurité des situations juridiques*.” (Tomlinson, J., 2020, Do We Need a Theory of Legitimate Expectations? *Legal Studies*, Vol. 40, No. 2, p. 293).

35 Jerinic, J., 2021, When the Administration Promises: Protection of Legitimate Expectations in Serbian Administrative Procedure, *Regional Law Review*, pp. 117–129.

36 Craig, P., 2015, UK, *EU and Global Administrative Law: Foundations and Challenges*, Cambridge, Cambridge University Press, p. 142.

37 Berge, G., Widdershoven, R., 1998. *The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law*, The Hague, Intersentia, pp. 423–424.

38 Schönberg, S., 2000, *Legitimate Expectations in Administrative Law*, Oxford, Oxford University Press, p. 10.

39 Tomlinson, 2020, pp. 295–297; Forsyth, C., 2011, Legitimate Expectations Revisited, *Judicial Review*, Vol. 16, No. 4, pp. 429–439.

40 Forsyth, C. F., 1988. The Provenance and Protection of Legitimate Expectations, *The Cambridge Law Journal*, Vol. 47, No. 2, p. 240.

41 Šikić, M., Ofak, L., 2011. Nova načela upravnog postupka (s posebnim naglaskom na razmjernost, legitimna očekivanja i stečena prava), *Zbornik Pravnog fakulteta u Rijeci*, Vol. 32, No. 1, p. 140.

42 This was accepted by Dutch courts, see Widdershoven, R., Remac, M., 2012, p. 386. Similar was identified by Belgian commentators, e.g., Lust, S., *Administrative Law in*

The need to respect legitimate expectations has found its way into the European Code of Good Administrative Behavior,⁴³ which largely inspired the inclusion of the right to good administration in the Charter of Fundamental Rights of the European Union.⁴⁴

Still, not all expectations are protected and there is a need to weigh the interests involved, which was the reason why in some countries, the principle is not rigidly defined in legislation, but remains a caselaw principle or is regulated only in some legal matters.⁴⁵

Both national and European courts have delved into the issue of the sources of legitimate expectations. For example, during the 1990s for Dutch courts these were laws, decisions, publication of policy rules and guidelines, provision of information on the application of the law or promises, contracts, court judgements,⁴⁶ while during the same period the European Court of Justice (now the CJEU) recognized that they can be raised even by soft-law, policy instruments, such as guidelines and notices, as well as by a course of conduct or assurances given by the administration.⁴⁷

In 1979 the Dutch administrative courts found that reliance on information given over the phone by the tax authorities, in a case in which tax authorities later decided to the detriment of the party, can constitute legitimate expectation. The Dutch Supreme Court found that the risk of misinformation should as a rule be borne by the taxpayer, because the opposite approach would hinder the government in its duty to provide information, but that in special cases, the tax authorities may be bound by the information provided.⁴⁸ This is possible in cases when the information is not clearly contrary to the law and if the interested party suffers

Belgium, in: Seerden, R., Stroink, F., (eds.), 2002, *Administrative Law of the European Union, Its Member States and the United States. A Comparative Analysis*, Antwerpen–Groningen, Intersentia, pp. 31–32. Also, see Perry, A., Ahmed, F., 2014. The Coherence of the Doctrine of Legitimate Expectations, *The Cambridge Law Journal*, Vol. 73, No. 1, pp. 61–85.

43 Art. 10 of the Code. The Code subdivides the principle into three aspects: the necessity of consistency in administrative behavior; the respect of “legitimate and reasonable expectations that members of the public have in light of how the institution has acted in the past”; and the duty to advise the public on how to pursue a particular administrative matter.

44 Although it is still mainly applied by the European Ombudsman. See Clement, M., 2018, Breach of the Right to Good Administration: So What? *ELTE LJ*, 1, p. 19.

45 This is the case of the Dutch GALA, see Berge, G., Widdershoven, R., 1998, It appears only in relation to subsidies (Division 4.2.6, Art. 4:51 GALA).

46 Berge, G., Widdershoven, R., 1998.

47 Craig, P., Burca, G. de, 2003, *EU Law – Texts, Cases and Materials*, 3rd ed., Oxford, Oxford University Press, pp. 380–387.

48 Berge, G., Widdershoven, R., 1998, p. 446.

damage. Furthermore, it is easier to bind the tax authorities by the given information if it is phrased as a promise. The condition is that the taxpayer has provided accurate information to obtain such a promise, as well as that the promise is not manifestly contrary to law.

In Serbia, the principle of legitimate expectations does not exist in the described form, nor in literature or in the reasoning of legislators, administrators or the judiciary. Even though the broader administrative sphere saw rare but express recognition of legitimate expectations in the decisions of the Ombudsman (as early as 2011) and later on the Constitutional Court, this did not have a significant effect on the drafting of the legislation on administrative procedure (passed in 2016), or the jurisprudence of the Administrative Court.

In the 2011 annual report the Serbian Ombudsman found that the breach of legitimate expectations was one of the most common violations of the right to good administration. The Ombudsman singled out the case of the Tax Administration, which by changing its interpretation of the tax laws, wronged a number of individual farmers who took maternity leave. The Tax Administration refused to act upon the Ombudsman's recommendation and annul its decisions, after which the Government stepped in and covered the costs of taxes of the farmers who had not previously paid the taxes levied according to the controversial interpretation, but those who had paid the taxes were not compensated.⁴⁹ The following year, the law was amended, as a demonstration of the indisputable primacy of the principle of legality in the eyes of the Serbian tax administration. In four cases, decided between 2013 and 2019, the Constitutional Court found a breach of legitimate expectations in final administrative acts, which concerned land usage and construction and development.⁵⁰

The Serbian Law on General Administrative Procedure (LGAP)⁵¹ contains the principle of predictability, but in its substance, it does not

49 Protector of Citizens, 2012, *2011 Annual Report*, Belgrade, Protector of Citizens of the Republic of Serbia, pp. 133–134. In the later years, the Ombudsman found more examples of legitimate expectations created by administration or the legislature, e.g., in 2014 in connection with replacement of driving licenses (Protector of Citizens, 2015, *Regular Annual Report of the Protector of Citizens for 2014*, Belgrade, Protector of Citizens of the Republic of Serbia, pp. 161–162); in 2019 in connection with the untimely decisions and erroneous interpretation of laws by the Real Estate Cadastre (Protector of Citizens, 2020, *Regular Annual Report of the Protector of Citizens for 2019*, Belgrade, Protector of Citizens of the Republic of Serbia, pp. 94–95); in 2020 concerning a water supply failure in Belgrade (Protector of Citizens, 2021, *Regular Annual Report of the Protector of Citizens for 2020*, Belgrade, Protector of Citizens of the Republic of Serbia, pp. 114–115).

50 Jerinić, J., 2021, p. 125.

51 *Official Gazette of the Republic of Serbia*, Nos. 18/16, 95/18, 2/23.

guarantee the protection of legitimate expectations in the wide sense seen in other European jurisdictions, but settles for the need to have a unified administrative practice. By tying predictability to the principle of legality, the LGAP requires administrative authorities to take into account earlier decisions in the same or similar administrative matters.⁵² Being a general principle of administrative procedure, this connects all administrative authorities, even those whose procedural law heavily departs from rules of general administrative procedure – the Tax Administration being the most prominent example, with its own procedural law.⁵³ Furthermore, the LGAP states that when an authority departs from its previous practice, it is required to justify that in the rationale of its decision.⁵⁴ Available caselaw and existing Serbian scholarly literature, unfortunately, do not provide any trace of actual application of the predictability principle, as defined in the 2016 LGAP.

Even in this rudimentary form, this principle could be transformed and expanded, to eventually extend to the principle of legitimate expectations, in its procedural and substantial form. This would require an activist approach by the Administrative Court, as well as the Ombudsman and the Constitutional Court.

Notwithstanding the lack of express recognition of the principle in Serbian legislation or caselaw, if one was to promote the idea that a solution for the “freelancers” case at hand could be sought in the protection of their legitimate expectations, it should first be examined whether the expectations could have been created by the lack of activity on the part of the Tax Administration prior to 2020; do the expectations deserve legal protection, and do they deserve it even if being *contra legem*.

4. A WAY FORWARD?

The previous analysis clearly shows that the current Serbian legislation, as well as the existing administrative practice and jurisprudence, does not provide us with much of a foundation for an effective remedy for the issue before us.

The relevant legislation in our case study is clear. Although the results of its application in certain cases may lead to unjust and even potentially

52 Art. 5, para. 3. LGAP.

53 Law on Tax Procedure and Tax Administration, *Official Gazette of the Republic of Serbia*, Nos. 80/02, 84/02, 23/03, 70/03, 55/04, 61/05, 85/05, 62/06, 61/07, 20/09, 72/09, 53/10, 101/11, 2/12, 93/12, 47/13, 108/13, 68/14, 105/14, 91/15, 112/15, 15/16, 108/16, 30/18, 95/18, 86/19, 144/20, 96/21, 138/22.

54 Art. 141, para. 4. LGAP.

unconstitutional outcomes,⁵⁵ the Serbian Tax Administration is not authorized to challenge the policy rationale or even the constitutionality of the legislation it is supposed to apply to individual cases. In the case of the tax on other income and the corresponding social security contributions, the procedure for meeting the tax obligations is that of self-assessment, with a small number of taxpayers duly complying with the statute in the past decades. Furthermore, in some rare instances the Serbian Tax Administration did perform audits and impose the unpaid tax as well as penalties on taxpayers who failed to do so on their own for incidental service income generated from abroad. In other words, it would be very difficult to argue that the principle of predictability from the LGAP has been infringed. True, practice has been rare, but where it exists – it has been uniform. Even if we rely on Dutch jurisprudence and the implication that oral guidance given by certain officials of the Serbian Tax Administration to some taxpayers, that they did not have any tax obligations with respect to their foreign sourced income, did result in the existence of legitimate expectations, it would be only theoretically possible to prevail even before a sympathetic court. Again, we might have a costly, time-consuming solution for some rare cases, but certainly not for the vast majority of them.

Both the principle of legitimate expectations and of predictability leave us with a fundamental unresolved dilemma. Namely, if the imposition of tax is ultimately in accordance with the law, can it completely nullify the existence of the tax obligation, or does it just lead to a potential claim that the taxpayer may have against the Serbian Tax Administration. If we adopt the second option which would seem to be more in line with the general purpose of taxation, then we would have to determine what would be the correct legal procedure to pursue such a claim. Again, more litigation, more costs, and more uncertain results for all parties involved. In addition to the existence of the tax obligation proper, we must also address the issue of the potential penalties. Namely, if we choose the option that the tax obligation does not disappear, it would be unacceptable for the taxpayer to continue to be liable for the infringement of rules on which improper guidance was given by the authorities themselves.⁵⁶

The commonsense solution would be to strive for an institutional mechanism that would provide adequate protection for at least the most

55 Kostić, S., 2022, Tax Treatment of Flexible Forms of Work in Serbia in Light of the COVID-19 Global Pandemic, *Annals of the Faculty of Law in Belgrade*, Vol. 70, No. 4, pp. 1158–1159.

56 Comparative legislation contains examples of explicit provisions stipulating the existence of a tax obligation without the violation of tax law due to non-reporting caused by following the instructions of the authorities (cf. Entrepreneurial Code of Kazakhstan, Art. 14(3), Tax Code of Russia, Art. 111(1)(3)).

obvious cases where legal certainty has been infringed due to the disparity between real-life dynamics and the mostly static tax legislation. Such a mechanism must be effective enough to force the Serbian Tax Administration to abide by it, as clearly shown in the existing experiences of the credence given by this institution to the Serbian Ombudsman in the case of farmers' maternity leaves. Experience has shown that the Serbian Tax Administration is not against clemency towards taxpayers, but that in its institutional wisdom it refuses to carry the risk of such clemency unless clear legislative authority is provided for it.

The existing Serbian institutional framework did contain examples of good practice, albeit usually in cases involving sufficient vested political and economic interests. For example, the issue of the widespread abuse of the lump sum mechanism for taxing registered entrepreneurs, wherein individuals who were in substance employees were engaged by their effective employers as independent service providers registered as entrepreneurs, with the primary purpose of lowering the fiscal burden on their incomes, was resolved in a way that may provide notable guidance.

Namely, in 2017 and 2018, during audits the Serbian Tax Administration noticed widespread abuses of the employee/independent service provider relationship and started to initiate proceedings against numerous taxpayers. The issue was that unofficial evidence showed that this abuse was so widespread that thoroughly pursuing all those implicated could potentially lead to the collapse of the IT sector, one of the most vibrant sectors of the Serbian economy, and to the accelerated emigration of irreplaceable professionals. Many taxpayers did not feel they were in breach of the law as formally they were fully compliant with relevant legislation, provided one accepted that the individuals in question were independent service providers and not employees. Furthermore, while in some cases there could be no dispute as to the true nature of the relationship, in others the circumstances were not so clear.⁵⁷

Due to the relevance of the potential consequences of the initiated proceedings, the Serbian Tax Administration essentially paused its work, allowing for all interested parties to jointly come to an acceptable solution. The discussions involved independent experts, representatives of the Ministry of Finance and the Serbian Tax Administration, as well as of the relevant business community, predominantly affected by the issue. As a result, the Serbian Personal Income Tax Law and the Law on Compulsory Social Security Contributions were amended in late 2019,⁵⁸ providing a

57 *Ibid.*, pp. 1152–1153.

58 See Art. 10 of the Law on Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 86/19 and Art. 6 of the Law on the Amendments to

clear regulatory framework for taxing dependent and independent service providing, while the legislation also provided effective amnesty for the previous period as it prohibited the Serbian Tax Administration from challenging the nature of the formally contracted relationships between independent service providers and their clients during the period prior to the introduction of the new rules.⁵⁹

In this particular case taxpayers were provided with legal certainty for the future, by virtue of the introduction of specifically tailored legislation, as well as for the past, due to the granted amnesty for the period where no such clear legislation existed. In our case study involving “freelancers”, the Serbian Tax Administration did not pause, while the Serbian Ministry of Finance reacted only once they took to the streets and the general public started showing sympathies for their cause. In other instances, where the taxpayers did not have sufficient influence or were unable to generate politically relevant attention, there was no remedy to be found. As the speed of the digital transformation of society will inevitably lead to an increase in the number of similar situations, it would be in line with the essential principle of equality before the law that we introduce procedures that will not limit *special treatment* only to those who can afford it or to whom we cannot afford to refuse it.

Our proposal is to introduce specific provisions to the Serbian Law on Tax Procedure and Tax Administration, under which if the Tax Administration encounters a situation wherein, based on the information it is privy to, the number of uncompliant taxpayers, looking at a period of time that covers the statute of limitations (5 years),⁶⁰ is greater than the number of compliant taxpayers, it would postpone the issuance of decisions⁶¹ in audited cases until the completion of a specific proceedings, whose duration would not be counted for the purposes of the statute of limitations in initiated proceedings. However, the penalty interest for late payment would not be incurred for the duration of these proceedings.

This procedure would require the Tax Administration to prepare a report for the Ministry of Finance and ask for guidance in the case at hand. Based on the submitted report the Ministry of Finance would promptly

the Compulsory Social Security Insurance Contributions Law, *Official Gazette of the Republic of Serbia*, No. 86/19.

59 See Art. 24 of the Law on Amendments to the Personal Income Tax Law.

60 This timeframe ensures that the special procedure will deal only with genuine cases and not those where, e.g., taxpayers would intentionally orchestrate a campaign of non-compliance in order to meet this condition.

61 The Serbian Tax Administration would be allowed to initiate proceedings so as not to allow uncompliant taxpayers to benefit from the expiry of the statute of limitations.

organize a public hearing, to which all interested parties would be invited – representatives of the professional tax advisory, tax and public finance academics, representatives of the business community and taxpayers, as well as other relevant participants, depending on the specifics of the case. Following the public hearing, the Ministry of Finance would appoint a committee of experts, wherein civil servants, as well as taxpayer representatives, would have to be in the minority, and who would be given a reasonable timeframe and resources to prepare and publish an advisory report and recommend steps on how to deal with the situation at hand. If the Ministry of Finance chooses to reject the recommendations provide by the committee of experts, it would have to publish its answer and hold a public hearing in order to discuss the points of conflict.

Taxpayer associations (groups of 10 or more taxpayers, legal entities as well as individuals) would be entitled to initiate the same proceedings, and in that case the Ministry of Finance would require the Tax Administration to confirm that there is a discrepancy between the number of compliant and non-compliant taxpayers, over the period of the statute of limitations. If such a discrepancy is confirmed, the process would continue in the identical way as if the Tax Administration had initiated it.

If the resolution of the issue warrants legislative action, the dormancy of the proceedings initiated by the Ministry of Finance would continue until the necessary provisions are enacted. If no new legislation was deemed necessary, the Minister of Finance would be required to issue a binding instruction⁶² explaining in detail the application of the law deemed appropriate.

Such a mechanism would not only resolve issues such as the one found in the “freelancers” case, but also many which could be classified as retrospective interpretation.

5. CONCLUSIONS

Previous analyses have shown that Serbian legislation – both legislation on general administrative procedure, as well as the *lex specialis* on tax procedure – do not provide an adequate remedy for situations in which static tax legislation and the understaffed tax administration are unable to provide certainty and predictability.

Legal certainty in administrative law goes hand in hand with the principles of predictability and legal certainty. In European jurisdictions, these

62 Binding for the Serbian Tax Administration, as per Art. 11, para 3 of the Law on Tax Procedure and Tax Administration.

have largely been developed in caselaw and, in some cases, later included in codifications of administrative procedure. Nowadays, they are seen as constituent parts of the right to good administration. Predictability was introduced into Serbian administrative procedure in 2016, with the effects of the principle yet to be seen. On the other hand, protection of legitimate expectations appears before the Constitutional Court and the national ombudsman only in rare cases.

However, even if Serbia had elaborate experience regarding the protection of legitimate expectations, in all likelihood, the case at hand still would not be resolved by its application. Firstly, this would require its application in a large number of individual cases. Furthermore, since the imposition of tax is in accordance with the formal law, it is very difficult to advocate the *contra legem* effect of the principle of legitimate expectations or to find an adequate remedy for compensation claims. One should also bear in mind that, even though extremely rare, there were cases in which taxes were paid and the ignorance of tax obligations in the other cases would inevitably lead to discrimination.

All of the above leads to the conclusion that a solution must be general measure, an institutional mechanism that would provide adequate protection in cases where legal certainty has been infringed as a result of misalignment of tax legislation and contemporary life. We expect that the “freelancer” case will not be the only one and that similar situations will arise due to the inevitability and pace of technological development.

The mechanism should compel the Serbian Tax Administration to abide by it in order to be effective and would therefore have to be included in the Law on Tax Procedure and Tax Administration. In cases involving a significant number of uncompliant taxpayers, the Tax Administration would be obliged to postpone the issuance of tax decisions until a specific procedure involving meaningful public consultation is carried out, under the auspices of the Ministry of Finance. The process could lead to possible legislative changes.

If the resolution of the issue warrants legislative action, the dormancy of the proceedings initiated by the Ministry of Finance would continue until the necessary provisions are enacted. If no new legislation is deemed necessary, the Minister of Finance will be obliged to issue a binding instruction⁶³ explaining in detail the application of the law deemed appropriate.

63 Binding for the Serbian Tax Administration, as per Art. 11, para 3 of the Law on Tax Procedure and Tax Administration.

BIBLIOGRAPHY

1. Adžić, S., Adžić, J., 2009, The Public Healthcare System in the Transition Countries: The Case Study of Serbia, *Interdisciplinary Management Research*, 5, pp. 515–540.
2. Avi-Yonah, R., Haiyan, X., 2017, Evaluating BEPS, *Erasmus Law Review*, 1, pp. 3–11.
3. Baez Moreno, A., Brauner, Y., 2018, Policy Options Regarding Tax Challenges of the Digitalized Economy: Making a Case for Withholding Taxes (<https://ssrn.com/abstract=3167124>, 18. 11. 2023).
4. Barak-Erez, D., 2008, The Institutional Aspects of Comparative Law, *Columbia Journal of European Law*, Vol. 15, No. 3, pp. 477–493.
5. Berge, G., Widdershoven, R., 1998, *The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law*, The Hague, Intersentia.
6. Brauner, Y., 2014, BEPS: An Interim Evaluation, *World Tax Journal*, Vol. 6, No. 1, pp. 10–39.
7. Clement, M., 2018, Breach of the Right to Good Administration: So What? *ELTE LJ*, 1, pp. 19–27.
8. Collier, R., Pirlot, A., Vella, J., 2020, Tax Policy and the COVID-19 Crisis, *Inter-tax*, Vol. 48, Nos. 8–9, pp. 794–804.
9. Craig, P., 2015. *UK, EU and Global Administrative Law: Foundations and Challenges*, Cambridge: Cambridge University Press.
10. Craig, P., Burca, G. de, 2003, *EU Law – Texts, Cases and Materials*, 3rd ed., Oxford, Oxford University Press.
11. Dokko, J., Mumford, M., Schanzenbach, D. W., 2015, *Workers and the Online Gig Economy*, Hamilton Project, December, (https://www.hamiltonproject.org/wp-content/uploads/2023/01/workers_and_the_online_gig_economy.pdf, 18. 11. 2023).
12. Eurofound, 2020, *Living, Working and COVID-19*, Luxembourg, Publications Office of the European Union, 2020, (<https://www.eurofound.europa.eu/en/publications/2020/living-working-and-covid-19>, 18. 11. 2023).
13. Forsyth, C. F., 1988, The Provenance and Protection of Legitimate Expectations, *The Cambridge Law Journal*, Vol. 47, No. 2, pp. 238–260.
14. G20, 2013, Tax Annex to the Saint Petersburg G20 Leaders Declaration, Saint Petersburg, September, (<https://www.oecd.org/g20/summits/saint-petersburg/Tax-Annex-St-Petersburg-G20-Leaders-Declaration.pdf>, 18. 11. 2023).
15. Jerinić, J., 2021, When the Administration Promises: Protection of Legitimate Expectations in Serbian Administrative Procedure, *Regional Law Review*, pp. 117–129.
16. Koopmans, T., 2003, *Courts and Political Institutions: A Comparative View*, Cambridge, Cambridge University Press.
17. Kostić, S., 2017, Transfer Pricing in Serbia: Facing a Sobering Reality, *Annals of the Faculty of Law in Belgrade*, Vol. 65, No. 4, pp. 75–90.
18. Kostić, S., Vuković, D., 2019, The Perfect Silence: An Empirical Study on How Ignorance and Lack of Critical Debate Effect the Process of Enacting Tax Legislation in Serbia, *Annals of the Faculty of Law in Belgrade*, Vol. 67, No. 1, pp. 67–92.

19. Kostić, S., 2022, Tax Treatment of Flexible Forms of Work in Serbia in Light of the COVID-19 Global Pandemic, *Annals of the Faculty of Law in Belgrade*, Vol. 70, No. 4, pp. 1146–1162.
20. Kunnecke, M., 2006, *Tradition and Change in Administrative Law: An Anglo-German Comparison*, Berlin, Springer.
21. Lust, S., Administrative Law in Belgium, in: Seerden, R., Stroink, F., (eds.), 2002, *Administrative Law of the European Union, Its Member States and the United States. A comparative analysis*, Antwerpen–Groningen, Intersentia.
22. OECD, 2017, Model Tax Convention on Income and on Capital.
23. Parpworth, N., 2008, *Constitutional and Administrative Law*, 5th ed., Oxford, Oxford University Press.
24. Perry, A., Ahmed, F., 2014, The Coherence of the Doctrine of Legitimate Expectations, *The Cambridge Law Journal*, Vol. 73, No. 1, pp. 61–85.
25. Popelier, P., 2000, Legal Certainty and Principles of Proper Law Making, *European Journal of Law Reform*, Vol. 2, No. 3, pp. 321–342.
26. Popelier, P., 2008, Five Paradoxes on Legal Certainty and the Lawmaker, *Legisprudence*, Vol. 2, No. 1, pp. 47–66.
27. Popović, D., Ilić-Popov, G., 2015, Retroaktivnost zakona u poreskom pravu, *Anali Pravnog fakulteta u Beogradu*, Vol. 63, No. 1, pp. 5–22.
28. Popović, D., Kostić, S., 2018, Legal Certainty and Taxation: The Problem of Retroactive Interpretation, *Annals of the Faculty of Law in Belgrade*, Vol. 66, No. 4, pp. 38–55.
29. Protector of Citizens, 2012, *2011 Annual Report*, Belgrade, Protector of Citizens of the Republic of Serbia.
30. Protector of Citizens, 2015, *Regular Annual Report of the Protector of Citizens for 2014*, Belgrade, Protector of Citizens of the Republic of Serbia.
31. Protector of Citizens, 2020, *Regular Annual Report of the Protector of Citizens for 2019*, Belgrade, Protector of Citizens of the Republic of Serbia.
32. Protector of Citizens, 2021, *Regular Annual Report of the Protector of Citizens for 2020*, Belgrade, Protector of Citizens of the Republic of Serbia.
33. Seerden, R., Stroink, F. (eds.), 2002, *Administrative Law of the European Union, Its Member States and the United States. A Comparative Analysis*. Antwerpen–Groningen: Intersentia.
34. Schönberg, S., 2000, *Legitimate Expectations in Administrative Law*, Oxford, Oxford University Press.
35. Szczepanski, M., 2021, *Taxing the Digital Economy: New Developments and the Way Forward*, European Parliament Briefing ([https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)698761](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698761), 18. 11. 2023).
36. Šikić, M., Ofak, L., 2011, Nova načela upravnog postupka (s posebnim naglaskom na razmjernost, legitimna očekivanja i stečena prava), *Zbornik Pravnog fakulteta u Rijeci*, Vol. 32, No. 1, pp. 127–151.
37. Tomlinson, J., 2020, Do We Need a Theory of Legitimate Expectations? *Legal Studies*, Vol. 40, No. 2, pp. 286–300.
38. United Nations, 2021, UN Model Double Taxation Convention between Developed and Developing Countries.

39. Vallas, S., Schor, B. J., 2020, What Do Platforms Do? Understanding the Gig Economy, *Annual Review of Sociology*, Vol. 46, pp. 273–294.
40. Widdershoven, R., Remac, M., 2012, General Principles of Law in Administrative Law Under European Influence, *European Review of Private Law*, Vol. 20, No. 2, pp. 381–407.

LEGISLATIVE SOURCES

1. Law on General Administrative Procedure, *Official Gazette of the Republic of Serbia*, Nos. 18/16, 95/18, 2/23.
2. Law on Tax Procedure and Tax Administration, *Official Gazette of the Republic of Serbia*, Nos. 80/02, 84/02, 23/03, 70/03, 55/04, 61/05, 85/05, 62/06, 61/07, 20/09, 72/09, 53/10, 101/11, 2/12, 93/12, 47/13, 108/13, 68/14, 105/14, 91/15, 112/15, 15/16, 108/16, 30/18, 95/18, 86/19, 144/20, 96/21, 138/22.
3. Law on Amendments to the Personal Income Tax Law, *Official Gazette of the Republic of Serbia*, No. 86/19.
4. Law on the Amendments to the Compulsory Social Security Insurance Contributions Law, *Official Gazette of the Republic of Serbia*, No. 86/19.

CASE LAW

1. ECtHR, *The Sunday Times v. United Kingdom*, case no. 6538/74, 26 April 1979.
2. ECtHR, *Shchokin v. Ukraine*, App. 23759/03 and 37943/06, Judgment of 14 October 2010.

UTICAJ MODERNIH TEHNOLOGIJA NA PRAVNU SIGURNOST U PORESKOM PRAVU: NOVI HORIZONT

Svetislav V. Kostić

Jelena Jerinić

APSTRAKT

Ubrzane reforme srpskog poreskog prava, najčešće zasnovane na komparativnim uzorima, dovele su do značajnog obima takozvanog zakona u mirovanju budući da zbog nedostatka znanja i iskustva sistem nije bio spreman za njegovu primenu. Članak istražuje neke aspekte legitimnosti srpskog poreskog zakonodavstva, na prvom mestu posledice neusaglašenosti između propisa i načina na koji se poreski obveznici ponašaju, pri čemu su se autori oslanjali na slučaj oporezivanja takozvanih frilensera. Pažnja je usmerena na ključna pitanja pravne sigurnosti koja nastaju iz sudara promena koje su posledica savremenog doba i primene statičnih poreskih normi na okolnosti koje su bile nezamislive u vreme njihovog usvajanja. Istraživanje pokazuje da srpski propisi i relevantna praksa ne pružaju efikasnu zaštitu u ovakvim slučajevima, između ostalog jer princip legitimnih očekivanja kod nas još uvek nije naišao na značajniji odjek. Predlaže se institucionalni mehanizam koji uključuje izmene i dopune Zakona o poreskom postupku i poreskoj administraciji i barem jedan krug javnih konsultacija u cilju otklanjanja pravne nesigurnosti prouzrokovane neadekvatnom primenom poreskih zakona.

Ključne reči: pravna sigurnost, legitimna očekivanja, pravo na dobru upravu, poreska uprava, poresko pravo, zakonodavstvo u mirovanju, javna rasprava.

Article History:

Received: 23 October 2023

Accepted: 20 November 2023