

THE CRIME OF USING FORGED DOCUMENTS IN THE TAX LAW

Taxes collected from the taxpayers are the most important source of the national economy. Consequently, although the obligation to pay tax differentiates based on the respective types and rates, its violation is deemed as an economic crime committed against the state treasury. The crime of using forged document pursuant to the sub-paragraph B of Article 359 of the Tax Procedure Law (“VUK”) within Tax Criminal Law belongs to the crimes which cannot be put on trial without obtaining the statement of the Tax Offices pursuant to the article 367 of Tax Procedure Law and are generally considered as tax evasion.

Examples such as non-payment of tax, payment of less amount of tax than required or declaration of excess expenses, reducing VAT taxable base and obtaining false invoice in order to benefit from tax reduction, ensuring the prevention of the revelation of a customs duty or tax evasion crime already committed or using false invoices to realize fictitious export are the most frequently encountered types of tax crimes put on trial in daily life.

1. Tax Crime Inspection and Reports Issued by Tax Offices

Tax inspections aiming to discover the respective tax crimes are carried out by the inspectors of the competent Tax Office.

Tax inspections can be conducted at the tax office or at the workplace provided that the workplace is suitable for that purpose. (VUK Article 139). Tax inspector responsible for the inspection can, if he deems necessary, send a notification to the taxpayer requesting the release of the commercial books and records or grant a period of 15 days to the taxpayer for the submission of all kinds of documents related to the revenues and expenses including invoices, bonds, payrolls, receipts etc. and can further demand the statements of the authorized representative and personnel in charge of financial affairs. At this point it is important to have those statements taken by the tax inspector under the oversight of a specialized attorney in respect of the potential investigations and prosecutions that may be initiated in future.

Furthermore, the tax inspector may request documents and information from all natural or legal persons doing business with the respective taxpayer and even demand the statement of these persons. In other words, tax inspector can control each of the transactions made by the taxpayer for commercial purposes and check whether all kinds of information and documents and the entire purchasing / sale network are in accordance with law for the purpose of discovering tax crimes. On the other hand, the liquidation of a company subject to tax inspection does not constitute any obstacle to carry out this inspection.

As stated in the introduction to this article, the assessment of the tax offices pursuant to Article 367 of VUK is prerequisite of action regarding the criminal justice concerning tax crimes, however, this assessment is not regarded final but discretionary evidences and can be issued by the tax office in two forms, namely in the form of “report on tax technique” and “report on tax crime”.

- **Report on Tax Technique:** The report on tax technique analyses the transactions made by the taxpayer, the commercial relations, the relevant information obtained from the examined books and documents and determines whether there are any irregularities or not.

- **Report on Tax Crime:** Report on Tax Crime is prepared on the basis of the evaluation of the report on tax technique following the tax inspection. The report on the tax crime is a report containing a legal assessment about whether the irregular transactions made by the taxpayers constitute a crime as well as how the crime was committed, if those transactions are considered a crime. The process of criminal complaint to be submitted to the Office of the Public Prosecutor is to be initiated as soon as the respective act has been clarified as a crime in the report on tax crime.

2. Criminal Procedures

Tax crimes specified in the Tax Procedure Law are divided into two categories in terms of the sanctions to be imposed, namely tax crimes requiring financial

sanctions and tax crimes requiring sentences restricting freedom. The sanction prescribed for the crime of the use of forged documents stipulates a sentence restricting freedom. The criminal courts are the competent courts to hear these cases. Since the upper limit applied for the crime of using forged documents is five years, the criminal courts of the first instance have jurisdiction whereas the courts situated in the region where the authorized tax office has its seat, are locally competent.

3. Perpetrator of the Crime

3.1. Criminal Liability of Natural Persons

Having criminal capacity as a taxpayer is required to be qualified as the perpetrator of crime. In this context, each person who will be sentenced to a freedom restricting imprisonment must be a “natural person” in terms of tax crimes. Pursuant to Article 332 of VUK, those who are under guardianship or custody, or entrusted the administration of their business to a trustee will not be subject to a punishment due to the violation of the tax laws by the guardian, custodian or trustee acting in their name. In those cases, the address of the sentence will not be the minors or people with legal disability but their legal representatives.

3.2 Personal Liability of the Legal Persons

Legal persons carry out their transactions through persons who are authorized to represent the company or through its personnel in charge of running the company. The legal representative of the company will be considered the perpetrator of the crime of using forged documents in terms of the legal persons. However, in case the crime is committed by the personnel authorized to run the company and that personnel can carry out transactions without the approval of the legal representative, the criminal liability of the legal representative will be out of question.

In case the legal person has more than one representative, criminal liability is to be determined based on the role of the representative committing the crime and the causal link between the crime and perpetrator as well as the distribution of the duties and power of representation.

4. Complaint, Reconciliation and Effective Remorse

The use of forged document or other tax evasion crimes do not fall within the scope of reconciliation

and the investigation and persecution of those crimes is not subject to the submission of a complaint.

The provisions of effective remorse apply to those who have informed the relevant authorities about the situation in accordance with the conditions of effective remorse pursuant to Article 359 and Article 371 of VUK.

5. Criminal Lapse of Time and Limitation of Action

Limitation of action (statute of limitation) is an institution of criminal law resulting in the abatement of a criminal lawsuit, provided that no lawsuit has been filed at all or a filed lawsuit has not been finalized within the respective period of time. On the other hand, criminal limitation period prevents the execution of a sentence due to the expiry of time determined by the law. Since the sentence prescribed for the crime of using forged documents is imprisonment for three to five years, the period of limitation of action for the mentioned crime is eight years and criminal limitation period ten years.

6. Elements of the Crime

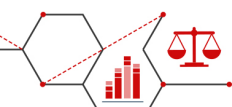
6.1 Legal Element

The legal basis of the crime of tax evasion is specified in Article 359 of VUK. In addition to the crime of using forged documents, this provision covers crimes such as using documents with a misleading content and failure to submit commercial books and documents. The crime of using forged documents laid down in sub-paragraph “b” is as follows:

359/b) Those who destroy the books, records or documents kept or issued pursuant to the tax laws that have to be submitted or those who remove the pages of those books and replace them with other leaves or do not put any leaves at all or those who issue the original documents or copies thereof partly as forged documents or use those documents shall be sentenced to imprisonment between 3 and 5 years. Documents issued as if a related transaction was made are considered forged documents.

6.2 Material Element

Firstly, the existence of a crime requires the existence of an act of the perpetrator and an unlawful consequence thereof. As a result, material element must be evaluated on the basis of “the causal connection between act and consequence”. In this context, the Su-



preme Court Assembly of Criminal Chambers ***“refers to the issuance of a document as if a real transaction was made although this was not the case”*** in its verdict dated 26.09.2019 and numbered 2018/21-396 E. – 2019/567 K. as an example for the material element of the crime.

6.3 Moral Element

Moral Element refers to the use or issuance of the forged document intentionally by the perpetrator who knows that it is a forged document. This fact is defined as “intent” in the criminal law. The existence of the element of intent is a prerequisite for holding the perpetrator liable for the crime. In this context, this person must have committed the crime intentionally and willingly. On the other hand, the determination of the moral element is important in order to accuse the perpetrator of committing the crime of the use of forged documents and this requirement is indeed expressed as the need to **“make an in-depth investigation”** in the well-established judicial precedents of the Court of Cassation and Council of State. That investigation is carried out by the experts appointed during the court proceedings and, unfortunately, persons who have no special knowledge and expertise regarding the sectors in dispute are appointed as experts and this hinders the conduct of an in-depth analysis. For that reason, the experts appointed during the court proceedings must be specialists of the respective sector and need to know that an examination must cover various issues including the production of goods, types of sale, the impact of administrative permissions and licenses on the sale of goods as well as the commercial books and records of the counter party of the respective commercial relation.

7. Proof

The taxpayer accused of using forged documents must submit the documents related to storage, transportation and purchase of goods, bank receipts of the payments and, if a production plant is in question, production approval reports, documents on actual consumption, documents on energy consumption, documents on personnel expenses and all kinds of documents issued during both phases beginning from the phase of the supply of the goods up to their delivery to the taxpayer in order to prove that the document claimed to be forged is actually not a forged document and that the purchase of goods or services was a real purchasing transaction. On the other hand, if the payment of the amount in the invoice claimed

to be a forged document was performed through a bank or by check and this was in accordance with the commercial books and documents, this shall serve as a presumption for the authenticity of the respective transaction made pursuant to the decisions of the Court of Cassation.

8. Conclusion

Tax inspections are carried out by tax offices and a conclusion is generally reached based on the opinion of the inspector, who has issued the tax inspection reports or reports on tax crime whether the document is forged. In other words, tax inspectors sometimes issue unfavorable reports based on only differences between the dates and means of accrual without making any further inspection on the counter party of the respective commercial relation and examining the basic records and documents such as the production, logistic and bank records of the commercial enterprise. For that reason, all kinds of records and documents that can prove the authenticity of the so-called forged documents or invoices are important both at the phase of administrative examination and during the prosecution proceedings. The preparation of those documents, their submission to the inspection authority (Tax Office, Office of the Public Prosecution or the Court) and the defense of the perpetrator are crucial and it is important to follow-up this legal process with an experienced attorney having deep knowledge regarding these proceedings in order to avoid unjustified inspections and sanctions.

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