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INDIRECT METHODS IN ASSESSING ILLEGAL ORIGIN OF INCOME AND ASSETS

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ABSTRACT

The most important activity of financial investigators is the investigation of assets of illegal origin. In order to avoid the mistakes regarding the assessment of assets of illegal origin, the investigators have to respect the professional rules. As the illegal origin asset is confiscated, it should be precisely identified.

Keywords: *assets, illegal origin, financial investigation, forensic accounting, taxation*

1. INTRODUCTION

One of the problems of modern society includes greed, manifested by obtaining the assets of illegal origin. Countries are tackling this issue in different ways. Developed countries reached the agreement on preventing the acquisition of illegal assets. Tax legislations were harmonized in all important issues: assets, on which tax has not been paid, are taxed at specific tax rates; and legal basis for illegal assets confiscation was adopted. In Slovenia, assets of illegal origin are subject to additional taxation according to tax regulations, or are confiscated in compliance with illegal assets confiscation legislations. The difficulty can be found in the assessment of the scope of non-taxed assets and the scope of assets of illegal origin. Having shortage of documentary evidence, the indirect methods are used in the assessment of the scope of illegal origin assets. We address these methods in this chapter.

2. BACKGROUND

When assessing the assets of illegal origin and its amount, two types of assets should be differentiated: assets, which have not been subjected to tax, and assets of illegal origin. In the first example, origin of assets is legal, but assets have not been taxed at correct tax rate. In the second example, origin of assets is illegal.

Wealth taxation that was not subject to taxes is governed by Tax Procedure Code¹, describing in its Article Nr. 68 the examples on how the tax bases are set in special cases, and in Article Nr. 68a the examples, when taxpayer has not declared their incomes.

Article Nr. 68: Examples on how the tax bases are set in special cases:

This holds true for cases when taxpayer does not file tax return or submit tax return to tax authority or submit them without data, necessary for setting the tax base, as for example: natural person files no tax return; tax authority finds out that tax return is based on false or inaccurate data; tax authority finds out that estimated revenues or revenues, presented in tax return, are not proportionate to estimated expenditures or expenditures, presented in tax return, unless taxpayer specifies adequate justification; taxpayer does not submit books and records on a request by tax authority, if they are materially false or show significant formal shortcomings that justify the doubt about their material accuracy; employer does not present the information on withholding tax on income from employments.

Article Nr. 68.a examples, when taxpayer has not declared their incomes:

Such cases occur when taxpayer – natural person: has funds for private use at disposal, including wealth that significantly exceeds the incomes presented in tax return, and tax authority receives different information on assets possessed by taxpayer – natural person, spending of taxpayer – natural person or information on acquired wealth of taxpayer – natural person

In such cases, the valuation of taxable amount is carried out. In this declaratory proceeding, the evidences are established, helping the tax authority to lay down the most relevant taxable amount. In terms of income tax liability, Financial Administration of the Republic of Slovenia considers disproportional expenditures of natural persons, including acquisition of wealth, as extremely risky. These occurrences are clear indicator that natural persons do not file and pay their tax income in accordance to their economic power. The goal of targeted control is to verify the accuracy of incomes, filed by natural persons, using different approach, e.g. indirect, by means of information on natural person's disposal of assets for private expenditures, including wealth. Such situation shows a significant loss for state

¹ Published in <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4703>; acquired: August 1, 2017.

budget on one side, while on the other side it indicates uneven load and treatment of taxpayers².

If tax authority has information on part of income or part of expenses at their disposal, the most relevant taxable amount can be determined on the basis of legal information and data, obtained by tax authority during the declaratory proceeding, concerning the taxpayer, their family members and associated persons, eg. number of employees, wages and other work-related remunerations, income and expenses, purchases of goods and services, value of assets and other external signs of possession of the assets, production capacities or facilities and location of commercial and residential premises, number of tenants and period of renting.

Provided that tax authority does not possess these data, it can assess the tax base using the above information through other taxpayers, having performed the same or comparable economic activities or reached similar incomes in the same tax period and similar circumstances. In such case tax authority determines tax for tax period as established by act on taxation from assessed tax base. When taxpayer has not filed their incomes, tax is levied from tax base³, equal to the identified difference between assets value, deducted for obligations from assets acquisition, assets or absorption of assets, and incomes, from which tax has been levied and charged, or non-taxable incomes.

One or more calendar years are examined in the period of last ten years before the year when the procedure commenced. In assessing the tax base, proven claims of taxpayer are considered.

Important area of work for financial investigators is to determine the volume of assets of illegal origin due to its confiscation⁴. Assets can be confiscated to those who acquired it illegally, or was such assets transferred to them free of charge or for payment not corresponding the actual value, or they knew or should know that the acquired assets are of illegal origin.

Assets are treated as illegal if there is no proof that it is legally acquired. It is considered that the assets were not acquired from legal incomes or legally, when there is an imbalance between its volume and incomes, less taxes and contributions, paid during the period of assets acquisition. When assessing the imbalance, tax authority takes into account the value of all wealth in the possession of person, used and disposed by person or that has been used or transferred to related persons or blended with their assets or passed on their legal

² More: Prijava premoženja - Ciljno usmerjeni nadzori postopkov primerjave premoženja in odmere davka v teh primerih. Ljubljana, marec 2015; source: http://www.fu.gov.si/fileadmin/Internet/Nadzor/Podrocja/Preiskave/Opis/Podrobnejsi_opis_1_izdaja_Prijava_premozenja.pdf; acquired: August 1, 2017.

³ From tax base, identified according to Article 69.a of Tax Procedure Code, 70% tax is calculated and paid, which is considered a final tax.

⁴ Confiscation of Proceeds of Crime Act (ZOPNI); Published: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6267>; acquired: August 1, 2017.

successors. The volume of illegal assets is assessed by financial investigation, initiated when pre-trial or trial phase gives rise to suspicion that particular persons have the assets of illegal origin, acquired in catalogue crime acts, and the total value of such assets exceeds 50.000 EUR.

This crime acts are: Specifically defined crime acts as terrorism, financing of terrorism, forcing into slave labour, trafficking in human beings, prostitution, displaying, creating, possessing and distribution of pornography material, production and distribution of harmful products for healing, production and distribution of harmful foodstuffs and other goods, unauthorized production and distribution of drug precursors, doping in sports and substances frequently used in the illicit manufacture of narcotic drugs, facilitating drug abuse or doping in sport, organizing pyramid schemes and prohibited gambling, economic offences, which are punishable by imprisonment of three or more years, bribe taking, trading in influence, criminal organization, manufacture and acquisition of weapons or explosives, other offence, committed in criminal organization, or other intentional offence, which are punishable by imprisonment of five or more years, if it can be the source of assets of illegal origin (eg. tax related crime).

Republic Slovenia as applicant sues the defendants⁵ in order to confiscate the illegal assets. Civil proceeding is independent from criminal proceeding, meaning that defendant can be acquitted of the charges in the criminal proceeding, while in the civil proceeding the defendant can be confiscated the illegal assets. Even if the court in civil proceeding identifies lower volume of illegal assets, required to initiate the investigation (50.000 EUR), civil proceeding continues. Following the court's decision, the illegally acquired assets are confiscated and become the assets of Republic of Slovenia. In taxation procedure, the procedural characteristic of taxation procedure should be considered, which differ from the illegal assets according to ZOPNI.

Financial investigation procedure is carried out by the Public Prosecutor's Office of the Republic of Slovenia, having jurisdiction in pre-trial or trial proceeding for a (catalogue) criminal offence, cooperating with competent public prosecutor, who initiates financial investigation. Request for investigation with detailed reasonable grounds for suspecting can be delivered by police, Financial Administration of the Republic of Slovenia, Commission for the Prevention of Corruption or Office for Money Laundering Prevention of Republic of Slovenia. Public prosecutor identifies the person against whom the investigation is carried out, and period for which it is carried out. Financial investigation can be carried out for the period not exceeding five years before the year of

⁵ Persons, possessing illegal assets (not necessarily acquired by themselves through commission of an offence, they could be heirs, beneficiaries, etc).

commencing the alleged offence, and until the action is brought. The goal of financial investigation is to collect the evidences and data, necessary for decision on:

- freezing and sequestration of illegal assets,
- and/or opening the proceeding against which persons the confiscation proceeding should be initiated.

Financial investigation collects:

- data on volume of wealth of person concerned and the ratio between income less tax and contributions paid, and value of wealth in possession, usage or disposal in the period for which the investigation is carried out;
- data on volume of wealth set out in the previous indent, which was transferred to related persons or passed on to their legal successors in the period for which the financial investigation is carried out, and how it was transferred;
- other data, which may be relevant for proceeding, or when the circumstances of the case suggest that such data would help determine the source, volume and transfer of the wealth.

Financial investigation can also include legal measurements under the terms of the criminal proceeding, which are permitted for obtaining the data and evidences to secure the claim for confiscation of the proceeds of crime. Financial investigative team is lead by competent public prosecutor and is composed of representatives of Police, Financial Administration of the Republic of Slovenia, State Attorney's Office of the Republic of Slovenia, Office for Money Laundering Prevention of Republic of Slovenia, Securities Market Agency, Slovenian Competition Protection Agency or Court of Auditors in line with the proposal of competent public prosecutor. After financial investigation is completed, team leader prepares a report and hands it over to the head of competent public prosecutor office and to the head of Specialised State Prosecutor Office of the Republic of Slovenia, together with all the collected data. The report should include precise data and collected evidences about assets, for which it is suspected to be of illegal origin, about transfers of such assets to related persons and their assets, as well as about grounds for possible freezing or sequestration of assets of illegal origin. Financial investigation can last for a maximum period of one year, though it can be extended for no more than six months for objective reasons. Before the introduction of the action before the court, the competent public prosecutor invites the person under investigation to the prosecutor's office, which initiated financial investigation, and makes all the collected data from financial investigation available for inspection. Person under investigation has the right to make a statement regarding collected data

and submit the evidences. Burdens of proof rules are specific. The applicant in the civil procedure states facts and suggests evidences, showing the suspicion for illegal origin of property owned by person under investigation. Person under investigation can rebut it with proving that the property are not illegal or that the actual value was paid for these property. If the court in its judgement upholds the applicant's claims, property of illegal origin are confiscated from the owner. The applicant is allowed to change the claim until the end of the trial without the consent of defendant, requesting for sequestration of property that correspond to the value of illegal property or ordering the defendant to pay the amount that corresponds to the value of illegal property, if new circumstances after the action was brought made the confiscation impossible.

3. INDIRECT METHODS OF ASSESSING THE VOLUME OF ILLEGALLY ACQUIRED PROPERTY

How to determine the most relevant volume of property of illegal origin? The answer is the professional challenge that the investigators deal with. Besides the professional rules in investigation the needs of civil procedure should also be considered, where parties have a right to be treated fairly, including the requirement for equitable treatment (equality of arms) and balanced positions of parties. This is also apparent from the judgement VSL0084480 of the Court of Appeal, Ljubljana, which decided⁶:

»The aim of freezing the assets of illegal origin is to avoid that this assets would not be possible to be confiscated after the civil proceeding. As it is an interference with the rights to private property, court has to perform strict proportionality test and allow freezing only to the extent that enables efficient confiscation of illegal assets or prevent illegal enrichment. It should consider that substantive scope of freezing should only cover the assets that are equivalent to alleged assets of illegal origin. In the objection procedure phase, court should also consider defendant's difficult situation, who can rebut the presumption from Article 5 of ZOPNI regarding burdens of proof, as referred in Article 27 of quoted law, only if they prove that assets are not of illegal origin. It is difficult procedural position for defendant, who has to give reasons and submit evidence for assets, acquired over past several years. Freezing manner is adequate and necessary in order to avoid the real risk of subsequent enforcement of confiscation of illegal assets, action should be proportional and cover only the volume of assets that correspond to the estimated volume of illegal assets«.

If this is not considered, there is a risk of generating procedures due to procedure itself. Nevertheless, the objectiveness of such investigation is called

⁶ Source: <http://www.sodnapraksa.si/?q=id:2015081111397526&database%5BSOVS%5D=SOVS&database%5BIESP%5D=IESP&database%5BVD> acquired: August 1, 2017.

into question as well. Assessment of volume of illegally acquired assets is technically demanding and responsible task. Investigator has to consider the professional guidelines for investigation that, among others, require respect to the case-law of the courts, which considers adequate standard of proof and difficult position of defendant in assuring quality material evidence.

Observance of standard of proof in investigation is required by professional guidelines for financial investigation. Burdens of proof are defendant's issue. Investigators have to test the defendant's claims, and this is also required by ACFE methodological guidelines. Investigators should consider standard of proof, which will be used by court in court proceeding. In profession, standard of proof »possible« is used.

Some grounds for application of standard of proof »possible«:

- Application of »possible« standard is scientifically justified with complexity of obtaining the evidence on asset origin over past several years, from period when ZOPNI has not yet entered into force, for period when it was not required to store evidence (persons under investigation normally do not keep various documents from everyday activities) etc. Method of evidence assessment and usage of burdens of proof have to be evident from the report (reproducibility and transparency).
- Application of »possible« standard of proof also derives from explanation of Constitutional Court's decision No. U-I-91/15-2.
- Expert resources state that the court confiscate the assets when defendant is not able to convince the court with a degree of possibility, that the property has legal origin.
- Degree of possibility is also determined by professional guidelines for bookkeeping, where »more likely than not« presents more than 50% possibility.
- Standard of proof "possible" for identification of illegal assets is likewise used in other EU members (e.g. Great Britain)

This implies that investigator in their financial report considers sections, which indicate the possibility (more likely than not).

Investigators are generally linked to documentary basis. However, they might not have them or the documents lack in substance. The indirect methods⁷ help them to overcome these shortcomings. Indirect methods aim to determine the possibility of existence of illegal assets especially when defend-

⁷ OECD : Strengthening Tax Audit Capabilities: Innovative Approaches to Improve the Efficiency and Effectiveness of Indirect Income Measurement Methods; Forum on Tax Administration's Compliance Sub-group; CENTRE FOR TAX POLICY AND ADMINISTRATION; October 6, 2006. Source: www.oecd.org/tax/administration/37590009.pdf; acquired: August 1, 2017.

ant does not possess the evidence for existence of income. Indirect methods comprehend collection of indirect proofs about income, which can be carried out based on:

- cash T account method,
- bank deposits method,
- net worth method,
- source and application of funds method.

These methods are used merely in taxation procedures, but are useful also in the process of identification of illegal assets, considering requested particularities in assessing the volume of illegal assets.

OECD strategy for strengthening tax audit mentions the following indirect methods:

- Source and Application of Funds Method, which with calculation of the amount of unknown income represents the taxable income;
- Bank deposits and cash expenditure methods is based on theory that if taxpayer receives money, it has two options: either they deposit or spend it;
- Mark up method reconstructs the income and is based on percentages of difference, added to gross income of taxpayer;
- Unit and volume method, where gross remunerations can be determined or remunerations are determined by comparison to a comparable taxpayer;
- Net worth method is based on theory of taxpayer's financial past reconstruction.

Indirect methods are used in case of reasonable grounds for imbalance between receipts and expenditures. If the existence of imbalance between receipts and expenditures (more expenditures than receipts) is identified, it is suspected that origin of assets might be illegal. Publicly accessed data and data which investigating bodies have on their disposal are used for the investigation purposes.

Most often used is Net worth method, which is the method of detection of undeclared income and includes comparison of net value of income of person under investigation at the beginning and at the end of monitored period.

For tax purposes, terminology of tax regulations (income, expenses, etc) are in use. However, the focus during investigation of volume of illegal assets lies on receipts and payments as defined by financial-accounting professionals (monitoring of the cash-flow).

The above mentioned methods are used in many countries. Most often used is Net worth method, which is based on theory of taxpayer's financial past reconstruction.

Elements of reconstructions:

- initial balance of net assets (ZNP)
- receipts during investigation period (P)
- expenditures for living during investigation period (Ž)
- end balance of net assets (KNP)

Applies:

$$ZNP+P-\check{Z}=KNP$$

When KNP is sufficiently higher than expected, imbalance exists (suspicion of existence of illegally acquired assets)

Investigators are facing several challenges when identifying individual categories. Challenges include:

- Often are, under pressure of investigation for tax purposes, referred to incomes and expenses (items included in the tax base). This is not a problem until specificities of tax items (e.g. non-monetary items that influence tax base) are also included in the financial investigation of imbalances during identifying illegal assets.
- During investigation of illegal assets it is merely focused on cash inflows and cash outflows, which are items of cash-flow statement.
- When non-monetary items influence volume of assets, they need to be identified and their influence on volume of illegal assets explained.
- One of the hardest tasks for investigator is monitoring of the cash-flow from the source to consumption. Receipts are proved by different forms of legal receipts (salaries, capital gains and other taxable receipts and non-taxable receipts). When receipts are part of tax returns, proving is easy, as they are based on official data of financial agency. When receipts are non-taxable, the grounds are often incomplete. It is mostly based on evidences of person under investigation. Such evidences are various documentary basis of bodies liable to payments, loan contracts, donation agreements, as well as statement of the person under investigation, often testified by witnesses. Professional guidelines request that all statements and evidences by persons under investigation are treated the same as other documentary basis.
- Common simplification is to monitor the cash-flow only on transaction accounts. Data from transaction accounts are generally accessible. It is necessary to be careful; as the content is often unreliable (e.g. code of payment is often stated as OTHR – others, which does not correspond to actual purpose).

- Particular problem are cash withdrawals and deposits on transaction accounts (it is possible to withdraw cash first and then deposit the unused amount of the cash again on transaction account). In some cases, the entire withdrawal is treated as spending, and redeposit as unidentified source of assets. Definitions were not explained and did not enable reconstruction. The result is duplication, which is the result of technical error. Such a mistake in investigation is later hard to reverse.
- Investigators have to be aware that in the period under investigation, cash management was not forbidden, as well as supplying documentary basis for transactions was not prescribed or usual. This especially holds true for smaller amounts. In practice we observed cases when investigators requested documentary evidence for insignificant transactions that occurred several years ago. Persons under investigation did not submit the proof (e.g. proof of exchange of trifling sum of SIT into foreign currency was requested), but they made a statement which was objected, and it was not even professionally addressed in accordance with standard of proof, used by court. There are many such cases and they do no one any honour.
- Specific challenge is identification of amount, spent by person under investigation for their living. There is no single answer. Lifestyle, habits etc. of person under investigation is analysed. Such analysis is sensitive and is generally based on comparison to comparable persons. Data should be adapted and should consider the differences in habits and lifestyle of persons under investigation and comparable subjects. Analysis is often referred to presumptions, which have to be specified, and their implementation clarified. Regardless the effort put in the analysis, the risk of arbitrariness exists. This risk is lessened by person under investigation, who is invited to comment and clarify the findings of financial investigation, to submit evidence, etc.
- Considering the data of person under investigation, investigators are often in state when they defend their investigative assumptions. Special attention should be paid to avoid being misled by this position. The mission of investigators is to reach as objective assessment of actual situation as possible and not to defend their opinions, beliefs, hypothesis... When addressing the statements of person under investigation, the standard of proof, used by court, should be consistently in use. Each definition has to be clarified and justified.
- Importance of technically correct treatment of person's statement is emphasised in many expert resources. It is best to consider the case-law, emphasising that in selecting the method, such method should be chosen which would provide the result that can be proven by standard of consid-

erable certainty. Courts also underline that cooperation of taxpayer (and this should be extended to person under investigation) is very important and that it is necessary to consider the statements of taxpayer in the procedure at the discretion of investigating body.

- Assets⁸ are evaluated by its value at the time of acquisition and not by current market value.
- Assets at the beginning and at the end of investigated period are composed of all assets of person under investigation: real-estate, movable property, successions and presents, cars, vessels, motorbikes, dividends from shares, bonds, jewellery, furniture, funds (cash and balance on transaction accounts)⁹ etc. On the other hand, there are liabilities like loans, credit card debts, taxes from taxable income, etc. Liabilities are deducted from value of assets. The result is net asset value.

Applicant in legal proceeding provides facts and proposes evidences, which give presumption of illegal origin of assets of defendant. This however does not imply that the investigator does not need to propose evidence or that it is no need for expertise investigation statements and findings. On the contrary, statements should be clarified very carefully and provide robustness of the procedure of illegal property volume assessment.

In the case when illegal assets were transferred to related person, applicant in legal proceeding provides facts and proposes evidence, showing that transfer was carried out free of charge or for payment not corresponding the true value; in case of closer related person or closer family member, they present facts and evidences that show a presumption of the existence of free of charge transfer. Defendant can object it if they provide proofs that assets are not illegally acquired or that the actual value was paid for the assets.

Illegally acquired assets are generally confiscated. In that part of identification of illegally acquired assets, which is confiscated, it should be based on Constitutional Court of the Republic of Slovenia's view Nr. U-I-91/15-24, which states:

⁸ Assets are property and rights, which can be subject to enforcement, especially real-estate, movable property, financial assets and all other assets that have monetary value, as well as property which directly or indirectly stems from such property, in which it was modified or with which it was mixed.

Financial assets are monetary funds, claims, debt securities, shares, capital shares, other investments in legal entities and other financial instruments.

⁹ It is important to take into account all the assets and liabilities, not only the transaction accounts (in period under investigation the cash management was technically undisputed, but in some cases money was exchanged into foreign currency due to distrust in local currency).

»Decision referred to previous paragraph of the operative part shall be implemented in the way that when asset is the sum of legally and illegally acquired assets, such asset is confiscated entirely, if defendant mixed it in order to exercise illegal activities or conceal the illegal source of assets, while the share of illegally acquired assets is not insignificant. If blending of the assets was not done with such intention and when a share of illegal assets is insignificant, the ideal share of this asset is confiscated and then established the joint ownership between state in the share, corresponding to blended illegal assets, and defendant in the share, corresponding their recorded legal investment in asset addressed. It is assumed that mixture was carried out in order to exercise illegal activities or conceal the illegal source of assets. Defendant objects the hypothesis, if they credibly demonstrate that there was no such intention in blending. «

It is clear from submissions of Constitutional Court that it is necessary to establish precise share of illegal assets in financing particular asset¹⁰. Values shall be determined in accordance with professional rules, following International Valuation Standards.

4. CONCLUSION

Article identifies means of determining assets of illegal origin. The expertise particularly stresses the Net worth method. Its usage requires the consideration of the content of applied economic categories. The usage of income instead of receipt can significantly influence the outcome of investigation. The article also stresses the importance of due diligence of person under investigation and compliance with standard of proof, respected by court. Some cases show that investigators still have plenty of room to improve their skills. Special attention should be dedicated to prevention of the arbitrariness.

5. LITERATURE:

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¹⁰ In some cases the investigators do not follow this guideline, but the identified sum of illegal asset is simply spread over assets at the end of investigation. This proved to be wrong. It is necessary to be precise when monitoring cash-flow and attribute to such asset only so much property (money) of illegal origin as it was spent for acquisition. This is particularly sensitive in capital injections, where, besides invested assets, value is created by other factors as well.

4. *Sodba VSL0084480*; 28.06.2016; Republika Slovenija, Višje sodišče v Ljubljani, z 28.06.2016. Source: <http://www.sodnapraksa.si/?q=id:2015081111397526&database%5BSOVS%5D=SOVS&database%5BIESP%5D=IESP&database%5BVD> [Accessed August 1, 2017].
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INDIREKTNE METODE PROCJENE ILEGALNOG PORIJEKLA PRIHODA I IMOVINE

SAŽETAK RADA:

Najvažnija aktivnost financijskih inspektora je istražiti imovinu ilegalnog porijekla. Kako bi se izbjegle pogreške prilikom procjene imovine ilegalnog porijekla financijski inspektori moraju poštovati profesionalna pravila. Budući da se imovina ilegalnog porijekla plijeni, ona se mora točno odrediti.

***Ključne riječi:** imovina, ilegalno porijeklo, financijska inspekcija, forenzično računovodstvo, oporezivanje.*