

X. Economic Crime, Organized Crime, and Crisis

The Hellenic tax criminal law – basic principles and targets

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Introduction

Failure to fulfil their tax obligations by the citizens constitutes primarily a violation of the principle of tax equality (article 4, par. 1 of the Hellenic Constitution). To this end, apart from the necessity of having a mechanism for compliance, in order for citizens to fulfil their obligations, there is a question of having to create an auxiliary system for the imposition of sanctions to the citizens who are negligent. This is achieved firstly through administrative measures, by the enforcement of additional surcharges, fines, interest, and by taking steps to protect the State, and generally, through administrative sanctions, if citizens fail to comply with the tax legislation and the obligations under it (articles 1 to 16, law 2523/97). This legal issue is subject to the administrative law; hence the various differences are reviewed by the Administrative Courts.

However, the lawmakers chose, in addition to the enforcement of administrative sanctions, to consider punishable certain breaches of tax obligations. This option, which follows purposes that are irrelevant to the criminal law, is under question by criminal dogmatic. As it will be seen later on, the various tax offences are ratified, in any case, through the administrative procedure. To this end, any further criminalization thereof seems to be excessive (and much more when following decision 1/2010 by the Supreme Special Court (SSC) it was decided that any detention for debt to the State, as a means for a procedural coercion

is opposed to the Constitution and is not allowed) or, in certain cases, could fall into common criminal clauses, especially those of fraud and forgery (articles 216 and 386, par. 1 of the Criminal Code), and sometimes also into the increased sanctions provided by law 1608/50 for State embezzlers.

In any case, the application of two sanctions, criminal and administrative, for this behaviour seems to be inappropriate, excessive, and opposite to the principle of proportionality (article 25, par. 1 of the Hellenic Constitution), at least in certain light-weight instances. In any case, from the part of the European Court of Human Rights, it has been admitted that the enforcement for the same tax violation of a tax fine by the tax authority and of a sentence by a criminal court does not violate article 4, par 1 of the seventh protocol of the European Convention on Human Rights, which protects the principle of *ne bis in idem*.

The Necessity of Legal Protection

Jurisprudence has accepted that under the criminal clauses of law 2523/97, which are analysed below, the legal interest of the State assets is protected, since the monetary amounts hidden or illegally withheld through the tax-evasion actions belong to state assets; i.e. these should have been deposited to the treasury of the State which, due to the non-payment thereof, shows an respective deficit. In this way, each of the crimes provided by articles 17, 18, and 19 of law 2523/97 places in jeopardy or affects the assets of the State, by either reducing its assets or by not increasing them (through the payment of the various tax or duty owed, etc.).

Specifically, with regard to the crime provided by article 19 of law 2523/97 (tax-evasion through fake, fictitious or forged tax documentation), it is accepted that the assets of the State are not directly affected, but that through this punishable action, the terms are set that, under specific conditions, it would be possible to damage the state assets in the future. Moreover, through this behaviour, the legal interest of the memorandum is created, i.e. of fictitious, forged and other tax documentation, as being documents with increased value as evidence.

We believe that the above position is imperfect, firstly because it cannot explain why, since after admitting that the non-payment of tax causes a direct damage to state property, in the above sense (non-increase or reduction of its assets), punishable actions are considered only those that refer to the non-payment (or to the reduced payment) of specific taxes, fees, etc. (income tax, VAT, etc.) and not those that refer to others (e.g. inheritance tax, tax for the transfer of real property, etc.). This selective treatment, which is obviously due to tax-collection purposes, shows also the reluctance by legislators when choosing to criminalize illegal tax behaviours.

Multiple Criminal Punishment

Within the context of the bad condition of the Greek economy, the already problematic appeal of the legislators to the criminal law, as an ultimate means of coercion for the undisciplined tax-payer, increased two-fold: Both in terms of quantity and in terms of quality.

In terms of quantity, the inflation of the tax criminal issues is declared firstly through the upgrading of certain criminally punishable tax behaviours from misdemeanours to felonies, and secondly, by increasing the penalty limits in the latter.

In terms of quality, the same trend is expressed through the standardization of two crimes for the basically same behaviour: The tax offences provided by law 2523/97, which shall be further examined below, and the separate crime (always misdemeanour) of non-payment of debts to the State (article 25, law 1882/90). According to the last provision, a sentence of up to five years of imprisonment, the minimum of which depends on the amount of the debt verified, is imposed to anyone not paying the amounts owed to the Tax Offices and to the Customs Offices or to the State Entities, as well as to the businesses and organisations of the wider state sector, after four months have passed from the date it was due.

The above criminal clause establishes a separate punishable action in relation to the tax-evasion offences provided by law 2523/97. To this end, if the non-payment of tax does not constitute a punishable action

under law 2523/97 (e.g. non-payment of property transfer tax, of inheritance tax, etc.), after it has been verified, the indebted person shall be prosecuted for the special criminal offence provided by article 25 of law 1882/90. Moreover, if this non-payment constitutes a criminal offence under law 2523/97 (e.g. non-payment of VAT, article 18 of law 2523/97), then the tax payer shall be prosecuted for this offence, as well as for the offence provided by article 25 of law 1882/90.

However, through the above, there is a triple punishment of the same behaviour. To this end, a tax-payer committing tax-evasion over his revenue, by withholding his income (article 17, law 2523/97), shall incur the following:

- Firstly, he shall be subjected to the relevant tax sanctions provided by the administrative law (fines for the overdue payment, interest, State protection measures, etc., under law 4174/2013).
- Moreover, he shall be criminally prosecuted for the crime of tax-evasion over his income (article 17 of law 2523/97) which, depending on the amount, could be considered also a felony, punishable with imprisonment for up to 20 years.
- Further, he shall then be criminally prosecuted for the misdemeanour of not having paid certified debts to the State (article 25 of law 1882/90), while:
- In certain occasions, he may be face criminal charges even for money laundering (law 2331/95), where the basic offence shall be tax evasion over his income, accompanied then by money laundering, even by simply holding in a bank account the amounts respective to the unpaid income tax.

As one may understand, such punishment of the same, antisocial behaviour, is not compatible with the principle of proportionality and is an expression of panic by the state towards the current financial conditions, hence it cannot be accepted as fair.

The Current Legislative Framework

The substantive and procedural clauses governing the Greek tax criminal law are included in articles 17 to 21, and 24 of law 2523/97, as

these have been successively amended, especially by laws 3220/04, 3888/2010 and 3943/2011. In accordance to jurisprudence, the newer (of substantive law) clauses that amended the above law are not applied retroactively if they worsen the position of the accused person (article 2, par. 1 of the Criminal Code), e.g. if they increase the penalties of the various tax offences.

With regard to its structure, law 2523/97 provides for three categories of tax offences: Tax evasion through the omission to submit or by submitting inaccurate statements with regard to income tax (article 17), tax evasion through the non-payment or inaccurate payment of VAT and other deducted or charged taxes, fees, or contributions (article 18) and tax evasion through forged, fictitious, or tampered tax evidence, as well as through the failure to apply the clauses of the Code of Books and Records (article 19).

Legal Entities

Article 20 of law 2523/97 includes certain special provisions for the natural persons bearing any capacity in a legal entity. Firstly, they are considered as the perpetrators of the crimes provided by articles 17, 18, and 19 of law 2523/97 (article 20 par. 1 to 3 of law 2523/97):

- In domestic société anonymes, the Presidents of the Board of Directors, the managers or authorized or collaborating consultants, the administrators, the general managers, or the directors, and generally all persons authorized under the law through an agreement or court decision to exercise administration or management. In absence of these persons, as perpetrators are considered the other members of the Board of Directors, provided they are temporarily or permanently exercising the management or administration of the company.
- With regard to personal companies, the general partners or managers.
- With regard to limited liability companies, the managers and, when absent or not specified, the partners.
- With regard to cooperatives, the presidents or secretaries or treas-

urers, or managers.

- With regard to joint ventures, societies, civil, participatory or hidden companies, their representatives and, in absence of them, their members.
- With regard to foreign undertakings, the managers or their representatives or their agents in Greece.

In addition, as perpetrators are considered those who under the law, following a court decision or a provision in a will, are managing foreign property, including the commissioner, guardian, or administrator of foreign assets, as per the clauses of the Civil Code (article 20, par. 4 in law 2523/97).

Moreover, to the action the heads of the accounting department of the undertaking are considered as direct accessories, liable for any form of tax-evasion, and generally anyone assisting by any means to the above offences, including the attorney signing the pertinent statement (article 20, par. 5 of law 2523/97). In the last case, i.e. with regard to the attorney, it obviously refers to the cases provided by articles 17 and 18 of law 2523/97, with regard to the filing of income tax or VAT statements (since in the crime stipulated by article 19, the filing of a statement to the tax authority is not a prerequisite).

The aforementioned clause has been subjected to criticism by the criminal science, since it divides the clauses of the Criminal Code on participation, to which it is opposed. Indeed, articles 45 et seq. of the Criminal Code were more than sufficient in order to deal with the issue of participatory action by natural persons involved in tax evasion committed by a legal entity.

Without expanding to issues of criminal dogmatic, two remarks are necessary. Firstly, under par. 1 to 4 of article 20 in law 2523/97, in our view, a refutable presumption is created regarding instigation against certain persons, which, at least, is mitigated by the provision of par. 6 of the same article (according to which, in every case of responsibility as per article 20 of law 2523/97, it is required to have knowledge of the actual action of the tax evasion committed by the legal entity). Secondly, the provision of par. 5 in article 20 of law 2523/97 con-

siders as direct assistance, punishable with the penalty applicable to the perpetrator (article 46, par. 1, case b) of the Civil Code) all assistance given to a tax offence, even if it occurred prior the crime or if it was not completely necessary for its commitment (to this end, in accordance with article 47 of the Civil Code, it would constitute as simple assistance, punishable under article 83 with a reduced penalty). This creation of directness for all assistance to tax evasion is opposite to the principle of proportionality and equality (articles 4, par. 1 and 25, par. 1 of the Civil Code), since it brings a stricter treatment of the simple accessory to these crimes in comparison to the participant who is just participating in all other punishable action; for this reason, it is opposite to the constitution.

However, it should be stated that a recent law provides that a person bearing in an undertaking (legal entity) one of the capacities provided by article 20, par. 1 to 3 of law 2523/97, in a solely typical manner (hence the natural person committing an action that constitutes a form of tax evasion is different, i.e. the person exercising the actual administration and management of the legal entity), in order to be convicted, it is necessary to prove firstly that he knew and willingly covered the action or omission performed by the third party (which constitutes a crime of tax evasion) and secondly, that he had the actual ability to stop this action or omission by the above third party, by exercising the powers deriving from his capacity.

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