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THE LEGAL NATURE OF THE SLOVENIAN SPECIAL TAX ON UNDECLARED INCOME

This paper deals with Slovenian special tax on undeclared income and attempts to determine its legal nature by presenting and analysing the regulation. The author believes that this public levy is actually not a tax since it lacks the financial purpose that each tax should have, according to the jurisprudence of the Slovenian Constitutional Court. Since the rate at which the special tax on undeclared income is levied exceeds the tax rates applied on declared income, and therefore the taxpayer's burden is higher, the author claims that the discussed tax is actually a mixture of compensation for the lost tax revenue and a legal sanction, with both deterrent and retributive (punitive) purpose, which is imposed on the taxpayer for not declaring the income.

Key words: Tax. – Undeclared income. – Estimation. – Compensation. – Sanction.

1. INTRODUCTION

Countries all around the world are constantly fighting tax avoidance in order to minimize their tax gap, using different measures. It is an ongoing battle between the taxpayers and the governments. Sometimes the latter (perhaps out of despair, due to lack of self-efficacy) introduce unorthodox legal measures. One such measure is a special tax on undeclared income, according to Article 68.a of the Slovenian Tax Procedure Act¹ (hereinafter: TPA). Regardless of its name, this public

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¹ Tax Procedure Act, *Official Gazette of the Republic of Slovenia*, No. 13/2011 – officially consolidated text, 32/2012, 94/2012, 101/2013, 111/2013, 25/2014, 40/2014, 90/2014, 91/2015, 63/2016, 69/2017 and 13/2018.

duty is not levied on all undeclared income, but only on undeclared income the origins of which are unknown, so it should be called a special tax on undeclared income of unknown origin.² In order to avoid confusion and an excessively long description, this paper uses the official terminology.

The current legal regime raises a number of different constitutional law issues, but this article will discuss only one of them: the legal nature of the special tax on undeclared income. In an attempt to resolve this issue, firstly the content of the article governing the special tax is presented and a brief comment provided. Next, the constitutional law analysis is carried out by listing the necessary features of each tax according to the Slovenian Constitutional Court case law, finding that one (i.e. financial purpose) is missing. To determine its non-tax legal nature, the single obligation is broken down into two parts: a compensation for the lost tax revenue and a legal sanction with a deterrent and retributive (punitive) purpose. The conclusion contains the most important findings and possible legal consequences if the author's view is correct.

2. THE LEGAL ARRANGEMENT OF THE SPECIAL TAX

Although Article 68.a of the TPA came into effect on 1 January 2014, similar provisions were part of the Slovenia's tax system prior to this.³ On the mentioned date the regulation became stricter for taxpayers. Two changes should be noted: the rise of the tax rate from the one that is calculated using the progressive personal income tax scale to a fixed 70 per cent, and the furtherance of the prescription period from five to ten years. The legislator has stringent the legislation with a questionable transition period (only for taxpayers with procedures pending on 1 January 2014 the previously, the former legislation is used), which is the reason why the Administrative Court has lodged a request for assessment of constitutionality of the transition period.⁴

To be able to analyse the legal nature of Slovenian tax on undeclared income, its essential characteristics must be described.⁵ As will be seen

² J. Podlipnik, "Razmerje med splošnimi določbami o cenvi davčne osnove in davkom od nenapovedanih dohodkov", *Poslovodno računovodstvo* 3–4/2017, 329–332.

³ For a brief historical overview see J. Podlipnik, "Obdavčitev nezakonitega in neprijavljenega dohodka", *Podjetje in delo* 6–7/2013, 1134–1135.

⁴ Pending Constitutional Court case U-I-113/17.

⁵ Although Slovenia is not the only country in the world with a special tax on undeclared income, countries with such arrangements are rare. Poland and Macedonia are the only two examples, besides Slovenia, that the author is aware of. The Polish Personal Income Tax Act (Ustawa o podatku dochodowym od osób fizycznych, *Official Gazette of the Republic of Poland* from 2018, position 200 – consolidated text) regulates this matter

in the next chapter, one of them is of particular importance for its legal nature.

Article 68.a (tax assessment on undeclared income) of the TPA reads as follows:⁶

- (1) In addition to the cases referred to in Article 68 of this Act, the tax authority (hereinafter: TA) may determine the object of taxation by estimation, in the event that it finds that:
 - a taxpayer – a natural person disposes of private consumption funds, including assets that considerably exceed the income he/she declared,
 - the TA is otherwise acquainted with information on the assets held by the taxpayer – natural person, his/her expenses or the information about the property he/she has acquired.
- (2) In the cases referred to in the preceding paragraph, the tax shall be levied from the tax base equal to the established difference between the value of the assets, minus the liabilities arising from the acquisition of assets, assets or consumption of assets, and the income from which the tax was assessed or calculated or income, of which taxes are not paid.
- (3) The procedure under this Article shall be introduced for one or more calendar years, during the period of the last ten years preceding the year in which that procedure was introduced.
- (4) The tax base determined according to the second paragraph of this Article shall be calculated and paid at 70 per cent of the rate considered to be a definitive tax.

in Articles 25b to 25g. As far as this contribution is conserved, it is important to emphasize that Polish Constitutional Tribunal found (judgement, No. P 90/08 of April 12, 2011, *Official Gazette of Republic of Poland*, No. 87, position 493) that the 75 per cent tax rate, which is higher than the highest marginal tax rate on declared (disclosed) income (30 per cent), is not a repressive sanction but compensation for lack of late payment – (delay) interests (A. Nita, A. Światłowski, “Synergy or Chaos: Administrative Versus Penal Sanctions in Polish Tax Law”, *Tax Law vs Tax Frauds and Tax Evasion* (eds. V. Babčák, A. Románová, I. Vojníková), Pavol Jozef Šafárik University in Košice, Košice 2015, 71–72). The Macedonian Personal Income Tax Act (*Zakon za personalniot danok na dohod*, *Official Gazette of Republic of Macedonia*, 80/1993, 3/1994, 70/1994, 31/1996, 40/1996, 71/1996, 28/1997, 8/2001, 50/2001, 52/2001, 2/2002, 44/2002, 96/2004, 120/2005, 52/2006, 139/2006, 6/2007, 160/2007, 159/2008, 20/2009, 139/2009, 171/2010, 135/2011, 166/2012, 187/2013, 13/2014, 116/2015, 129/2015, 199/2015, 23/16 and 190/2017) regulates such special tax in Articles 94.a–94.d. The tax rate is 70 per cent, which is much higher than tax rate on declared income which is 10 per cent. The author of this paper is not aware of the Macedonian Constitutional Court having ruled on the constitutionality of this special tax.

⁶ Author’s translation.

- (5) The tax base determined in the second paragraph of this Article shall be reduced in the event that the taxpayer proves that it is lower.
- (6) Notwithstanding the provisions of the laws on taxation, when calculating the tax base on income from activities or profit from capital for fiscal years, by the periods for which the tax is levied under this article, the taxable amount shall not be reduced due to the exercise of undisclosed tax losses, or unused parts of the negative difference between the value of equity at disposal and the value of equity at acquisition (loss) established in the periods for which the tax was levied under this article.

The essential (substantial) elements that need to be prescribed by the parliament in the form of a law (principle of legality in the field of tax law)⁷ according to (German) tax law theory⁸ and the jurisprudence of the Slovenian Constitutional Court are: tax object (Germ. *Steuerobjekt*), taxpayer (tax subject, Germ. *Steuersubjekt*), tax base (Germ. *Steuerbemessungsgrundlage*) and tax rate (Germ. *Steuersatz*).⁹ Article 68.a of the TPA contains all of them: the object of taxation is (undeclared) part of taxpayers income, taxpayers are people (individuals, natural persons), regardless of whether they are income tax residents or not,¹⁰ the tax base is determined in monetary form, and the tax rate is proportional (70 per cent).¹¹

Article 68.a (1) of the TPA states additional conditions that need to be fulfilled in order that the tax on undeclared income could be assessed by the tax administration. Prescribing such additional conditions is not customary when tax norms are formed. It can basically be said that the TA is entitled to levy the tax on undeclared income, if it believes that the individual has not declared all of his/her income, by analysing his/her consumption and the assets he/she has acquired. The legislator directly states that in this case the tax object can be estimated. But can tax object really be estimated by conduction a so-called best judgement,

⁷ D. Popović, *Nauka o porezima i poresko pravo*, Savremena Administracija, Beograd 1997, 298–301.

⁸ K. Tipke, *Die Steuerrechtsordnung*, Volume I, Dr. Otto Schmidt, Köln 2000², 129.

⁹ Decision of the Constitutional Court U-I-215/11, Up-1128/11, 10 January 2013 (*Official Gazette of the Republic of Slovenia*, No. 14/2013).

¹⁰ K. Erjavšek, *Obdavčitev nenapovedanih dohodkov posameznikov s posebnim poudarkom na skladnosti 70-odstotne davčne stopnje z Ustavom Republike Slovenije*, Master's thesis at University of Maribor Faculty of Law, Maribor 2016, 34–35.

¹¹ According to Administrative Court the tax rate is punitive by nature, because it exceeds the tax rate that applies to declared income.

estimated or discovery¹² assessment? I believe not, because only the tax base can be determined by estimation (Germ. *Schätzung*);¹³ the tax object cannot be estimated, because this would cause taxation on mere suspicion, which would be contrary to rule of law (in tax law) and basic freedoms.¹⁴

Let us assume that the wording in Article 68.a of the TPA is poor, because the legislator did not differentiate between the tax object and the tax base.¹⁵ Is Article 68.a of the TPA really a legal basis for tax-base estimation? In order to answer this question, the term estimation of the tax base should first be defined. The TPA (Article 68 (2)) defines estimation as a special procedure whose purpose is to determine such facts that enable the TA to determine the probable tax base. Because the TA cannot determine the crucial (legal) facts directly, since taxpayers violated their obligations to cooperate (Germ. *Mitwirkungspflichten*), those facts are determined alternatively through clues (Germ. *Indizien*) which indicate what are most probably the crucial (legal) facts.¹⁶ These probable facts are then applied to the “ordinary” relevant substantive tax rule, which prescribes how to calculate the tax base (legal rules in personal income tax law, corporate income tax law, value added tax law, etc.). When the estimated tax base is determined, the tax rate can be applied and the amount of (estimated) tax is calculated. Since crucial (legal) facts can only be determined with certain degree of probability,¹⁷ the amount of the levied tax can be higher or lower than the actual amount of tax liability according to the actual circumstances, which are incomprehensible. It is important to emphasize that the purpose of the tax base estimation is not to penalize taxpayers for violating their obligations to cooperate,¹⁸ but rather to ensure the principle of equality in taxation,¹⁹ by indirectly determining the crucial (legal) facts, with the highest possible degree of

¹² D. W. Williams, G. Morse, *Principles of Tax Law*, Sweet & Maxwell, London 2012⁷, 61–62.

¹³ W. Jakob, *Abgabenordnung*, C. H. Beck, München 2010⁵, 71–72.

¹⁴ R. Seer et al., *Steuerrecht*, Dr. Otto Schmidt, Köln 2013²¹, 1112–1113.

¹⁵ The definition of estimation in Article 68 (2) of TPA confirms this assumption, as the legislator states that the purpose of estimation is to determine the probable tax base. This provision does not state anything about (determining the probable) tax object.

¹⁶ W. Jakob, 71–72.

¹⁷ This degree should be as high as possible, depending on the clues that can be identified.

¹⁸ M. Wakounig, *Davčno inšpiciranje in ocena davčne osnove*, MFB Consulting, Ljubljana 1998, 18–19 and W. Doralt, H. G. Ruppe, T. Ehrke-Rabel, *Grundriss des österreichischen Steuerrechts*, Volume II, Manzsche Verlags- und Universitätsbuchhandlung, Wien 2011⁶, 519.

¹⁹ M. Brinkmann, *Schätzungen im Steuerrecht*, Erich Schmidt Verlag, Berlin 2012², 25.

probability.²⁰ Equality in taxation would be compromised if the taxpayers who failed to comply with the rules were exempt from taxation because their tax base could not be calculated directly.²¹

If the purpose of tax base estimation is to assess the amount of tax which is as close as possible to the actual amount of tax, the assessment of the tax on undeclared income, according to Article 68.a of the TPA, cannot be considered a best judgement assessment. At least two reasons support this statement. First, the facts that the TA must determine, in order to calculate the tax base, are not clues that will help determine probable crucial (legal) facts. Rather, they are crucial (legal) facts themselves, according to Article 68.a (2). It is not possible to discuss tax base estimation according to the abovementioned definition, if legally relevant facts are not indirectly determined through clues, because they are prescribed as crucial (legal) facts for another tax – the one that the taxpayer has failed to declare. A different (new) tax, with a higher tax rate, is the second reason why it is not correct to talk about tax base estimation. Tax base estimation is used to levy the original tax and not another tax that did not exist when the legally prescribed facts occurred. The amount of tax assessed with the help of tax base estimation cannot regularly be higher than the original tax, but only as the consequence of the incapability of indirectly determining the crucial (legal) fact, not the stricter substantive rules (e.g. governing the tax rate).

3. THE CONSTITUTIONAL LEGAL NATURE OF THE DISCUSSED TAX

The Constitution of Republic of Slovenia²² (hereinafter: Constitution) mentions the term tax in Articles 90, 146 and 147, but does not define it by stating the features that a compulsory contribution must have in order to be considered a tax. This lack of a definition in the Constitution has been replaced by the jurisprudence of the Slovenian Constitutional Court. According to the Court's position, taxes are those compulsory contributions that cumulatively fulfil the following conditions: they are (state or local) budgetary funds,²³ that have a

²⁰ A. Pahlke *et al.*, *Abgabenordnung Kommentar*, C. H. Beck, München 2009², 1225.

²¹ The purpose of the rules that enable tax base estimation is to resolve the so called *non liquet* situation (W. Jakob, 69).

²² *Official Gazette of the Republic of Slovenia*, No. 33/1991–I, 42/1997, 66/2000, 24/2003, 69/2004, 69/2004, 69/2004, 68/2006, 47/2013, 47/2013 and 75/2016.

²³ Decisions of the Slovenian Constitutional Court U-I-181/94 of 20 March 1995 (*Official Gazette of the Republic of Slovenia*, No. 21/1995), U-I-62/95 of 16 February

monetary form,²⁴ they are compulsory and the taxpayer does not directly receive anything in return,²⁵ they may be introduced only by law in parliamentary procedure,²⁶ or in the case of local communities, the relevant law must provide the legal basis for the introduction of a local tax,²⁷ and they have a necessary financial purpose²⁸ (the intent to collect financial resources),²⁹ although other social (nonfinancial) purposes (e.g. deterring undesirable behaviour of taxpayers and promoting desired behaviour) are permissible.³⁰

The last of the listed features is essential for this paper. No doubt that a declaration of income is mandatory by law, that failure to comply with this legal obligation is undesirable and an additional financial liability can have an impact on the behaviour of taxpayers, but can the tax on undeclared income serve a financial purpose? The answer to this question is negative, since the government cannot desire that the taxpayers violate (tax) norms. The financial source that stems from a breach of regulations cannot have a financial purpose. If misdemeanour fines (e.g. fines for driving under the influence of alcohol or above the speed limit) are not considered taxes because they lack financial purpose, then any other financial obligations imposed exclusively for infringement of regulations, regardless of their legal naming, cannot be taxes.³¹ So called prohibitive taxes (Germ. *Erdrosselungssteuern*, *Prohibitivesteuern*,

1996 (*Official Gazette of the Republic of Slovenia*, No. 14/1996) and U-I-397/98 of 21 March 2002 (*Official Gazette of the Republic of Slovenia*, No. 35/2002).

²⁴ Decisions of the Slovenian Constitutional Court U-I-257/09 of April 14, 2011 (*Official Gazette of the Republic of Slovenia*, No. 37/2011), U-I-215/11, Up-1128/11 of 10 January 2013 (*Official Gazette of the Republic of Slovenia*, No. 14/2013) and U-I-173/11 of 23 May 2013 (*Official Gazette of the Republic of Slovenia*, No. 49/2013).

²⁵ Decisions of the Slovenian Constitutional Court U-I-9/98 of April 16, 1998 (*Official Gazette of the Republic of Slovenia*, No. 7/1998), U-I-307/98 of 5 December 2002 (*Official Gazette of the Republic of Slovenia*, No. 112/2002) and U-I-181/01 of 6 November 2003 (*Official Gazette of the Republic of Slovenia*, No. 113/2003).

²⁶ Decision of the Slovenian Constitutional Court U-I-34/93, U-I-33/93 of 19 October 1994 (*Official Gazette of the Republic of Slovenia*, No. 74/1994).

²⁷ Decision of the Slovenian Constitutional Court U-I-424/98 of 8 November 2001 (*Official Gazette of the Republic of Slovenia*, No. 96/2001).

²⁸ Decisions of the Slovenian Constitutional Court U-I-91/98 of 16 July 1999 (*Official Gazette of the Republic of Slovenia*, No. 61/1999) and U-I-397/98 of 21 March 2002 (*Official Gazette of the Republic of Slovenia*, No. 35/2002).

²⁹ H. W. Arndt, H. Jenzen, T. Fetzer, *Allgemeines Steuerrecht*, Verlag Franz Vahlen, München 2016³, 47.

³⁰ Decisions of the Slovenian Constitutional Court U-I-260/04 of April 20, 2007 (*Official Gazette of the Republic of Slovenia*, No. 45/2007) and U-I-158/11 of 28 November 2013 (*Official Gazette of the Republic of Slovenia*, No. 107/2013).

³¹ H. B. Brockmeyer *et al.*, *Abgabenordnung Kommentar*, C. H. Beck, München, 2012¹⁷, 12.

Steuern mit Nullaufkommen)³² are not actually taxes, as they lack financial purpose. The taxes with a social function (e.g. ecological taxes, tobacco taxes) aim to reduce socially undesirable actions to a socially desirable level and not to prevent them completely.³³

If a tax on undeclared income is not a tax, what is its constitutional legal nature? It seems that a single monetary obligation consists of two parts.

First part: Slovenian tax legislation does not state that when the tax on undeclared income is levied, the “original” tax obligation ceases to exist.³⁴ Hence, it is (at least in theory) possible that the same person is burdened with the “original” tax as well as the tax on undeclared income. This does not occur in practise, as the TA is not able to discover the origin of the income in order to tax it as it should be taxed. To prevent double “taxation” it would be wise if the legislator explicitly prescribed that the “original” tax liability ceases to exist once the tax on undeclared income is levied. The part of the tax on undeclared income that “replaces” the original tax is by its legal nature compensation for the loss of the original tax revenue.

Second part: since the rate that is applied on the undeclared income is always higher than the “original” income tax rates,³⁵ the amount that is levied is higher than the “original” tax, therefore the legal nature of this surplus must be determined. It seems that the answer depends on the legislator’s intent to collect more than tax plus interests.³⁶ The executive branch of the government, which proposed the law, stated that from the point of view of equality under the law, it is neither proportional nor

³² A. Eiling, *Verfassungs- und europarechtliche Vorgaben an die Einführung neuer Verbrauchsteuern*, Herbert Utz Verlag, München 2014, 131–133.

³³ S. Homburg, *Allgemeine Steuerlehre*, Verlag Franz Vahlen, München 2015⁷, 5.

³⁴ According to Article 44 (4) of TPA tax obligation ceases to exist with its fulfilment, or in other ways determined by this Act. These other ways are prescription (Germ. *Verjährung*), tax remission (Germ. *Steuererlass*), etc.

³⁵ If a separation is made taking into account the (direct) progressivity of taxation, there are two types of income according to Slovenian Personal Income Tax Act (*Official Gazette of the Republic of Slovenia*, No. 13/2011 – officially consolidated text, 9/2012, 24/2012, 30/2012, 40/2012, 75/2012, 94/2012, 52/2013, 96/2013, 29/14, 50/2014, 23/2015, 55/2015, 63/2016 and 69/2017): the income that is taxed synthetically and the income that is taxed analytically. The first group is taxed using the (directly) progressive tax scale with five brackets, from 16 to 50 per cent being the marginal tax rate. The second group is usually taxed with a fixed 25 per cent tax rate, with the exception of capital gains, where tax rate falls according to the time of holding capital, from 25 per cent to zero.

³⁶ In comparison to the reasoning of the Polish Constitutional Tribunal, in the case of Slovenia, in addition to tax, interests are also levied to taxpayers (Judgement of the Supreme Court of Republic of Slovenia X Ips 285/2012, 14 March 2013), so the higher tax rate cannot represent compensation for late payment.

admissible that a taxpayer who has not fulfilled his/her tax obligations within the time limit and in the manner prescribed by law is treated the same way as the one who has. For these reasons, a tax rate of 70 per cent is introduced.³⁷ According to this, the only reason for the different (i.e. stricter) treatment before the law is violation of tax regulations. This does not directly mean that this surplus is a punishment (retributive purpose)³⁸ for violating tax regulations, because it could have a preventive (detering, non-retributive) purpose.³⁹ Although the latter is not mentioned in the proposal of the TPA, it can be said that it does. On the other hand it seems that it also has a retributive function, since the proposer of the TPA stated that the taxpayer has various options to eliminate irregularities in regard to the fulfilment of tax obligations. If he/she does not use them and continues to avoid compliance, taking into account that there is a major disparity between the acquired assets or consumption and the revenues declared to the TA in these procedures, it is appropriate that this incompatibility should be subject to high taxation.⁴⁰ Because the Slovenian Tax Administration is not concerned with discovering the origin of the income, taxpayers cannot be held responsible for misdemeanours or criminal offenses. Instead, they are punished with additional financial burden – a tax surplus. This supports the view that this surplus has a retributive function.⁴¹ The same view seems to be supported by European Court of Human Rights (hereinafter: ECHR) case law. In *Jussila v. Finland*⁴² the ECHR dealt with the Finnish tax proceeding in which tax surcharges were levied and ruled that this was a criminal proceeding. Hence tax surcharges are criminal sanctions because of their deterrent and punitive (retributive) purpose.

³⁷ Predlog Zakona o spremembah in dopolnitvah Zakona o davčnem postopku, EVA: 2013–1611-0077, 10 July 2013, 10.

³⁸ According to Slovenian criminal law theory, there are two complementary functions of legal sanctions: retributive and preventive (L. Bavcon *et al.*, *Kazensko pravo – splošni del*, Uradni List Republike Slovenije, Ljubljana 2003⁴, 386).

³⁹ Like surcharges (Germ. *Zuschläge*) in German tax law (D. Birk, M. Desens, H. Tappe, *Steuerrecht*, C. F. Müller, Heidelberg – München 2014¹⁷, 87–88).

⁴⁰ Predlog Zakona o spremembah in dopolnitvah Zakona o davčnem postopku, EVA: 2013–1611-0077, 10 July 2013, 10.

⁴¹ Since further elaboration of this issue would exceed the purpose of this contribution, I can only state that the legal arrangement of this retributive function is (constitutionally) problematic, since the retributive side of the punishment should be proportionate to the intensity of the violation and the culpability of the perpetrator (L. Bavcon *et al.*, 386). By assessment of tax on (allegedly) undeclared income none of these circumstances is identified, since the only criterion is the amount of allegedly undeclared income.

⁴² *Jussila v. Finland*, no. 73053/01, 23 November 2006.

4. CONCLUSION

This analysis shows that tax on undeclared income according Article 68.a of the TPA is not really a tax, but in fact partly compensation for the lost income tax revenue, partly a sanction with a deterrent and retributive purpose. The first part is unproblematic, since compensation may also be decided in (special) administrative procedure. The second part is more intricate, because constitutional procedural requirements are more demanding when it comes to procedures in which penalties can be imposed. Presumption of innocence (Article 27), principle of legality in criminal law (Article 28), and legal guarantees in criminal proceedings (Article 29) are constitutional basic human rights and liberties that need to be respected in all penal procedures, not only those of strictly criminal nature. It is doubtful whether undeclared income tax procedures according to the TPA fulfil these requirements. It seems that especially presumption of innocence is questionable, since taxpayers must prove beyond a reasonable doubt how they financed the acquisition of property and consumption. On the other hand, the TA usually calculates the undeclared income tax base on a number of assumptions. If the Slovenian Constitutional Court will share the author's view on the constitutional legal nature of the undeclared income tax, this unorthodox measure will be declared (at least partly) unconstitutional.

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