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THE CRIME OF TAX FRAUD IN SPAIN

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1. INTRODUCTION

A long legislative evolution of the Spanish criminal law system, which is to protect the State Treasury and social security administration, results in determination of offences and illegal acts, which is referred to in literature as "an axis of economic penal law".[1] Those legally protected interests that were earlier unknown have now become one of the most rapidly developing criminal law fields. It is not possible to discuss all the issues connected with those offences in this paper.[2] Thus, the analysis is limited to basic aspects of tax fraud (Article 305 Spanish Criminal Code, hereinafter: SCC).[3]

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1 M. Bajo Fernández, [in:] M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública*, Madrid 2000, p. XIII.

2 For more, see J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública y la Seguridad Social*, Tirant lo Blanch, Valencia 2018.

3 Article 305 para. 1 Criminal Code: "Any person who, whether by action or omission, defrauds the state, regional or local treasury, avoiding the payment of taxes or deductions, or amounts that should have been deducted, or payments on account, wrongfully obtaining rebates or likewise enjoying fiscal benefits, provided that the amount of the defrauded payment, the unpaid amount of deductions or payments on account or the amount of the rebates or fiscal benefits wrongfully obtained or enjoyed exceeds one hundred and twenty thousand euros, shall be punished with a prison sentence of between one and five years and a fine of up to six times the aforesaid amount, unless his tax situation has been brought into compliance with the terms of section 4 of this article. The mere filing of returns or making of voluntary payments does not preclude fraud, where other facts provide evidence of that. In addition to the sentences stated, the person accountable shall lose the possibility of receiving state grants and aid and the right to enjoy fiscal or social security benefits or incentives for a period of between three and six years".

2. LEGAL-TAX RELATION

The recognition of tax fraud requires that a perpetrator have one or a few tax obligations and legal-tax relations with the tax administration.[4] It is a very important element because in case there are no such relations, a perpetrator may be prosecuted for an offence against property. It takes place, e.g. when a perpetrator deceives the tax administration claiming VAT return, although he has had no tax obligation whatsoever. Article 305 para. 1 SCC, which regulates tax fraud, functions as a blank norm. This means that in order to check if its features are matched (if it is fraud in the form of tax evasion or undue tax exemption), it must be established whether tax obligations resulting from tax regulations have been breached. This makes it possible to establish whether there is a legal-tax relation between the parties, i.e. the tax administration, a taxpayer or his proxy and an activity that is subject to taxation that results in an unfulfilled tax obligation.[5] For determination of that, the provisions of the General Tax Act or acts regulating particular taxes necessary to identify tax obligation and its due amount are applied with the use of the factual and evaluative criteria.[6] A taxpayer's financial obligations include due tax payment (Article 19 General Tax Act, hereinafter: TA) and contribution to sustain public expenditure (Article 31 para. 1 Spanish Constitution), which are enforced by the tax administration. There are also other obligations such as collection of advance payments and bank transfers. On the other hand, formal obligations are important, i.e. timely submission of tax returns in a special form, which makes it possible to calculate due tax amounts and proper bookkeeping that also results in tax obligations. Tax massification of the last decades hampers or prevents exhaustive control of an individual taxpayer's situation. Such a state requires generalisation of obligations that become the essence of the above-mentioned legal-tax relation. This relation, administrative in nature, consists in calculation and collection of taxes.[7]

The offence under Article 305 SCC can be recognised in case of failure to fulfil a tax obligation and because of that is connected with a concept used in tax law, which precisely, with the use of statutes and ordinances, lays down taxpayers' obligations.[8] It especially concerns data essential from the taxation point of view of tax authorities responsible for tax collection (formal obligations) and payment obligation (financial obligation).[9]

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[4] C. Martínez-Buján Pérez, *Derecho Penal Económico y de la Empresa. Parte Especial*, 5th edition, Tirant lo Blanch, Valencia 2015, p. 622; F. Morales Prats, *De los delitos contra la Hacienda Pública y contra la Seguridad Social*, [in:] G. Quintero Olivares (dir.), *Comentarios a la Parte Especial del Derecho Penal*, 10th edition, Aranzadi, Navarra 2016, p. 1042; I. Ayala Gómez, *Los delitos contra la Hacienda Pública relativos a los ingresos tributarios: el llamado delito fiscal del art. 305 del Código Penal*, [in:] E. Octavio de Toledo (dir.), *Delitos e infracciones contra la Hacienda Pública*, Valencia 2009, p. 98.

[5] F. Pérez Royo, *Los delitos y las infracciones en materia tributaria*, Instituto de Estudios Fiscales, Madrid 1986, p. 79.

[6] Cf. C. Martínez-Buján Pérez, *Derecho Penal Económico…*, *Parte Especial*, p. 622 ff.

[7] Cf. I. Ayala Gómez, *Los delitos contra la Hacienda Pública…*, p. 99 ff.

[8] Cf. C. Martínez-Buján Pérez, *Derecho Penal Económico y de la Empresa. Parte General*, 5th edition, Tirant lo Blanch, Valencia 2016, p. 322.

[9] Cf. F. Muñoz Conde, *El error en Derecho Penal*, Tirant lo Blanch, Valencia 1989, p. 103.

Tax massification causes that administrative control is troublesome and complicated. A self-assessment tax system is used but it requires that taxpayers have complex legal skills, which are not within the scope of knowledge of most members of the public, and results in incurring expenses on tax consulting services in order to fulfil tax obligations.

3. THE CONCEPT OF FRAUD

The causative act consists in fraudulent activity or omission that creates or increases risk and requires a financial and legal consequence which has impact on the indirect object of protection (the functioning of the State Treasury) by an attempt against the direct object of protection (the tax base). As it is rightly stated in the doctrine,[10] the condition for fraud results directly from the financial object of protection. If the state property is to be protected, the protection of the property should be thoroughly determined in order to avoid inadmissible imprisonment for debts. There is also another argument, which departs from the protection of the state property and interprets the concept of fraud for fiscal penal purposes and adopts new characteristics from the perspective of economic crimes.[11] Nevertheless, there are different approaches to the conditions for fraud: the assumption of fraud and the assumption of the breach of duty are most important. Regardless of the adopted standpoint, there is some unanimity concerning the statement that a mere failure to pay the due tax does not automatically mean the commission of tax fraud.[12] The following theories concerning the meaning of deception are presented in the doctrine:

(1) Deception that is explicitly like the offence of a confidence scheme. Many authors state that deception is a condition for the occurrence of the crime of tax fraud, i.e. artifice, a stratagem must take place; it is connected with a real *mise-en-scène*.[13] It is something more than just causing economic loss or failing

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[10] J. Bustos Ramírez, *Bien jurídico y tipificación de la reforma de los delitos contra la Hacienda Pública*, [in:] J. Boix Reig, J. Bustos Ramírez, *Los delitos contra la Hacienda Pública*, Madrid 1987, p. 32.

[11] For more on the object of protection, see: J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública…*, p. 109 ff; by the same author, *El bien jurídico protegido en los delitos tributarios*, Revista Penal No. 33, 2014.

[12] A. Castro Moreno, *Elusiones fiscales atípicas*, Barcelona 2008, p. 15. In the 1980s, an opinion was supported that the offences also included "civil disobedience", i.e. a perpetrator's intentional resistance to tax payment; thus C. Lamarca, *Observaciones sobre los nuevos delitos contra la Hacienda Pública*, Revista de Derecho Financiero y de Hacienda Pública, 1985, p. 773 ff. Nevertheless, in my opinion, such conduct cannot be prosecuted because it does not concern the object of protection, i.e. tax determination. The amount is known, which opens the way to execution with the use of administrative means.

[13] G. Rodríguez Mourullo, *El nuevo delito fiscal*, [in:] *Comentarios a la legislación penal*, Madrid 1983, p. 261; M. Bajo Fernández, *Manual de Derecho Penal, Parte Especial*, Vol. 2, Madrid 1987, p. 431; M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública…*, p. 48; J. Boix Reig and J. Mira Benavent, *Los delitos contra la Hacienda Pública y la Seguridad Social*, Tirant lo Blanch, Valencia 2000, p. 48; J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública y la Seguridad Social*, [in:] J. Boix Reig (dir.), *Derecho Penal, Parte Especial*, Vol. 3, Iustel, Madrid 2012, p. 18 ff; F. Morales Prats, *De los delitos contra la Hacienda Pública…*,

to fulfil tax obligations. It requires an operation misleading the public administration, detriment to property and special deceptive intention. Therefore, the offence of a breach of duty is not included in this category because it does not contain deception. In this context, it would be difficult to include the offence of omission in this category. Some authors believe that crime is not committed in case of failure to submit a tax return if the Treasury's loss results from laziness or negligence of the tax administration controlling the payment of due taxes.[14] C. Martínez-Buján Pérez supports this approach, although his opinion is closer to the theory of the breach of duty. According to him, deception has features that do not exactly match the structure of a confidence trick but is more than just a breach of duty. Deception requires the kind of conduct that may have impact on the object of protection, "hiding a tax base or basic data, which may prevent or hamper calculation of due tax".[15]

(2) Breach of duty. It is believed that Article 305 para. 1 SCC does not require any specific deception but intentionally causing financial loss to the State Treasury with the breach of financial obligations resulting from the legal-tax relation.[16] Because of that, its scope is limited to the breach of financial obligations associated precisely with the breach of duty to pay. It is an offence with consequences that is materialised in property loss resulting from the breach of duty. It requires all kinds of conduct, activity or omission, provided that the breach of duty is connected with causing a classified consequence. In some cases one can notice a deceptive conduct. However, deception is not necessary because the offence consists in the breach of tax obligation that results in property loss. Deception, artifice or *mise-en-scène* is not required.[17] Supporters of this approach believe that the concept of fraud is not unambiguous because it adopts a different meaning depending on the context set by the object of protection. Thus, in order to speak about fraud, it is enough to breach the tax obligation and cause a loss, which is done by a perpetrator who manipulates data constituting the tax base and by one who knows about the obligation to submit a tax return and does not do this.

In other words, an offence of tax fraud is committed even in case the tax administration has not been deceived. It may take place, e.g. when the tax administration knew the amount of due tax. It does not matter and has no effect whether the owner of the object of protection knows about deception or lacks this knowledge.

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p. 1049, the author assumes that omission does not require a lie. Similarly, M. Acale Sánchez and G. González Agudelo, *Delitos contra la Hacienda Pública y la Seguridad Social*, [in:] J.M. Terradillos Basoco (coord.), *Lecciones y materiales para el estudio del Derecho Penal*, Vol. 4, 2nd edition, Madrid 2016, p. 203.

[14] M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública…*, p. 53.

[15] C. Martínez-Buján Pérez, *Derecho Penal Económico…*, *Parte Especial*, 5th edition, p. 624.

[16] This is what I used to state. I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Todo sobre el fraude tributario*, Barcelona 1994, p. 49 ff. Others also claim so, inter alia, F. Pérez Royo, *Los delitos y las infracciones…*, p. 113; E. Gimbernat Ordeig, *Consideraciones sobre los nuevos delitos contra la propiedad intelectual*, Rev. Poder Judicial, No. especial IX 1989, p. 352.

[17] L. Gracia Martín, *La configuración del tipo objetivo del delito de evasión fiscal en el Derecho penal español: crítica de la regulación vigente y propuestas de reforma*, Civitas. Revista española de Derecho Financiero No. 58, 1988, p. 275 ff.

In my opinion, in the offence of tax fraud "to deceive" means "to hide". I believe that the requirement of deception means the breach of a formal duty, which is materialised in hiding or disfiguring of the tax base, which prevents determination of the amount of tax (lack of knowledge of its amount).[18] It consists in hiding the activity that is subject to taxation by concealment of the truth and, through action or omission, leading to the violation of the State Treasury's object of protection. Deception within the meaning of a confidence trick is not necessary, and there may be no will of deception.[19] This conclusion results from the fact that the Spanish legislator unfortunately used the term fraud. The imprecision results from erroneous assessment of the object of protection. The legislator aimed to protect the State Treasury with the use of property-related criteria, while it would be appropriate to use other criteria more adequate to the social and economic nature of this legal interest. Building the type on the basis of fraud, it seems that "the model of confidence trick" was adopted, which means that it is required that a perpetrator commit deception, have intention of deception and cause a change and a financial loss. It is a totally unusual confidence trick because the offence of confidence trick consists in deceptive conduct concerning somebody else's property. Tax fraud takes place within one's own property because a taxpayer's liability arises earlier and is contained in his own property.[20]

Conclusions are made in literature that the breach of duty is necessary but this element is not connected with financial obligations but with formal obligations, which ban hiding a tax base. In order to provide grounds for penal fiscal liability, the requirement of a breach of duty should not be applied automatically[21] and based on the lack of payment. This results in basic features of the content of the verb '"deceive" within the scope of fiscal penal law. That is why, I believe that failure to fulfil tax obligations does not mean fraud and requires more elements. This is connected with creating or increasing the risk that a consequence may occur, i.e. with the hiding of the tax base, which is next materialised via specified forms of conduct such as avoiding payment, groundless return of tax or unfounded use of tax exemptions. All that should result in an indefinite due tax amount.

Tax fraud is not connected directly with the features of a confidence trick; it has its own meaning and its own form in fiscal penal law. It is rightly assumed in the

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[18] On this point of view, see: F. Pérez Royo, *Delito fiscal y ocultación*, [in:] M. Bajo Fernández (dir.), *Política fiscal y delitos contra la Hacienda Pública*, Ramón Areces, Madrid 2007, p. 223 ff; I. Ayala Gómez, *Los delitos contra la Hacienda Pública*…, p. 106; J.A. Choclán Montalvo, *La aplicación práctica del delito fiscal: cuestiones y soluciones*, Bosch, Barcelona 2011, p. 94 ff; J.M. Martín Queralt et al., *Curso de Derecho Financiero y Tributario*, 25th edition, Madrid 2014, p. 597. There were similar opinions about fraud against Social Security: M. Bustos Rubio, *La regularización en el delito de defraudación a la Seguridad Social*, Tirant lo Blanch, Valencia 2016, p. 56. I believe that the opinion is not far from it (hide or distort the tax base): A. Nieto Martín, *Delitos contra la Hacienda Pública y la Seguridad Social. Delitos de contraband*, [in:] *Nociones fundamentales de Derecho Penal. Parte Especial*, 2nd edition, Tecnos, Madrid 2015, p 316.

[19] The author supporting the requirement of sufficient deception within the meaning applied to a confidence trick is J.A. Choclán Montalvo, *La aplicación práctica del delito fiscal*…, p. 98. I. Ayala Gómez tries to place hiding close to deception, I. Ayala Gómez, *Los delitos contra la Hacienda Pública*…, p. 115.

[20] J. Bustos Ramírez, *Bien jurídico y tipificación*…, p. 33.

[21] Thus, F. Pérez Royo, *Delito fiscal y ocultación*…, p. 223.

doctrine that deceptive conduct under Article 305 SCC is directly connected with the breach of the obligation to submit a tax return and information, which a fraud perpetrator owes, "a beam on which a building of tax imposition system rests".[22] If tax bases are not hidden or disfigured and operations are legal and reflected in bookkeeping, in the whole corporate documentation and in tax returns, and tax control does not show irregularities, one cannot speak about fraud because nothing is hidden. This means that:

– A simple failure to pay due tax is not sufficient to commit the offence of tax fraud.[23]
– Deception, artifice, *mise-en-scène* or omission are not required (attributing deceptive nature to omission of a tax return submission).[24]
– Subject-related elements such as intention are not required; it is necessary to take into account that the tax administration is not always able to control mass tax management. An entity's special will to act does not matter; it is enough to establish the intention to hide a tax base, regardless of any other aims that can be proved.
– Criminal law should not be applied in a situation when the tax administration knows about liabilities that have not been hidden by a taxpayer, his proxy or a person acting on his behalf[25] because the tax has not been established. To deceive means that the conduct of action or omission causes that the administration has no knowledge about a tax base. Thus, what are the conditions for speaking about the administration's lack of knowledge? If it is required to have potential knowledge, with the use of modern technologies and a possibility of exchanging data, the administration can potentially know about everything and make offences against the State Treasury impossible to commit. In the face of massification and millions of existing data, it is necessary to prove that the administration possesses real knowledge of a taxpayer's tax data in order to exclude fraud based on the taxpayer's own activities. For example, the fact of failing to pay taxes that are in the personal income "tax return draft", which revenue offices collect and which are at a taxpayer's disposal, is not a crime.[26] Hiding activities that are subject to taxation, even if the administration could check them, matches the features of tax fraud.[27]
– It is not required that the tax administration make an error that might be a prerequisite from the perspective of the theory of deception. In our system based on tax self-assessment, tax management to a large extent is a taxpayer's respon-

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[22] *Ibid*.

[23] I. Ayala Gómez, *Los delitos contra la Hacienda Pública…*, p. 108; J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública…*, p. 19; E. Mestre Delgado, *Delitos contra la Hacienda Pública y contra la Seguridad Social*, [in:] C. Lamarca (coord.), *Delitos. La parte especial del Derecho Penal*, Madrid 2016, p. 553.

[24] A. Castro Moreno, *Elusiones fiscales atípicas…*, p. 57.

[25] F. Pérez Royo, *Delito fiscal y ocultación…*, p. 224; J.A. Choclán Montalvo, *Responsabilidad de auditores de cuentas y asesores fiscales*, Bosch, Barcelona 2003, p. 187; J.A. Choclán Montalvo, *La aplicación práctica del delito fiscal…*, p. 108; E. Mestre Delgado, *Delitos contra la Hacienda Pública…*, p. 554.

[26] A. Nieto Martín, *Delitos contra la Hacienda Pública y la Seguridad Social…*, p. 317.

[27] C. Martínez-Buján Pérez, *Los delitos contra la Hacienda Pública y la Seguridad Social*, Tecnos, Madrid 1995, p. 45; I. Ayala Gómez, *Los delitos contra la Hacienda Pública…*, p. 117.

sibility, and the administration's task is to control, check and verify. That is why, hiding or simulating activities that are subject to taxation and its amount, and conduct posing a threat of causing a consequence, regardless of a potential error on the part of the aggrieved are banned.[28]

In my opinion, a failure to fulfil a formal obligation is critical to the essence of an offence and deception; if a tax return is proper and there is a lack of payment without hiding due amounts, the condition of fraud is not met.[29]

Deception does not take place, either, in case data are accurate and there are differences in calculations or operations connected with the calculation of tax, which can even be justified by a different legal assessment of the tax regulations applied. Obviously, difficulties with proper comprehension of tax regulations may lead to an error; nevertheless, also in this case there are no grounds for recognising deception. As it is rightly stated: "There are no secrets in arithmetic operations or the application of regulations. They are either correct or erroneous; in the latter case, they are corrected by an authorised entity, i.e. the tax administration with no need to apply to a judge to do that".[30]

As far as the object-related aspect is concerned, it is an offence the consequence of which consists in a failure to determine a tax base. Thus, it is necessary to check the criteria for objective attribution of the consequence.[31] As it is rightly noticed, the aim of protection is of transcendent importance. In other words, the objective laid down in Article 305 SCC is not the same as the aim of the offence of a confidence trick. It is highlighted that the provision aims to prevent "as a result of the breach of duty by a taxpayer, a competent tax administration body from being obliged to perform controlling activities and examining data, the provision of which is clearly laid down in statute and the lack of which in a tax return makes the body thoroughly calculate the due tax amount".[32]

4. AIDING AND ABETTING

Only someone who deceives the State Treasury, i.e. only someone who can legally and factually act this way, may be a perpetrator of a tax offence.[33] Namely, it concerns a tax debtor (a taxpayer or his representative) and other entities that are subject to taxation (Article 35 para. 2 TA). It is an individual offence,[34] which may only

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[28] I. Ayala Gómez, *Los delitos contra la Hacienda Pública*…, p. 121 ff.

[29] E. Mestre Delgado, *Delitos contra la Hacienda Pública*…, p. 554.

[30] F. Pérez Royo, *Delito fiscal y ocultación*…, p. 227 ff.

[31] I. Ayala Gómez, *Los delitos contra la Hacienda Pública*…, p. 110. He is right to state that the limitation of conduct capable of violating the object of protection in case of this offence is part of the object-related aspect.

[32] C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 627.

[33] J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública*…, p. 177 ff.

[34] I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Todo sobre el fraude tributario*…, p. 39; J. Bustos Ramírez, *Bien jurídico y tipificación*…, p. 33; C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 636; M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública*…, p. 81; F. Muñoz Conde, *Derecho Penal, Parte Especial*,

be committed by someone who has special features or conditions, in this case an obligatory financial legal-tax relation.[35]

Therefore, only persons enumerated in Article 35 and the following TA may be perpetrators of the offence. They include:

– A taxpayer, i.e. an entity who is involved in an activity consisting in taxation (Article 36 para. 2 TA). The main person obliged by the legal-tax relation is one who owes financial and formal duties laid down in tax law. A taxpayer is a person who owes a particular stipulated tax obligation. It is someone who obtains income or benefits in case of direct taxes (personal income tax – IRPF; corporate income tax – IS; non-residents' income tax – IRNR). An individual entity may be a perpetrator of the offence of tax fraud. In case of indirect taxes, namely VAT, the issue is more complicated. It is a tax on consumption. Nevertheless, a consumer is not a taxpayer. It is someone who provides goods or services, although the tax cost in covered by a consumer. According to the doctrine, the situation results from the taxation mechanism, which requires that taxpayers settle VAT in advance, before they collect the amount from consumers.[36] Thus, it concerns a taxpayer. However, it should be taken into account that the concepts of a taxpayer and the person subject to a tax obligation are normative in nature and are laid down in tax law with special regulations.[37]
– A taxpayer's substitute, i.e. a person who, in accordance with the provisions of statute and instead of a taxpayer is obliged to fulfil the main tax obligation (Article 36 para. 3 TA). A taxpayer must perform activities that are subject to taxation and is the first person obliged to directly fulfil his tax duties. A substitute appears in connection with special taxes within a more complex legal relation existing between three entities: the administration, a taxpayer (who is substituted) and his substitute. Two conditions are required: firstly, a taxpayer must perform an activity subject to taxation; and secondly, his substitute must be legally obliged to pay the tax directly to the State Treasury. His obligation to pay abrogates the taxpayer's obligation, provided it has been fulfilled. The institution of a substitute lets the administration enable or improve managing some types of taxes and collect them this way. The substitute must be distinguished

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21st edition, Tirant lo Blanch, Valencia 2017, p. 901; L. Morillas Cueva, *Delitos contra la Hacienda Pública y la Seguridad Social*, [in:] L. Morillas Cueva (coord.), *Sistema de Derecho Penal Español. Parte Especial*, 2nd edition, Dykinson, Madrid 2016, p. 805; J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública…*, p. 18.

[35] A considerable part of the doctrine assumes that it is a common offence. See J. Boix Reig and J. Mira Benavent, *Los delitos contra la Hacienda Pública…*, p. 51; J.L. Serrano González de Murillo and E. Cortés Bechiarelli, *Delitos contra la Hacienda Pública*, Madrid 2002, p. 21.

[36] L.M. Alonso González, *Fraude y delito fiscal en el IVA: Fraude carrusel, truchas y otras tramas*, Marcial Pons, Madrid 2008, p. 112 ff.

[37] What can draw attention is the fact that in some cases the provisions change a taxpayer and thus result in errors concerning who may be liable for a tax offence. For example, this happens in case of the reverse of a taxpayer who is involved in trade in scrap metal, Article 84 para. 1(2) Act on VAT, in accordance with which generally a seller is a taxpayer; however, he does not pay tax but its payment is transferred onto the buyer. For more, see V.A. García Moreno, *Inversión del sujeto pasivo en el IVA y delito fiscal*, Carta Tributaria No. 24, 2017, p. 94 ff.

from the taxpayer because his obligation is independent of the person whom he charges the advance payment and independent of the main tax obligation.

– Other persons subject to tax obligations can also be perpetrators (Article 35 para. 2 TA). It concerns a taxpayer who is obliged to deduct and pay, e.g. advance personal income tax, IRPF, to the tax administration (Article 37 para. 1 TA, Article 98 Act on personal income tax, etc.).[38] His obligation is independent of a taxpayer or his substitute. Also successors (Article 39 TA) and beneficiaries in case of tax exemptions, returns or breaks who are not taxpayers, etc., may be perpetrators.

Legal and voluntary representatives (Articles 45 and 46 TA) may be perpetrators because they act on behalf of other persons (Article 31 SCC); this legal form places them directly in the position of a warrantor of a legally protected interest.[39] Parents who manage their children's property or a spouse managing the property of the other spouse may be direct perpetrators of tax fraud. Persons holding managerial positions acting on behalf of a company can be liable for this offence. Such a solution prevents them from being unpunished when a representative is used as "an intentionally unclassified tool".[40] Other solutions would lead to a lack of possibility of prosecuting all people involved in the offence. Due to the fact that it concerns an individual offence, Article 31 SCC is applied, provided the conditions are met, to persons who in general do not have special features. It is not an obligation *intuitu personae* and, that is why, it is also imposed on representatives, provided the conditions laid down in the General Tax Act (Articles 45 and 46) and in Criminal Code (Articles 31 and 305 para. 1) are met.

4.1. ISSUES CONCERNING PERPETRATION

As it has been indicated above, it is an individual offence[41] the perpetrators of which may be persons having a legal-tax relation with the tax administration, i.e. persons who have a tax obligation. Nevertheless, Article 31 SCC, based on the fact of acting on behalf of another person, allows attributing criminal liability to entities with no characteristic features if they act in a prohibited way. If a person having tax obligations appoints his tax advisor to represent him, the representative may be criminally liable pursuant to Article 31 SCC because the tax obligation and the guarantor's obligation have been transferred to him. The person originally obliged may also be liable as a co-perpetrator or an accomplice depending on his actual participation in the course of activities. It is assumed in the doctrine that indirect

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[38] The characteristic of a payer of advances as a substitute is a topic of debate in the tax doctrine. C. García Novoa, *Estudios de Derecho Tributario Penal y Sancionador*, Centro Mexicano de Estudios en lo Penal Tributario, Mexico 2016, p. 107 ff.

[39] J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública*…, p. 209 ff; C. Martínez-Buján Pérez, *Autoría y participación en el delito de defraudación tributaria*, [in:] M. Bajo Fernández (dir.), *Política fiscal y delitos contra la Hacienda Pública*, Ramón Areces, Madrid 2007, pp. 73, 77 ff.

[40] C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 637 ff.

[41] J. Bustos Ramírez, *Bien jurídico y tipificación*…, p. 33 ff.

tax fraud perpetration takes place when a person with specific characteristic features uses another person who is not subject to liability as a tool.[42]

There is a possibility of paying personal income tax based on the provisions regulating joint taxation of family members. In accordance with tax law, all family members shall "be subject to tax law jointly and based on the principle of solidarity with no detriment to the right to divide the tax between them based on their income share" (Article 84 para. 6 Act on personal income tax). Thus, it is necessary to take into consideration situations when persons signing a joint tax return concerning two or more sources of income create one legal-tax relation, their income is added and may exceed 120,000 euros, which may be subject to fraud regulations. In literature, based on the principle of individual liability, there is an opinion that, regardless of the joint tax return, the income should be attributed to individual members of the family in order to reach that amount in the same way as in case of individual tax returns. Obviously, it is possible to prosecute other members of the family as accomplices.[43]

In case individual shares reach an amount that is subject to prosecution of one or more family members, it is necessary to establish that each of them matches all conditions for the recognition of an offence (classified, unlawful and faulty conduct). In other words, if one family member acts on behalf of others, and most often a spouse acts on behalf of the other one, it is necessary to establish that each of them matches all subject- and object-related elements of an offence, especially the lack of an error concerning the tax obligation.

4.2. ISSUES CONCERNING PARTICIPATION

The feature of an individual offence does not exclude the possibility of adopting other forms of participation in this offence: abettors, necessary co-perpetrators and accomplices if they deliberately perform activities that are prohibited by law. It means, in accordance with the principle of limited accessoriness, that a perpetrator commits a classified and unlawful act. In accordance with Article 305 para. 6 SCC, "judges and tribunals can impose one or two levels lower penalties on the obliged taxpayer (…). The above is applicable to other participants of an offence, other than the obliged taxpayer or a perpetrator if he actively cooperates in obtaining evidence in order to identify or arrest other persons liable, in order to fully explain criminal acts, or in order to check the property of the taxpayer or other persons involved in the offence". On the other hand, Article 65 para. 3 SCC is applicable in such cases and it stipulates that "if an abettor or co-perpetrator does not have conditions, qualifications or personal relations that substantiate a perpetrator's guilt, judges or tribunals may impose a penalty one level lower than the statutory one for a given offence".

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[42] F. Muñoz Conde, *Problemas de autoría y participación en el derecho penal económico, o ¿cómo imputar a título de autores a las personas que, sin realizar acciones ejecutivas, deciden la realización de un delito en el ámbito de la delincuencia económica empresarial?*, Revista Penal No. 9, 2002, p. 95.

[43] P. Chico de la Cámara, *El delito de defraudación tributaria tras la reforma del Código Penal por LO 5/2010. Reflexiones críticas y propuestas de lege ferenda*, Aranzadi, Navarre 2012, p. 65; F.J. Torres Gella, *Autoría y otras formas de participación en el delito fiscal*, [in:] *El delito fiscal*, Valencia 2009, p. 134 ff.

4.3. ABETTING

Abetting consists in direct incitement to an offence, i.e. deliberate persuasion to perform an act that consists in classified, unlawful and deliberate activity; in this case to tax fraud.[44] It is possible to abet in an offence that is not committed by the abetted person because this is an individual offence. An abettor's liability is the same as a perpetrator's (Article 28 SCC).

4.4. NECESSARY CO-PERPETRATION VS. AIDING

As far as necessary co-perpetrators are concerned, their acts should have impact on consequences because their share in an offence commission is technical or intellectual in nature, however, they have no power over the act. A co-perpetrator must also implement subject-related elements.

Accomplices are persons whose share in an offence commission is smaller. Aiding is possible in case of acts leading to an effect. However, it is less important or determining a perpetrator's conduct. The borderline between the significance of a co-perpetrator's and an accomplice's act is unclear.

4.5. LEGAL COUNSELS, TAX ADVISORS OR ACCOUNTANTS

The situation of advisors in criminal law and social insurance is especially significant.[45] They perform activities necessary for most taxpayers: they use their specialist knowledge to establish and apply the best taxation options, they advise in the field of tax returns, bookkeeping, etc. In general, they cannot be treated as tax fraud perpetrators because it is an individual offence that is committed by a perpetrator being subject to a financial legal-tax relation. They can be liable as perpetrators only if they legally or voluntarily represent a taxpayer because only then the principle of acting on someone's behalf can be applied to them (Article 31 SCC).

Legal counsels or accountants may make a substantial technical contribution to the commission of an offence. If they cannot be treated as perpetrators, they can be recognised to be participants, most often co-perpetrators. Their activities can constitute a secondary attempt at a legally protected interest. The legislator took into account this secondary nature because they are not the guarantors of the object of protection, and stipulated considerably lower penalty because of the lack of "conditions, classification or personal relations substantiating a perpetrator's guilt" (Article 65 para. 3 SCC).

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[44] J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública…*, p. 186 ff.
[45] *Ibid.*, p. 191 ff.

5. DEFRAUDED TAX AMOUNT

In accordance with Article 305 para. 1 SCC, the defrauded amount of unpaid advances on tax or undue tax returns or exemptions should exceed 120,000 euros.

Thus, it is necessary to explain the term "amount". There are different concepts of an amount. In Article 56 TA, there is a total amount resulting from the application of an appropriate tax rate of the amount that is subject to taxation and an amount to be paid that constitutes "the result of deductions of exemptions or other rates laid down in acts regulating each tax". On the other hand, Article 58 TA lays down a concept of a tax debt that "is composed of an amount subject to payment resulting from the main tax obligation or an obligation to pay an advance. (…) Moreover, a tax debt, in a given case, includes: (a) default interest, (b) an extra charge for failure to submit a return timely, (c) extra charges due at the time of execution, (d) legally required extra charges dependent on the tax base or amounts for the benefit of the State Treasury or other public entities".

Article 305 para. 1 SCC deals with a tax amount in its precise meaning (Article 56 TA).[46] Most additional charges laid down in Article 58 para. 2 TA do not compose a defrauded amount because of their compensating nature. Charges laid down in Article 58 para. 2(d) TA, i.e. "legally required extra charges for the benefit of the State Treasury or other public entities" are disputable. Some authors speak about "an amount of complex creation", including additional charges for the benefit of the State Treasury, which is the paid amount.[47] In my opinion, the representatives of the doctrine who assume that it is necessary to take into account a strict tax amount without extra charges and elements laid down in Article 58 para. 2 TA are correct.[48] The provision distinguishes periodical taxes or periodical tax returns. On the one hand, there are periodical taxes such as the personal income tax, corporate tax and real estate tax. They are usually calculated annually. They also include taxes calculated instantly but documented periodically, such as VAT, and they are classified within the amounts referred to in Article 305 para. 2(a) SCC.

Taxes instantly documented in a form of a return include a civil law transactions tax or an inheritance and donation tax, and they are referred to in Article 305 para. 2(b) SCC. In case of them, every act is independent and the defrauded amount should individually exceed 120,000 euros as laid down in Article 305 para. 1 SCC. In case of fraud committed a few times in the same tax year, which individually exceeds the above-mentioned amount, there is a concurrence of offences against the State Treasury.

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[46] J.M. Martín Queralt at al., *Curso de Derecho Financiero y Tributario*…, p. 602.

[47] C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 634.

[48] P. Chico de la Cámara, *El delito de defraudación*…, p. 62; I.J. Méndez Cortegano, *La cuantía defraudada*, [in:] *El delito fiscal*, Valencia 2009, p. 127; F. Morales Prats, *De los delitos contra la Hacienda Pública*…, p. 1053; J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública*…, p. 23.

5.1. ADMINISTRATIVE CALCULATION OF DUE AMOUNT AND ITS JUDICIAL DETERMINATION

Administrative tax calculation does not constitute a reason for initiating proceedings concerning tax fraud, although the calculation may be done by a tax inspection in accordance with the legal provision in force. Criminal law tribunals should determine the defrauded amount and decide whether it exceeds the amount laid down in statute.[49] The defrauded amount is determined based on tax legislation and always in accordance with the rules of evidence assessment typical of the criminal procedure.

This means that it is possible to use the assistance of tax administration inspectors and technicians as experts but they are experts of one party (prosecution) and not official experts. One cannot approve of an opinion that only tax interpretation and techniques criteria are applied.[50] If it were so, it would be necessary to apply the rules of direct tax determination, which may be one of many traces in criminal law. Articles 49 to 53 TA stipulate different methods of determining tax bases used to calculate tax (direct, objective and indirect determination). It is rightly stated in literature that tax regulations are evidence-related and not substantive and, that is why, they do not bind a criminal court judge who should take into account evidence-related criteria in criminal proceedings.[51]

In accordance with an act regulating each type of tax, direct or objective determination, which is also basic for the purpose of criminal proceedings, prevails. The method of indirect calculation (Article 53 TA) is subsidiary in nature and is applied "when tax administration does not have data necessary to establish a total tax base resulting from: (a) the lack of a tax return or submission of incomplete or inaccurate returns; (b) resistance, obstruction, excuses or refusal response to the activities of the inspection; (c) significant failure to fulfil bookkeeping or registering duties; (d) loss of or damage to accounting books and registers or documents confirming operations, even in case of force majeure". In such cases, applying the criteria of tax law and in the face of the lack of the obliged entity's cooperation, the due amount is determined in accordance with the criteria or presumptions that are taken into account when dealing with other entities in a similar situation. The guidelines for determining an amount resulting from Article 53 para. 2 TA are as follows: "The base of income shall be determined with the use of any of the measures or a few of them simultaneously: (a) the application of data and their available history; (b) the use of the elements that indirectly confirm the existence of property and income as well as receipts, sales, costs and efficiency that are typical of the given sector with the adjustment to the size of business or a family to be compared for the purpose of tax calculation; (c) the assessment of the size, indicators, modules or

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[49] E. Sola Reche, *Delitos contra la Hacienda Pública y contra la Seguridad Social*, [in:] C.M. Romeo Casabona, E. Sola Reche, M.Á. Boldova Pasamar (coord.), *Derecho Penal, Parte Especial*, Comares, Grenada 2016, p. 475; J.M. Martín Queralt et al., *Curso de Derecho Financiero y Tributario*…, p. 601.

[50] J. Zornoza Pérez, *Levantamiento del velo y determinación de la cuota en el delito de defraudación tributaria*, [in:] *Derecho Penal de la Empresa*, Universidad Pública de Navarra, Pamplona 2002, p. 224.

[51] J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública*…, p. 25.

data occurring in the adequate tax obligations in accordance with the data or history of similar or analogous cases". Pursuant to those principles, it is determined what amount of tax is hidden from the State Treasury.

The criteria concerning tax fraud should be applied with maximum carefulness and in compliance with the rules of providing evidence in criminal proceedings.[52] Indirect determination may be taken into account in the context of a proceeding system based on circumstantial evidence, i.e. as indirect evidence; conclusions drawn by the tax administration may be challenged by the parties in the course of a trial.[53]

Circumstantial evidence cannot be solitary but should be diversified. The basic factual state should be completely substantiated with the use of direct evidence and cannot negate the rules based on logic, sciences and general experience.

The defrauded amount is significant for the recognition of an offence under Article 305 para. 1 SCC. It consists of the tax amount (Article 56 and 58 para. 1 TA) and does not include default interest and additional charges (Article 58 TA) or any other extra fines or civil liabilities.[54] Article 305 para. 2 SCC distinguishes periodical taxes, reported periodically and non-periodical taxes. Periodical taxes are those that are divided into parts based on tax periods, e.g. personal income tax. Taxes reported periodically are those that are instantly calculated, i.e. are not based on tax periods but become periodical because they are reported with the use of periodical tax returns, e.g. VAT. In case of taxes, fraud may occur in any tax period or concern a tax return. If periods are shorter than twelve months, the defrauded amount refers to a calendar year. In such a case, periodical taxes or returns are accumulated (VAT, personal income tax, etc.) and calculated for the whole year. However, Article 305 para. 2 SCC stipulates that accumulation is not admissible in case of: (1) various taxes in the same tax period; (2) the same tax in various tax periods; and (3) various taxes in various tax periods.

There are also taxes that are not periodical and not reported periodically, i.e. calculated instantly. The activity that is subject to taxation finishes the moment it is performed, e.g. in case of tax on property transfer or inheritance tax.[55] In such cases "the amount concerns each of the titles for tax calculation". In the same way as in case of periodical taxes or taxes reported periodically, they cannot be accumulated with other defrauded amounts concerning other tax bases.[56]

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[52] I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Todo sobre el fraude*…, p. 103 ff. As F. Pérez Royo indicates, "substantive criteria for indirect determination laid down in General Tax Act and provisions resulting from it are not compatible with criminal procedure requirements"; F. Pérez Royo, *El delito fiscal tras veinte años de su implantación*, Civitas. Revista española de Derecho Financiero No. 100, 1998, p. 585. Also on this issue, see J.M. Martín Queralt et al., *Curso de Derecho Financiero y Tributario*…, p. 604 ff.

[53] I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Estimación indirecta y delito fiscal*, Anuario de Derecho Penal y Ciencias Penales, 1990, p. 793 ff; A. Castro Moreno, *Elusiones fiscales atípicas*…, p. 128; C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 636.

[54] Thus, it is not correct to include the latter amounts, according to M. Acale Sánchez and G. González Agudelo, *Delitos contra la Hacienda Pública y la Seguridad Social*…, p. 203.

[55] F. Pérez Royo, *Los delitos y las infracciones*…, p. 137.

[56] *Ibid*., p. 140 ff.

5.2. ILLEGAL INCREMENT IN PROPERTY

The classification of income that has not been included in tax returns causes serious evidential problems. The inspection often finds property that does not match the amounts reported in tax returns, which means that there are clear signs of wealth that exceeds the reported level of income. It can result from illegal transactions that generated profits, the so-called "black money".[57] It can be property generated in periods that are subject to limitation or in periods that are still subject to administrative or criminal liability. In the latter case concerning periodical taxes, there is a problem how to attribute the increase in property to a particular tax period. If it is divided into separate periods, the amount required for criminal liability under Article 305 para. 1 SCC may not be reached, and if it is attributed to a particular period, it is more probable it will exceed the amount required. The process of comparing the increase in property and tax periods is a troublesome and difficult task. The concept of illegal increment in property was coined after the Civil War with the appearance of great fortunes generated from illegal transactions and prohibited activities such as the black market as well as wealth obtained from construction industry. The conception is defined as "the presumption of hidden income from some expenditures or elements of property and processing them in the tax system that is quasi-legitimising".[58]

In case of evident increase in property that raises tax debt and reaches the level that is subject to criminal liability, it is necessary to thoroughly analyse the mechanism determined in Article 39 para. 1 Act on income tax. In accordance with this provision, the increase is attributed to the tax period when the increase was detected, unless evidence for a different situation is provided. It is noticed in literature that the system is based on the following presumptions: (a) it is presumed that there is hidden income after the detection of undeclared property or property not corresponding to the declared one; (b) it is attributed to the period when it was detected.

In literature, there are two ways of interpreting the possibility of excluding this income from a defrauded amount.[59]

According to the first one, unfounded income must be included in a defrauded amount by virtue of law. The concept of income is determined in such a way that it is not possible to challenge it based on the criminal law. The supporters of this opinion believe that it is not incompatible with the presumption of innocence and it does not concern a presumption or legal fiction: it concerns "specific determination of a legal concept of income defined in the Act on taxation".[60]

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[57] F. Pérez Royo, *El delito fiscal tras veinte años de su implantación…*, p. 578.

[58] P. Herrera Molina and P. Chico de la Cámara, *Los incrementos no justificados de patrimonio: componente imponible presunto del Impuesto sobre la Renta*, Civitas. Revista española de Derecho Financiero No. 81, 1994, p. 16 ff.

[59] S. Bacigalupo Saggese, *Ganancias ilícitas y Derecho Penal*, Madrid 2002, p. 44 ff.

[60] V. Hernández Martín, *Problemas procesales del delito contra la Hacienda Pública*, Crónica Tributaria No. 60, 1989, p. 103; D. Marín-Barnuevo Fabo and J. Zornoza Pérez, *Los incrementos no justificados de patrimonio y el régimen sancionador tributario*, Crónica Tributaria No. 71, 1994, p. 85 ff.

According to the other opinion, there is the *iuris tantum* presumption, which should be of fundamental importance at the evidential stage. This relative presumption exempts the tax administration from looking for further evidence and reverses the burden of proof. It concerns a dual presumption because after successful substantiation that there is undeclared or unfounded income, e.g. detection of hidden income (basic act), it is presumed that the hidden income is subject to taxation (act – consequence) and the income is attributed to the tax year when it was detected (time presumption).[61] Due to the time presumption, if Article 39 para. 1 Act on personal income tax were applicable to the offence of tax fraud, all income would be attributed to the tax period when they were detected "unless a taxpayer sufficiently proves he had been the owner of property or rights before the date of the limitation period". The reversed burden of proof does not allow attribution of all revealed income to every tax period that is not time-barred. There are two situations:

– what has been revealed as belonging to time-barred periods cannot be attributed to an entity's income for the purposes of personal income tax or corporate income tax, but there may be property tax fraud;
– total attribution of non-time-barred amounts to a period when the property was revealed even when the income was obtained in various non-time-barred periods; it is attributed jointly to the tax period when it was detected.

Tax legislation created challengeable presumptions, e.g. in case of time-barred income, and non-challengeable ones, e.g. a uniform tax period for income attribution. In my opinion, none of the above presumptions can be approved of automatically because legal presumptions against the accused are not applicable. They cannot be extrapolated because they would be clearly against the constitutional guarantee of the presumption of innocence.[62] The attribution of all income to the same period is especially critical for the features of the offence of tax fraud. As it is rightly stated in literature: "The attribution or concentration of the total unfounded value in one period, having impact on the level of the defrauded amount in a determined period, takes place by virtue of law as a result of a construction that cannot be called differently than a legal presumption, which is inadmissible in criminal proceedings". Unfounded increase in property is a common evidentiary simplification the legislator gave the tax administration but it cannot be applied in any sanctioning proceedings.[63] In my opinion, unfounded increase in property might be treated as circumstantial evidence within other evidence but it is a prosecutor's task to prove what income and what increase concerns each tax period.

The issue was also the subject matter of the Constitutional Court judgement 87/2001 of 2 April. It stated that the application of those tax presumptions does not mean the reverse of the burden of proof and does not have impact on the presumption of innocence. The critical analysis of the judgement emphasizes "the ambiguity of its argumentation" and rightly states that: "The error is in the recognition of the legal nature of unfounded increase in property as insignificant. If it is assumed that

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[61] C. García Novoa, *Consecuencias penales de los incrementos no justificados de patrimonio*, [in:] A.C. Altamirano, R.M. Rubinska (coord.), *Derecho Penal Tributario*, Vol. 1, Buenos Aires 2008, p. 350. S. Bacigalupo Saggese, *Ganancias ilícitas*..., p. 53 ff.

[62] F. Morales Prats, *De los delitos contra la Hacienda Pública*…, p. 1059.

[63] F. Pérez Royo, *El delito fiscal tras veinte años de su implantación*…, p. 582 ff.

it constitutes a legal presumption of obtaining income and the criminal provision refers to the Act on taxation in order to determine the defrauded amount, it is obvious that it leads to the reverse of the burden of proof: it is a taxpayer who must prove the sources of financing of the elements of property and the moment when it happened in order to avoid taxation of income of unknown source attributed to the period when it was revealed".[64] It is assumed that it is necessary to prove the increase in property and its unfounded tax nature, but the determination of the amount of income and the period when it was obtained is subject to tax law; thus, the principle of the presumption of innocence is not applicable.[65]

I believe that in the face of the lack of other evidence in criminal proceedings, it is not possible to attribute all the money to a tax period when it was revealed based on the lack of a perpetrator's cooperation.

Recently, there has been a tendency for objective treatment of all types of liability (civil, commercial, administrative, tax and even criminal) in order to avoid difficult substantiation of subject-related elements. There are presumptions in a trial that should never be applied to criminal liability.[66] In the area of tax, in order to determine a due amount, indirect determination of a tax base and presumptions applicable to unfounded increase in property are used. Nevertheless, the transfer of the criteria automatically to criminal proceedings means the violation of the principle of the presumption of innocence and the reverse of the burden of proof. A dual presumption takes place and it changes into a dually intolerant one from the point of view of criminal proceedings. It can be assumed that the revealed capital is income that was not subject to taxation but the inclusion of that income in the tax year when it was revealed is, in my opinion, absolutely inadmissible. The principles resulting from the Criminal Code and the Act on criminal procedure should substitute for the criterion in order to decide in which tax period the revealed amounts should be included.[67] The criminal statute lays down its own criteria for placing the defrauded amount (Article 305 para. 2 SCC). The concept of blank penal statute is confused with a kind of "blank cheque" to make the penal one be freely supplemented with tax legislation. Such interpretation makes evidence dynamic but, absolutely, means abuse of citizens' interests if it has penal consequences. It constitutes the breach of penal guarantees typical of the rule of law against the passiveness of some judicial entities, which should be a subject matter of a substantial critical reflection.

Eventually, presumptions in tax regulations have the value of circumstantial evidence and should be assessed as this type of evidence.[68] It is inadmissible to adopt, regardless of the principles of carefulness, a rule laid down in Article 39 para. 1 Act on personal income tax that attributes income to the period when it was revealed even if the presumptions are unchallengeable. It is rightly stated in the doctrine that

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64 P. Herrera Molina, *STC 87/2001, de 2 de abril: incrementos patrimoniales no justificados y delito fiscal*, Crónica Tributaria No. 105, 2002, p. 168.

65 *Ibid*.

66 F. Morales Prats, *De los delitos contra la Hacienda Pública*…, p. 1061.

67 I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Todo sobre el fraude*…, p. 89 ff.

68 M. Bajo Fernández and S. Bacigalupo Saggese, *Derecho penal económico*, Madrid 2010.

based on the presumption of innocence and the principle of accusatorial procedure, the administration should be required "not only to substantiate the property but also to prove the source of income and to place it in a particular tax year, to confirm that income is subject to taxation and that there is an intention to defraud if this conclusion can be drawn when there is concurrence of circumstantial evidence".[69] It is also rightly assumed that the mechanism of a legal presumption "does not have direct efficiency among judges and criminal tribunals because of the principle of the presumption of innocence and free assessment of evidence". A judge or a tribunal should apply standard conditions for conviction based on circumstantial evidence.[70]

The representatives of the doctrine warn that a tax presumption may be in favour of the accused because if the amounts exceed the limit every year, he is accused of single fraud instead of three or four offences, which might be attributed to him.[71] In my opinion, those tax-related evidential principles are not applicable in criminal law, regardless of whether they are in favour of the accused or not, because they are established in the context of tax norms and are not substantive but only procedural in nature.

5.3. ILLEGAL INCOME: PROPERTY OBTAINED FROM A CRIMINAL ACT

Criminal activity often takes the form of real business activity and therefore it generates income. As a result, there is an increase in property that can be recognised as income, i.e. it can be interpreted within the category of activities that are subject to taxation, for example, the purchase and sale of narcotic drugs. One can even consider the application of VAT to this activity. One can also reveal black money from corruption of officers or an offence of money laundering, which can constitute amounts exceeding the minimum limits laid down for tax fraud. A question is raised in all those cases whether illegal income obtained from crime should be subject to taxation. In case of a positive answer, it should be explained whether they might constitute tax fraud.[72]

In case of indirect tax, criminal activities are not subject to VAT or customs duty in any of the EU Member States because prohibited activities are not taxed.[73] The problem occurs in case of direct taxes, namely personal and corporate income tax (personal income tax, corporate income tax and non-resident income tax). The taxes are established in order to contribute to sustain public expenditures and absolutely cannot be used as sanctions. It is believed that: "The use of tax for sanctioning purposes may result from a hidden sanction. A hidden sanction is a kind of an atypical sanction, which, on the other hand, is classified as an abnormal sanction".[74]

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[69] C. García Novoa, *Estudios de Derecho Tributario*…, p. 129.

[70] P. Herrera Molina and P. Chico de la Cámara, *Los incrementos no justificados de patrimonio*…, p. 46.

[71] A. Castro Moreno, *Elusiones fiscales atípicas*…, p. 129.

[72] C. García Novoa, *Estudios de Derecho Tributario*…, p. 309.

[73] P. Chico de la Cámara, *El delito de defraudación*…, p. 98; M.T. Soler Roch, *La tributación de las actividades ilícitas*, Civitas. Revista española de Derecho Financiero No. 85, 1995, p. 13.

[74] C. García Novoa, *Estudios de Derecho Tributario*…, p. 310.

5.3.1. ARGUMENTS FOR TAXATION AND CRIMINAL LIABILITY

It is assumed in literature that there is not tax liability and a failure to fulfil tax obligations may be prosecuted in accordance with tax law because there is nothing that can abolish taxes and the application of tax statutes.[75] If the substantive and quantity conditions are met, there is also criminal liability. A lack of response from criminal law would infringe many principles, even those constitutional, mainly the principle of equality and tax capacity.

It is believed that letting deception stay unpunished is in conflict with the principle of equality. The principle would be violated because an entity fulfilling its tax obligations honestly would be in a worse situation than a fraudster.[76] In the tax doctrine, it is assumed that the Spanish statute does not lay down regulations on this income tax clearly but, based on the principle of neutrality, which constitutes our system, this type of tax is not impossible. If it were so, people acting illegally would become privileged, which is in conflict with the principle of equality.[77] In the same spirit, the Supreme Court also decided that the fact that income originates from crime could not result in an advantage or benefit exempt from tax or immunity. Moreover, it would also violate the principle of tax capacity because a perpetrator efficiently increases his wealth and violates the obligation to pay tax on that wealth.[78]

It is necessary to assess other arguments for criminalisation of such conduct. Its criminalisation may infringe the right not to make self-incriminating statements (Article 24 para. 2 Spanish Constitution), however, in the doctrine, it is believed that "the constitutional imperative to contribute to sustain public expenditures in accordance with economic capacity supports the theory of taxation of illegal activities as advantageous. However, the evidence of the activity subject to taxation should be obtained with the use of other methods than explanation or information provided by a perpetrator".[79]

Those who are for this point of view add other arguments for the advantage of obligatory taxation and criminal liability in case of fraud. It is assumed that in such cases the *non bis in idem* principle is not violated because these are different acts and different objects of protection. To support this opinion, it is stated that there is an international tendency confirmed in the regulations of comparative law, because some countries lay down taxation of illegal income, with fewer or more limitations, which makes simultaneous tax and criminal liability evident in their

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[75] C. Galarza, *La tributación de los actos ilícitos*, Cizur Menor 2005, p. 260.

[76] C. García Novoa, *Estudios de Derecho Tributario*…, p. 317 ff. It is an argument used in the United States: M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 10.

[77] C. Galarza, *La tributación de los actos ilícitos*…, p. 261 ff. Some representatives of the doctrine expressed a contrary opinion, e.g. A. Castro Moreno, *Elusiones fiscales atípicas*…, p. 134. Also differently, although recognising it as an attractive argument: A. Manjón Cabeza-Olmeda, *Ganancias criminales y ganancias no declaradas declaradas (el desbordamiento del delito fiscal y del blanqueo)*, [in:] *Libro homenaje al profesor Luis Rodríguez Ramos*, Tirant lo Blanch, Valencia 2013, p. 687.

[78] C. Galarza, *La tributación de los actos ilícitos*…, p. 261 ff; M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 19.

[79] M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 31.

territories. Anyway, even in those countries the issue is not free from considerable controversies.[80] In some systems, tax on illegal income requires that the product of original crime should not be lost or subject to forfeiture during the first trial. In a given case, criminal liability results from it.[81]

5.3.2. ARGUMENTS AGAINST PENALISATION

It is assumed that there is an exemption from the obligation to declare illegal income because the basic right not to self-incriminate would constitute the reason for justifying a failure to enforce law concerning tax obligations and thus avoiding criminal liability. In the doctrine, it is assumed that the obligation to declare illegal income is tantamount to the obligation to reveal a basic offence. Therefore, the use of data obtained as a result of tax inspection cannot be then referred to for sanctioning or penal purposes because it would breach the right to silence (Article 24 para. 2 Spanish Constitution).[82]

Other arguments concern ethical issues because collecting taxes would mean that the state acts as an accomplice and it would be immoral. It is believed that the state cannot accept benefits or profits from crime in the form of taxes because that would change it into a dealer in stolen property, a co-perpetrator or even a launderer of money obtained from crime.[83] If wealth originating from illegal sources were taxed, the amount after the tax deduction would become legal money in the hands of a criminal.[84] Moreover, there is no legal title. It is directly connected with the criterion of the unity of the legal system where there is no room for contradictions and where illegal acts do not generate legal consequences other than sanctions, in this case penal sanctions imposed on perpetrators.[85] From this point of view, a perpetrator has no right to dispose of his property obtained illegally because this benefit is not part of a criminal's property for the reason of an illegal way of acquiring property.[86] As a result, there is no obligation to tax an activity that cannot be subject to a contract.

It is indicated that there is an evident lack of legal-tax relation because this relation occurs only based on legal activities.[87] It is also stated that there is a lack of economic benefits. If there is a measure in the form of forfeiture or loss redress,

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[80] It is so, e.g. in Germany and Italy: M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 11 ff.

[81] On the situation in the United States, Germany and Italy, see S. Bacigalupo Saggese, *Ganancias ilícitas*…, p. 8 ff.

[82] *Ibid*., p. 25.

[83] *Ibid*., p. 22; M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública*…, p. 68 ff.

[84] R. Acquaroli, *La fiscalidad de los sobornos*, [in:] L.A. Arroyo Zapatero, A. Nieto Martín (coord.), *Fraude y corrupción en el Derecho penal económico europeo*, Cuenca 2006, p. 345.

[85] M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 17.

[86] A. Castro Moreno, *Elusiones fiscales atípicas*…, p. 137 ff; A. Manjón-Cabeza Olmeda, *Ganancias criminales y ganancias no declaradas*…, p. 684.

[87] S. Bacigalupo Saggese, *Ganancias ilícitas*…, p. 29.

there is an exemption of tax subordination of profits from unlawful conduct and one cannot speak about criminal liability for tax fraud. However, if there are economic benefits and the loss is not redressed, there is fraud.[88]

5.3.3. AUTHOR'S OWN STANCE

There is a very important problem that has technical and practical connotations. At first sight, it seems the requirement that a drug dealer pay taxes on profits of income obtained from his criminal activity is an excessive penalty. Apart from this seemingly simple solution, there are other examples, which raise many doubts. Let us imagine a big scale real estate swindle that generates enormous economic profits. Can a company involved in dealing in illegal property avoid taxes? It is also necessary to consider operations that are only partially criminal, in which most activities are legal. In such a case, if the legal part of transactions does not exceed the amount laid down in Article 305 SCC, there is no offence against the State Treasury. But if the legal and illegal income is added, it turns out that the sum exceeds the amount. The condition for the offence against the State Treasury is the legal-tax relation, which results in substantive and formal tax obligations. There should be benefits that shape the tax base used to calculate due tax. Someone who accepts bribes or commits whatever property-related offence (theft, robbery, confidence trick) matches the features or basic elements of a legal-tax relation. Can this illegal property be subject to taxation? The answer would be positive if there were a provision clearly stipulating that illegal income must be taxed. But it is not the case.

In my opinion, it is necessary to negate the offence of tax fraud if the income in question originates from an illegal act.[89] A different solution would have impact on other fundamental rights, namely the right not to self-incriminate.[90] It is assumed that a penalty for an original offence should be imposed on the person who committed it and uses the profits obtained. As a result, the legislator joined the sufficient penalty and additional consequences of each offence causing a loss to the owner of property interests and possibly the State Treasury. Thus, imprisonment, a fine, civil liability and forfeiture imposed for the original offence are legal solutions, which are sufficient.[91] It is not necessary to require anything else but apply legal consequences concerning the commission of an original offence and recognise that those situations are not subject to tax obligations.

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[88] As far as unlawful, but not criminal or illegal, conduct is concerned, such as profits obtained from prostitution, there are tax obligations and one can speak about tax fraud. P. Chico de la Cámara, *El delito de defraudación*…, p. 99; J.A. Choclán Montalvo, *La aplicación práctica del delito fiscal*…, p. 314.

[89] There is a different opinion that the offence takes place when property originating from crime is hidden, F. Muñoz Conde, *Derecho Penal. Parte Especial*…, p. 902.

[90] A. Manjón-Cabeza Olmeda, *Ganancias criminales y ganancias no declaradas*…, p. 687.

[91] Cf. S. Bacigalupo, *Ganancias ilícitas*..., p. 23.

Nevertheless, I believe that tax fraud is possible in case of illegal activity that does not constitute crime, e.g. income obtained from adults' voluntary prostitution, which should be taxed.

6. CONCLUSIONS

Economic crimes in general, and especially those against the State Treasury, are used to adjust the concepts from the theory of crime to modern forms of economic and tax offences. Examining every condition for the offence of tax fraud, one can notice their complexity and the lack of uniform interpretation. The scientific and juridical discussions lead to significant conclusions and progress resulting in the construction of better law. The issues discussed in the article (the concepts of deception, perpetration, participation and the quantity element) are the smallest part of the existing problems. However, they accurately synthesise the conceptual ambiguity, which needs a lot of interpretational efforts to be eliminated.

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THE CRIME OF TAX FRAUD IN SPAIN

Summary

The paper analyses essential features of the crime of tax fraud laid down in Article 305 of the Spanish Criminal Code. The fraud consists in tax evasion or use of undue tax exemptions. The important element of liability for this crime is the legal-tax relation between the perpetrator and the tax administration. The author emphasizes that it is not necessary to deceive the tax administration; it is sufficient not to fulfil the formal duty, which materialises in hiding or disfiguring the tax base, making the determination of tax impossible. The analysis covers also perpetration, co-perpetration, necessary co-perpetration, aiding and abetting, defrauded tax amount, administrative calculation of the due amount and its judicial determination, illegal increment in property in the context of liability for tax fraud, illegal income, as well as the liability of legal counsels, tax advisors or accountants.

Keywords: tax advisors, tax fraud, fiscal penal law, perpetration and aiding

PRZESTĘPSTWO DEFRAUDACJI PODATKOWEJ W HISZPANII

Streszczenie

W artykule została przeprowadzona analiza znamion przestępstwa defraudacji podatkowej stypizowanego w art. 305 hiszpańskiego kodeksu karnego. Defraudacja polega na uchylaniu się m.in. od zapłaty podatków lub nieuprawnionym korzystaniu z ulg podatkowych. Istotną przesłanką odpowiedzialności za to przestępstwo jest pozostawanie sprawcy w stosunku prawnopodatkowym z administracją podatkową. Zdaniem autora dla bytu tego przestępstwa nie jest konieczne wprowadzenie w błąd administracji podatkowej, a wystarczające jest naruszenie obowiązku formalnego, który materializuje się w ukryciu lub defiguracji podstawy opodatkowania, co uniemożliwia określenie kwoty podatku. Przedmiotem analizy w zakresie tego przestępstwa są także sprawstwo, współsprawstwo, współsprawstwo konieczne, podżeganie, pomocnictwo, zdefraudowana kwota podatkowa, administracyjne wyliczenie kwoty i jej określenie sądowe, nieuzasadniony wzrost majątku w kontekście odpowiedzialności za defraudację podatkową, nielegalne dochody, a także odpowiedzialność doradców prawnych, podatkowych lub księgowych.

Słowa kluczowe: doradcy podatkowi, oszustwo podatkowe, prawo karne podatkowe, sprawstwo i pomocnictwo

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