

**An evaluation of the Penal Law Act
No 1882/1990 considering unpaid debts
to the state, during a period
of economic recession**

NADIA CHR. BITHELI

*Attorney at law, Post Graduate Law Degree in Criminal law
(University of Athens, School of Law)*

and

MAGDALINI CHR. BITHELI

*Attorney at law, Master of Laws (LL.M) – Criminal and European Law
(Panteion University of Political and Social Studies)*

Summary: Before attempting a coherent and analytical evaluation of the criminal law Act 1882/1990 for tax offences, it is necessary to state that from the early 90s up until today, the legal framework and the penal approach of the subject matter has been amended many times, mainly in order to assess the enforcement of public law liabilities. Most of the reforms of the regulatory framework took place in 2011, in order to combat, prevent and suppress the scourge of tax evasion, which is claimed to be one of the major causes of the economic recession. However, these reforms have been strongly criticized by many academics of the legal society as particularly rigorous, ineffective and in conflict with the general principles of the Greek Penal Law. Over the last years, there has been a positive approach to rationalize the Penal Law for tax offences, in order to comply with the political, financial and social reality in Greece. Moreover, the failure to pay debts to the State on behalf of the citizen is assessed and addressed as a result and not as a main factor of the economic crisis itself.

According to the Greek national Law, the debt of taxpayers relating

to public law liabilities is a criminal offence, stated in Article 25 of Law No. 1882/1990. Under Article 25 of Law No. 1882/1990, as currently in force, after the amendment of Law No. 4337/2015: “whosoever does not pay to the tax administration, -including public-law legal persons, governmental organizations, public-sector operators-, public law liabilities for a period exceeding four (4) months shall be punished by a term of imprisonment of: A) at least one year, if the total debt from every cause, including interest payments and interest-like charges of any kind until the date the debit note is issued, exceeds the amount of 100.000 Euros”. B) At least three years, if the total debt, according to those stated in A) case above, exceeds the amount of 200.000 Euros. Criminal prosecution is initiated following a request lodged by the head of the tax office, or the audit authorities or the customs office, to the public prosecutor of the district court of their establishment. The application shall be accompanied by the relevant issued debit note including interest payments and interest-like charges of any kind. The offence can remain unpunished, if the amount of money due to public law liabilities has been fully settled at any stage of the trial”.

When referring to public law debts, we mean every type of public law debts, such as taxes including interest payments and interest-like charges of any kind, fines or fees regulated by law etc. The particular amount of debt of public law liabilities, which indicates the incrimination of the specific offence is being regulated by the criminal legislator, in order to be in accordance with the prevailing social and financial conditions as well as other factors, such as the necessity to battle tax evasion and the necessity to relieve congestion in the criminal courts, in the interest of the harmonious functioning of justice.

More specifically, Article 25 of Law No. 1882/1990 (Greek Government Gazette A 43 of 23 March 1990) has been subject to a series of amendments. In its initial form, the penalization of the particular offence, concerned loan debts and tax debts that exceeded the amount of 100.000 Drachmas and generally debts of public law liabilities that exceeded the amount of 300.000 Drachmas. In 2001, under Article 18 par.2 and Article 28 par. 2-4 of Law No. 2948/2001 (Greek Government

Gazette A 242 of 19 October 2001) following the Council Decision of 19 June 2000, Greece entered the euro zone, therefore the amount of debts were adjusted to the new functional currency and the incrimination of the offence concerned loan debts and tax debts that exceeded the amount of 3.000 Euros and debts of public law liabilities in general that exceeded the amount of 6.000 Euros. Moreover, in 2002 there is no longer a distinction between tax debt and public law liabilities and all debts now have “a unitary nature” and a common way in addressing and resolving the issue. Under Article 34 par. 1 of Law No. 3220/2004 (Greek Government Gazette A 15 of 28 January 2004) there is an increase on the amount that indicates the incrimination of the specific offence to debts that exceed the amount of 10.000 Euros. The Legislator was “forced” to proceed with an increase of the amount after assessing the broader economic conditions of the country and its citizens. As an immediate result, public law liabilities that did not exceed the amount of 10.000 Euros, were considered as minor offences, out of penal law.

In 2009 the Greek economy faced a time of profound crisis, which was aggravated following the signature of the first memorandum. Since then, the Greek Legislator began to relate the public law liabilities with the economic recession of the country. Tax evasion is considered as an extremely immoral action against the society. Therefore, new measures to combat tax evasion were affected such as provisions relating to the Court of Auditors that enable it to perform its role more easily and effectively, the expansion of powers of control bodies, the creation of a Financial Public Prosecutor’s Office and the Revenue Police. Moreover administrative and criminal penalties became more severe.

Furthermore, Article 3 of Law No. 3943/2011 amends once again the Article 25 of Law No. 1882/1990 making punishable public debts which exceeded the amount of 5.000 Euros. We have to bear in mind that with this change, there was an inevitable expansion of the boundaries incriminating the particular offence in comparison to the previous legal regime of Law No 3320/2004, which had raised the amount on debts

that exceeded 10.000 Euros. The strictest penal treatment, of those in debt was not exhausted only by reducing the incriminating amount of debt, but was also extended to the very nature of the crime itself.

Tax offences fall into the category of 'instant' crimes under article 17 of Greek Penal Code, therefore the actual crime is committed four months after the payment deadline of the debt is due. The legislator of penal Law No 3943/2011, however, shares a different view and opinion. According to his will, tax evasion should become a "constant" crime that falls within the scope of flagrante delicto. The procedure is set out in article 242 of the Code of Penal Procedure. In accordance with article 3 of the Penal Law act No 3943/2011 "the *Crime is being committed four months after the payment deadline of the debt and until the supplementation of time equal to the 1/3 of the limitation period of the crime.*"

Likewise, the amendment of article 3 par.2 of the Penal Law act No 3943/2011 set the minimum sum required in order to convert the sentence of imprisonment into a financial penalty. In particular, it raised the conversion sum from 3 euros per day (applicable at that time) to 20 Euros. This was applied exclusively to tax related crimes and not to other common criminal law offences.

The Explanatory Memorandum that accompanies penal Law No. 3943/2011 is very important as it aids the understanding of those legislative actions. According to the legislator's thoughts, since 2009 tax evasion has considerably expanded in Greece and worldwide by concealing sources of income. Furthermore, tax evasion remains an obstacle to economic and social development, depriving the state of minimum financial resources which have crucial role to the fulfillment of broader public policy objectives in the areas of health, education and welfare. Tax evasion also puts the citizens on an unequal footing, exacerbates the state's fiscal problems, decreases public revenue, negatively affects the State budget, on the back of younger generations. The Greek legislator believes that tax evasion reduces public wealth, while tax avoiders are getting richer. Under these circumstances of global economic crisis and current budgetary problems of the state, tax evasion is strongly considered by the legislator as a cause of State's fi-

nancial insolvency and a negative element of national economy, as a scourge that affects all sectors of society and compromises the financial interests of the Community and the people. For these reasons the battle against tax evasion is of a major political importance and critical the States' budgets. Success in the battle against tax evasion is necessary to achieve the objectives of sustainable growth, employment, competitiveness and social cohesion. According to the legislator's will, these goals could be achieved only if criminal law provisions were more stringent.

Penal Law act No 3943/2011 was criticized mainly for its severity, its disproportionate adverse impact on the people but also as the introduction of flagrante delicto proceedings on tax offenses. There were even judgments of lower criminal courts, which considered this law, in the application of this offense procedure unconstitutional and diametrically opposite to Article 2 and 7 of the Constitution on the protection of human dignity, of the nullum crimen nulla poena sine lege principle, and generally incompatible with the doctrine and principles of criminal law. Besides, both the criminal law and the Criminal Tribunals have been primarily established for protecting the rights of the defendants and not in order to assist the state collect debts.

This legislative failure was ultimately perceived by the Greek legislator, who under art. 20 of Law No 4321/2015 (Government Gazette 32 / 03.21.2015) abolished the flagrante delicto procedure and increased the in criminality limits from 5.000 € in debts to over € 50.000. Up until then, thousands of small debtors had suffered and had been humiliated in public by flagrante delicto arrest and detention and there was once again a congestion of the criminal courts, filled up with minor cases as such and with no substantive results in combating tax evasion.

In the Explanatory Memorandum that accompanies penal Law No. 4321/2015 and in the conscience of the Greek legislature, the concept of economic crisis starts to take a different meaning, by putting things on a more humanitarian basis. The tax increase, the continuous reduction of wages, the explosion of unemployment and the continued reduction of income, according to the legislature of Law No 4321/2015, have been

worsening the economic situation of the citizens and the country. Thus a considerable part of citizens and enterprises are actually unable to meet and satisfy all of their obligations, resulting in the accumulation of uncollected confirmed debt.

Penal Law No 4321/2015 readjusted the boundaries of criminality and eliminated the *in flagrante* procedure. Its main aim was the recovery of the country and its citizens. Moreover, it aimed to restart the economy and the recessionary climate, with the aim of ensuring the operation of enterprises and especially small businesses and the maintenance of self-employed professionals. Likewise, the last amendment of article 25 of Law No. 1882/1990, which took place with Article 8 of law No. 4337/2015 (Government Gazette 129 /17.10.2015) made punishable the public debts which exceeded the amount of 100.000 Euros, instead of 50.000 Euros, relieving congestion in the criminal courts.

Despite the numerous favorable penal reforms, which at a time of global economic crisis, 'humanize' the provisions of criminal tax law, the minimum sum required in order to convert the sentence of imprisonment into a financial penalty remains until today stable, at the high rate of 20 euros per each day of imprisonment. That, in addition to the interest-like charges which as estimated go up to 98% of the sum of the conversion, make it impossible for the majority of the defendants to pay for the conversion, with an immediate effect to end up in prison for state debts and be treated like a common criminal. Another unsatisfied demand of the legal society is the distinction between unintended debtor, ie people who because of over taxation and their low income, are not able to pay the established taxes and in general their public debts and between debtors who have the ability to pay their state debts but they avoid to do so. The distinction between these cases of state debtors would make criminal law more fair and consistent with the principles of criminal law and would satisfy a demand of the Greek society.

BIBLIOGRAPHY

- Papakiriakou, Th., *Penal Law for Tax Offences*, Sakkoulas Publications 2005.
- Dimitrenas, D., *Tax Offences Legal Law*, Library Publications 2011.
- Margaritis, L. & Papakiriakou, Th., 'The penal procedure of tax offences according to the penal law No 2523/1997, No 3888/2010 and No 2943/2011', *Criminal Justice* 2012 p. 123.
- Pantelis, N., 'Advocate's General Circural No 1/2011 Instructions for the effective prosecution of tax offences', *Criminal Justice* 2011 p. 1106.
- Papandreou, P., 'The Advocate General of financial crimes according to the penal law No 3943/2011', *Criminal Justice* 2012 p. 410.
- Tsogas, L., 'Questions about the prosecution of tax offences according to the penal law act No 2523/1997.

