

Prof. Dragana Bjelić Gaćeša, PhD*
Marija Milošević, BSc in Economics**
Assist. Prof. Predrag Zima, PhD***

SELECTED ISSUES OF ABUSE OF RIGHTS IN THE TAX SYSTEM OF THE REPUBLIC OF CROATIA

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The main purpose of this paper is to analyze the abuses of rights in the Croatian tax system committed by members of capital companies, which were identified during tax supervision. In the context of the above, it should be emphasized that in the Republic of Croatia, in accordance with applicable legislation, members of capital companies are generally not liable for the obligations of the company, which resulted in the possibility of members of these companies to commit a number of abuses. Thus, during tax inspections in the Republic of Croatia, the occurrence of establishing new companies with the aim of transferring profits to them after the previous company over-indebtedness which resulted in the company's inability to settle its short-term and long-term financial obligations to creditors. In order to achieve the purpose of the paper, the authors analyze the legal framework of the Republic of Croatia and its compliance with European Union regulations in the context of abuse of rights in the tax system and the responsibilities of members of capital companies. Special attention is paid to the analysis of individual cases of abuse and their perception through the prism of decisions of Croatian and European courts. In the conclusion of the paper, the authors present suggestions and recommendations for improving the detected problems. Methodologically, the authors collected relevant data in the text using analysis and synthesis, and in the preparation of the paper used a comparative method, inductive and deductive method, and the method of compilation.

Key words: *abuse of rights, companies, fictitious legal transactions, tax control*

1. INTRODUCTION

The paper deals with the issue of abuse of rights in the Croatian tax system committed by members of capital companies, more precisely members of joint stock

* Dragana Bjelić Gaćeša, PhD, college professor, Polytechnic in Pozega, Vukovarska 17, 34 000 Pozega, Republic of Croatia, e-mail: dbjelic@vup.hr

** Marija Milošević, BSc in Economics, Senior Administrative Advisor - Coordinator for JOPPD, Tax Administration - Pozega Regional Office, Pozega, Republic of Croatia, e-mail: marija.milosevic@porezna-uprava.hr

*** Predrag Zima, PhD, Assistant Professor at the Faculty of Law, University of Osijek, S. Radica 13, 31000 Osijek, Republic of Croatia, pzima@pravos.hr

companies and limited liability companies, which resulted in tax evasion. In terms of content, the paper consists of 6 parts or chapters. After the Introduction, the theoretical approaches of the institute of abuse of rights are presented in the second chapter, while the third chapter is focused on the legal framework that exists in the Republic of Croatia when it comes to the liability of members of capital companies. The fourth chapter is focused on the implementation of the procedure for identifying the abuse of rights in tax proceedings in accordance with the provisions of the umbrella tax law - the General Tax Law, and it is supplemented by the fifth chapter in which the authors analyze a specific case of abuse in tax proceedings. The sixth chapter is divided into two parts and on the one hand, the emphasis is put on fictitious legal transactions in the case law of Croatian courts, and on the other hand, on recent judgments of the Court of Justice of the EU which focused on abuse of rights in tax proceedings. In the seventh part of the paper, the authors present concluding remarks and give recommendations for improving the situation in the Republic of Croatia when it comes to tax evasion.

2. GENERAL ABOUT THE INSTITUTE OF ABUSE OF RIGHTS

Despite the fact that the concept of abuse of rights is a complex theoretical and practical problem, which initially appears in the field of private law, but today we also find it to a significant extent in public law, it has nevertheless been written about and published¹. In principle, one can accept the understanding that the abuse of rights is such a behavior of the subject (authorized person) by which he exceeds the limits of exercising his right by coming into conflict with another equal in value subjective right.² In the analysis of this phenomenon, various authors point out different arguments, create a subjective, objective and mixed theory. It could be said that for chronologically the oldest, subjective theory, the important fact is whether the authorized person intended to harm someone whereby he may benefit from that action or not. Obviously narrow definition of the notion of abuse represented by supporters of the liberal-individualist current in legal science³ is tried to be overcome by the application of solidarity concepts (Duguit) where the unlimited rights of the owners (authorized persons) are considered unacceptable, and they must use their rights rationally in order to benefit themselves and others. It is pointed out that the exercise of rights can take place only within the limits of normal (regular) use, and if this limit is exceeded, it is considered contrary to the general interest. Mixed theory only tries to “reconcile” the previous two and introduces (with intent) elements of negligence and gross negligence. In solving these problems, it is necessary to have

¹ Of papers published in the territory of former SFRY, the following are pointed out: Pavčnik, M.: Abuse of Subjective Rights, *Anthology of the Theory of Law II*, 1991, p.195 et seqq.; Vuković, M.: Abuse of Subjective Rights, *Anthology PFZ, III.*, 1953, p. 40 et seqq.; Kušej, G., Pavčnik, M., Perenič, A.: Introduction to jurisprudence, Ljubljana, 1992, p.168 et seqq. and Visković, N.: *State and law*, Zagreb, 1995, p. 204 et seqq.

² Vrban, D.: *State and law*, Golden marketing, 2003, p.314.

³ Vrban, D.: *State and law*, Golden marketing, 2003, p.315.

a perspective of subjective rights within the entire legal system, its institutes, and to observe positive law through a teleological perspective.

3. LIABILITY OF MEMBERS OF CAPITAL COMPANIES IN THE REPUBLIC OF CROATIA - LEGAL FRAMEWORK

In the Republic of Croatia, the liability of members of capital companies (joint stock company and limited liability company) is regulated by the Companies Act.⁴ The above mentioned Act incorporates into the Croatian legal system the Directives of the European Parliament and the Council relevant to the field of company rights⁵, thus harmonizing Croatian company rights with relevant EU regulations. In the context of liability of members of capital companies for the obligations of the company, the provision of Article 10, paragraph 2 of the Companies Act is relevant, according to which: “Members of a limited liability company, shareholders of a joint stock company and limited partners in a limited partnership are not liable for the obligations of the company, except when provided by the Companies Act.”

⁴ Companies Act, Official Gazette, No 111/1993, 34/1999, 121/1999, 52/2000, 118/2003, 107/2007, 146/2008, 137/2009, 111/2012, 125/2011, 68/2013, 110/2015, 40/2019

⁵ In this particular case, four directives are considered: Directive 2007/36/EC of the European Parliament and of the Council of July 1, 2007. on the exercise of certain rights of shareholders of listed companies (SL L 184 of 14/ 7/ 2007) as last amended by Directive (EU) 2017/828 of the European Parliament and of the Council of May 17, 2017. on amendments to the Directive 2007/36/EC in terms of encouraging long-term shareholder participation (SL L 132 of 20/ 5/ 2017), Directive 2009/102/EC of the European Parliament and of the Council of September 16, 2009. in the area of company law on limited liability companies with one member (codified version) (SL L 258 of 1/10/ 2009), Council Directive 2013/24/EU of May 13, 2013. on the adaptation of certain directives in the field of company law due to the accession of the Republic of Croatia (SL L 158 of 10/6/2013) and Directive (EU) 2017/1132 of the European Parliament and of the Council of June 14, 2017. on certain aspects of company law (codified text) (SL L 169 of 30/ 6/ 2017). In addition to the above-mentioned Directives, the Republic of Croatia has also implemented directives relevant to the field of taxation, namely: Council Directive 2010/24/EU of March 16, 2010. on mutual assistance in the collection of receivables related to taxes, customs and other measures (SL L 84 of 31/3/ 2010), Council Directive 2011/16/EU of February 15, 2011. on administrative cooperation in the field of taxation and repealing the Directive 77/799/EEC (SL L 64 of 11/ 3/ 2011), Council Directive 2014/107/EU of December 9, 2014. on amendments to the Directive 2011/16/EU with regard to the mandatory automatic exchange of information in the field of taxation (SL L 359 of 16/12/ 2014), Council Directive (EU) 2003/48/EC of June 3, 2003. on the taxation of interest income on savings (SL L 157 of 26/ 6/ 2003), Council Directive (EU) 2015/2060 of November 10, 2015. on repealing the Directive 2003/48/EC on the taxation of interest income on savings (SL L 301 of 18/ 11/ 2015), Council Directive (EU) 2015/2376 of December 8, 2015. on amendments to the Directive 2011/16/EU with regard to the mandatory automatic exchange of information in the field of taxation (SL L 332 of 18/ 12/ 2015), Council Directive (EU) 2016/881 of May 25, 2016. on amendments to the Directive 2011/16/EU with regard to the mandatory automatic exchange of information in the field of taxation (SL L 146 of 3/ 6/ 2016), Council Directive (EU) 2016/2258 of December 6, 2016. on amendments to the Directive 2011/16/EU regarding the access of tax authorities to information on anti-money laundering (SL L 342 of 16/12/ 2016), Council Directive (EU) 2018/822 of May 25, 2018 on amendments to the Directive 2011/16/EU with regard to the mandatory automatic exchange of information in the field of taxation in relation to the cross-border arrangements being reported (SL L 139 of 5/6/ 2018), Council Directive 2003/49/EC of June 3, 2003 on a common system of taxation applicable to interest and license payments between affiliated companies of different member states (SL L 157/49 of 26/ 6/ 2003), Council Directive 1 (EU) 2016/1164 of July 12, 2016. laying down rules against tax avoidance practices which directly affect the functioning of the domestic market (SL L 193/1 of 19/ 7/ 2016) and other.

However, it should be noted that such a rule on the exclusion of liability of members of these companies is not absolute. This is confirmed by Article 10, paragraph 3. of the Companies Act, according to which in the event that members abuse the circumstance that as members of the company they are not liable for the company's obligations, their responsibility for the company's obligations is activated. This phenomenon is known in the company law under the term "piercing the corporate veil".⁶

Piercing the corporate veil pursuant to the provisions of Article 10, paragraph 4. of the Companies Act can happen only in precisely prescribed cases of abuse that exist if a member uses the company to achieve a goal forbidden to him, if he uses the company to harm creditors, if contrary to the law, he manages the company's assets as if they were his assets and if for his benefit or for the benefit of another person, reduces the assets of the company even though he knew or should have known that he would therefore not be able to meet his obligations. Therefore, it can be concluded that in order to apply the institute of piercing the corporate veil, it is necessary to identify that in this particular case it is about one of the aforementioned abuses. According to Marin, abuse can be subjective and objective.⁷ In the case of subjective abuse, members use company to achieve otherwise prohibited goals, while in the case of objective abuse, company itself is objectively used contrary to its purpose. In the context of the piercing the corporate veil, the courts in the Republic of Croatia have taken similar positions. Thus, the County Court in Varaždin in the case Gž 328 / 2021-2⁸ established the existence of piercing the corporate veil. Namely, in the said case, the court found that the director of the company is liable for the company's obligations personally due to abuse according to the criterion of proven guilt. His abuse consisted in the act by which he kept for himself a certain amount of cash belonging to the company. Since the director of the company did not prove during the court proceedings that he had paid the disputed amount to the company's account, the court concluded that the director kept the said amount for himself "using the opportunity not to be liable for the company's obligations which led to piercing the corporate veil."⁹ A similar decision was made by the High Commercial Court in case Pž-3950/2017-4

⁶ For more details on piercing the corporate veil, see: Barbić, J.: *Company Law, Book one. Zagreb, Organizer, 2008*; Braut Filipović, M.: Responsibility of the parent company for the obligations of the daughter company. *Anthology of the Law School of the University in Rijeka*, v. 32, No.2, 2011, pp.795-828, Brnabić, R.: Piercing the corporate body in joint-venture relations, *Company Law*, 49 (3), 2008, pp. 703 – 721; Jelinić, S., Akšamović, D.: On piercing the corporate veil. *Company Law*, 48/2, 2009, pp. 560-564; Cheng-Han,T., Wang, J., Hofmann,C.: Piercing the Corporate Veil: Historical, Theoretical & Comparative Perspectives, *Berkeley Business Law Journal*, Vol.16, Issue 1, 2019, p.140-204. Vidi i: Millon, D.: Piercing the corporate veil, financial responsibility and the limits of limited liability, *Emory Law Journal*, Vol.56, No 5, 2007, p.1309-1382; Lee,P W.: The Enigma of Veil-Piercing, *International Company and Commercial Law Review*. 26, (1), 2015, p. 28-34. Research Collection School Of Law.

⁷ Marin, J.: Piercing the corporate veil in maritime law, *Comparative Maritime Law*, Vol 40, No 115, 2001, p.86.

⁸ Decision of 28/09/2021

⁹ County Court in Varaždin, Gž 328/2021-2 (28/09/2021), para. 8.

¹⁰. In the said case, the court took the position that “the fact that the defendant, as a member of a limited liability company A, founded a new company B which is partially registered for the same activities and does business with some of the same suppliers and customers as the previously established company, does not in itself mean that piercing the corporate veil has occurred. The Court continues: “in order for piercing the corporate veil to occur, the defendant should have used his position as a member of the company in company A by using the assets of company A as if they were his, to reduce the assets of company A for his own benefit or for the benefit of another person.” Since the issue of this paper concerns the abuse of rights in tax proceedings, it is necessary to analyze the relevant provisions of the General Tax Law ¹¹ which in the Republic of Croatia regulates relations between taxpayers and tax authorities. The said Act has been amended several times over the years as a result of its harmonization with the relevant European Directives. In the context of the liability of members of companies as tax guarantors, the General Tax Law has taken over the provisions of Art. 10 of the Companies Act mentioned above. These indications are clearly confirmed by the provisions of Art. 30. of the General Tax Law. In addition to taking over the provisions of the Companies Act, the General Tax Act also took over the relevant provisions of the Criminal Code of the Republic of Croatia concerning criminal offenses against the economy. Žunić Kovačević and Gadžo believe that “the legislator’s intention is to extend the responsibility of the guarantors to the persons who committed the act which is part of the essence of the criminal offenses exhaustively listed.” ¹² In this respect, the provisions of Article 31 of the General Tax Law have a special meaning establishing the liability of members of the company, persons running the company and related parties if it is found that they had taken any of the actions that resulted in inability to pay obligations under the tax-debt relationship. These actions are exhaustively listed in Article 31. of the General Tax Law, and relate to activities by which:

1. they fictitiously or gratuitously transfer assets to a company which they have established themselves or with other persons or otherwise sell all or part of the assets fictitiously; encumber it without appropriate counteraction or give free of charge to related persons, damage, destroy or render it unusable,
2. a fictitious legal transaction is concluded or a non-existent claim of the company’s members, persons conducting the company’s affairs and related persons is acknowledged,
3. contrary to orderly and in good faith management assets are reduced or concealed, statutory annual reports are not submitted, without delay, and no later than twenty-one days from the occurrence of the reason provided by a special law as a reason for initiating bankruptcy proceedings such a proceeding is requested.

¹⁰ Decision of 17/02/2020

¹¹ General Tax Law, Official Gazette, No. 115/16, 106/18, 121/19, 32/20, 42/20

¹² Žunić Kovačević, N., Gadžo, S.: Institute of Legal Tax Guarantee, *Anthology of the Faculty of Law University of Rijeka*, Vol. 34, No 1 (393-416), 2013, p.400

In view of the above, the following is an analysis of the implementation of the procedure for identifying the abuse of rights in the tax proceedings and an analysis of specific cases of abuse in the said proceedings.

4. PROCEDURE FOR IDENTIFYING THE ABUSE OF RIGHTS - TAX AUDIT

By amendments to the General Tax Law abuse of the right to the detriment of the tax authority as a creditor is identified in administrative proceedings. The procedure for identifying the abuse of rights is initiated *ex officio* and is carried out against persons responsible as tax guarantors. The said procedure is carried out in order to verify and establish the facts that indicate actions which have the character of abuse of rights, and which result in the inability to settle the obligation from the tax-debt relationship.¹³ The procedure for identifying the abuse of rights is carried out by the regional office of the tax administration, which is territorially competent according to the seat of the main debtor.¹⁴ The first prerequisite for conducting the procedure is that all enforcement measures aimed at collecting the tax debt from the main debtor have been taken, and that the tax debt has nevertheless remained in full or partially outstanding. If the obligation to collect has become statute-barred, the liability under the tax guarantee cannot be identified. After the authorized officials, after the preparatory actions, have assessed that the conditions for conducting the procedure have been met, the taxpayer must be informed that the procedure for identifying the abuse of rights has been initiated.¹⁵ In the process of identifying the abuse of rights, it is identified whether the person against whom the procedure is conducted uses the company to achieve a goal that is otherwise prohibited, whether he uses the company to damage the tax authority, whether, contrary to the law, he manages the company's assets as if they were his or the assets of affiliated companies, whether he has reduced the assets of the company for his own benefit or for the benefit of another person, even though he knew or should have known that he would not be able to meet his obligations and whether he entered into fictitious legal transactions.¹⁶ In the mentioned procedure, the contents of all legal acts (company statute, company contracts, entrepreneurial contracts, etc.) as well as data stated in the business books by which the taxpayer or tax guarantor determines and records his business are subject to audit. If it is probable that the tax guarantor will prevent the collection of the yet undetermined amount of the tax debt, the tax authority will take measures to ensure the collection of the tax debt.¹⁷ After the procedure of establishing the facts relevant to the procedure, and before preparing the record, a concluding interview

¹³ General Tax Law, Official Gazette, No. 115/16, 106/18, 121/19, 32/20, 42/20, Art.172 (1)

¹⁴ Tax Administration : Methodology for determining abuse of rights in tax proceedings, MF, *Tax Gazette*, 8a, 2012, p. 28 et seqq.

¹⁵ General Tax Law, Official Gazette, No. 115/16, 106/18, 121/19, 32/20, 42/20, Art.176

¹⁶ General Tax Law, Official Gazette, No. 115/16, 106/18, 121/19, 32/20, 42/20, Art.175 (1)

¹⁷ General Tax Law, Official Gazette, No. 115/16, 106/18, 121/19, 32/20, 42/20, Art.171

will be held with the taxpayer and the tax guarantor and the disputed facts and their effect on identifying the abuse of rights will be discussed. Based on the facts stated in the record, a decision is made. In the decision identifying the responsibility for the abuse of rights, in addition to identifying the responsibility of the tax guarantor, the amount of the identified obligation must also be determined. The amount of the debt for which the tax guarantor is responsible must be in proportion to the benefit obtained due to the abuse of rights, and may not exceed the amount of the tax debtor's tax debt. If in the audit procedure occurrences that can be considered to have the characteristics of tax offenses are found, the competent service for the detection of tax offenses will be notified.¹⁸

5. ABUSE IDENTIFIED DURING THE TAX AUDIT

This part of the paper will analyze a specific case of abuse that was identified during the tax audit. In the present case, R.V. in the period from 2010 to 2018, founded 14 companies in which changes in legal relations are constantly being made. In 2015, R.V. is a director (companies A, C, H, I and L) in five companies, and a director and founder in four other companies that were founded from 2012 to 2013 (companies G, K, M and N). All companies are engaged in the same activity, namely design, construction, construction supervision and real estate business. Prior to founding his own companies, R.V. was a member of the management board of company X, which is engaged in the same activity. Company X in 2012 sold a real estate to company C, whose founder is R.V. The value of the real estate is HRK 21.5 million, and the stated amount has not been paid into the GIRO account of company X. Company C has no funds on the account to purchase the real estate. At the time of the alienation of the said real estate, company X is not the debtor, but at the time of the alienation it is subject to tax audit. Obligations identified by the audit were indebted in 2015, according to the enforceability of the decision made in the audit procedure for obligations for which the statute of limitations has not expired. Real estate transfer tax for real estate acquired in 2010 was charged only in 2013, since the acquirer of the real estate disputed its obligation. In 2012, the total debt of Company X (which no longer has assets and enforcement proceedings cannot be conducted) amounts to HRK 2.75 million. Company C (in which R.V. was the founder at the time of the acquisition) acquires the property from Company X so it can be assumed that R.V. is a person of influence in company X, which may be the tax guarantor for the company's debts. Although R.V. is no longer a member of company X, as a natural person he acquires i.e. buys business premises from company X, the determined value of which is HRK 7.5 million, while the income tax return of company X does not show income from the sale of fixed assets. R.V. has no reported income to acquire a property worth HRK 7.5 million. R.V. as a natural person with an income of HRK 60,000.00 per year, in 2012 acquired an apartment

¹⁸ Vukšić,Z.: Detection of fictitious legal transactions in tax supervision, *Tax Gazette*, No.12, 2010 (32-49), p.47

worth HRK 1.4 million. At the same time, the companies in which he is the director and the founder are accumulating debts. The total debts of the companies to which R.V. is still the director and founder are HRK 4.85 million, of which HRK 4.6 million relates to real estate transfer tax. Thus, from the aforementioned facts and evidence, it can be found that the natural person R.V. in the course of tax audit in company X, knowing about the obligations that company X will be obliged to pay, by abusing his position, and in order to avoid paying taxes, alienated very valuable assets of the company by transferring assets to company C, where at the time of acquiring assets R.V. is the founder and due to his influence he is the tax guarantor in company X for the debts of the company. Since it has been proven that the Real Estate Purchase Agreement concluded between companies X and C is a fictitious legal transaction resulting in non-payment of X's obligations from the tax-debt relationship, the tax guarantor for X's debts is also company C. Both guarantors are liable for tax liabilities of company X in the amount of the determined value of the real estate of HRK 21.5 million, and due to the amount of the debt of the main debtor it can be charged for the amount of HRK 2.5 million.

6. ABUSE OF RIGHTS IN TAX PROCEEDINGS IN THE CASE LAW OF THE COURTS OF THE REPUBLIC OF CROATIA AND THE COURT OF JUSTICE OF THE EU

Since it is evident from the previously analyzed specific case of abuse that the abuse of rights was committed by concluding fictitious legal transactions, this chapter will focus on fictitious cases in the case law of Croatian courts, and on the other hand on recent judgments of the Court of Justice of the EU focused on the issue of abuse of rights in tax proceedings.

6.1. Fictitious legal transactions and case law of Croatian courts

In the context of fictitious legal transactions¹⁹, it is necessary to define them or conceptually determine them. The term that is imposed when talking about fictitious legal transactions is simulation. Simulation means the fictitious conclusion of legal transactions.²⁰ Simulation can be absolute or relative. Absolute simulation is the conclusion of an apparent or fictitious legal transaction with the aim of circumventing regulations, committing fraud and the like. For example, the fictitious sale of things to a friend in order to deprive a creditor. In contrast, relative simulation is about concluding a fictitious deal with the goal of concealing another deal. For example,

¹⁹ On apparent (simulated, fictitious) legal affairs, see for more detail in : Dambrauskaitė, A.: The Concept of Simulation in European Contract Law. *Societal Studies Research Journal*, vol.3, No 4, 2011, p. 1417-1441; Dinescu, A.G.: Short essay on the legal effects of simulated contracts in regard to third parties. *Lex et Scientia International Journal*, No 1,2020, p. 14-20

²⁰ Klarić, P., Vedriš, M.: *Civil law*. Official Gazette, Zagreb, 2014, p.142

the contracting parties fictitiously enter into a sales contract in order to conceal the actually concluded donation contract and thus avoid the application of less favorable tax regulations.²¹ Looking at the positive law of the Republic of Croatia, it should be noted that the provisions on fictitious contracts are contained in the Law on Contracts and Torts.²² The mentioned Law in Article 285. stipulates that the fictitious contract has no legal effect between the contracting parties, but if it conceals another contract, then that other contract is valid if the preconditions for its legal validity are met. There is a rich case law of Croatian courts on fictitious contracts. Thus, the County Court in Varaždin concludes that: “The fictitious contract is in fact²³ a contract that was not concluded with the consent of the contracting parties, but was created by the will of the parties to create a false, fictitious impression of the contract concluded.” When it comes to the effect of a fictitious contract the decision of the County Court in Velika Gorica in case Gž 795 / 2020-2 is significant²⁴ according to which: “A fictitious contract will not produce effect for the party to that contract, but if that fictitious contract actually conceals another contract, that other contract will have all legal effects if the fictitious contract satisfies the preconditions for the validity of that other contract.” In the context of fictitious legal transactions County Court in Zagreb in its decision in the case Gž 1890/2020-2²⁵ points out: “a fictitious, simulated contract is a discrepancy between will and manifestation, and the consequence is not nullity²⁶ but the fact that such a contract between the contracting parties does not produce legal effects.” The provision on fictitious legal transactions is also contained in the General Tax Law of the Republic of Croatia, which in Article 12. para. 1 stipulates that if another legal transaction is concealed by a fictitious legal transaction, the basis for determining the tax liability is then the concealed legal transaction. This implies that this is a “principle of preventing the abuse of legal norms.”²⁷ This is confirmed by the decision of the High Administrative Court of the Republic of Croatia in the case Us -11117/2011-7²⁸ establishing that the subsequent invoicing of the charter to members of the company’s management board who actually used the ship for private purposes is considered a fictitious legal transaction which intended to conceal the actual use of the ship, and therefore the Ministry of Finance as the first instance body on the basis of exclusion of goods and services from the company, determined the obligation of the members of the company to pay value added tax in the appropriate amount.

²¹ Klarić, P., Vedriš, M.: *Civil law*. Official Gazette, Zagreb, 2014 p. 142

²² Law of Contracts and Torts, Official Gazette, No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21

²³ County Court in Varaždin, Gž 29/2020-2, Decision of 11/ 11/ 2020

²⁴ County Court in Velika Gorica, Gž 795/2020-2, Decision of 29/10/2020

²⁵ County Court in Zagreb, Gž 1890/2020-2, Decision of 14/12/2020

²⁶ Null and void are those legal transactions that do not produce the legal effects which, if they were valid, they should produce. They are also called absolutely null and void legal transactions, and they are treated as if they were not concluded, as if they do not legally exist, according to: Klarić, P., Vedriš, M.: *Civil law*. Official Gazette, Zagreb, 2014, p.137

²⁷ Šinković, Z.:The principle of economic approach to the facts important for taxation, *Anthology of the Faculty of Law in Split*, vol. 55, 1/2018 (201-219), p. 209

²⁸ High Administrative Court of the Republic of Croatia, Us-11117/2011-7, Decision of 13/11/2014

6.2. Abuse of rights in tax proceedings in the case law of the Court of Justice of the EU

Speaking about the abuse of rights in the case law of the Court of Justice of the EU, the authors will also briefly look at its role. Many believe that its most important role is to give opinions on the interpretation and application of EU law at the request of national courts. Addressing the Court of Justice of the EU, national courts rectify errors made in the implementation of the *acquis communautaire* in the national legal corps as well as inconsistencies between national and European law. Thus, the Court of Justice of the EU interprets EU law, and its interpretation acts retroactively and *erga omnes*. The retroactive effect of interpretations means explaining the meaning of a norm from the moment it is created, while the effect of *erga omnes* implies that the reasoning of decisions of the Court of Justice of the EU in which a certain legal understanding, meaning and scope of a certain legal norm has binding effect to all courts of the member states in the same tax case.²⁹

In the continuation of the paper, attention will be paid to the analysis of recent decisions made by the Court of Justice of the EU in 2019 in four joined cases.³⁰ which were conducted under the common name *N Luxembourg and others v. Skatteministeriet*.³¹ All four cases involved Danish affiliated companies whose parent companies were established in EU member states, while the parent companies were owned by companies or investment funds that are fiscal residents of third countries (Cayman Islands) outside the EU. Furthermore, in all four cases, the right to an exemption from withholding tax on interest was examined in accordance with the provisions of the Council Directive 2003/49/EC.³², and in case of abuse of rights or tax evasion. The request for a preliminary ruling concerned the interpretation of the Council Directive 2003/49/EC, and the questions referred by the national courts concerned, inter alia, the existence of a legal basis allowing a member state to refuse to grant the tax exemption provided for in Article 1. of the mentioned Directive to a company which paid interest to an entity established in another member state due to the committed abuse, and in case such a legal basis exists, what the constitutive elements are of the possible abuse of rights.³³ The Court replied that the general principle of the Union law that individuals cannot refer to the provisions of the Union law for the purpose of evasion or abuse should be interpreted as meaning that national authorities and courts must deny the taxpayer the right to exemption from taxation of interest payments provided for in Article 1, paragraph 1 in case of

²⁹ Koharić, Z.: Application of the case law of the European Court in tax matters, *Anthology of the Faculty of Law in Split*, vol. 55, 1/2018 (221-230), p.224

³⁰ *N Luxembourg 1* (C-115/16), *X Denmark A/S* (C-118/16), *C Denmark I* (C-119/16), *Z Denmark ApS* (C-299/16)

³¹ CJEU, Case- 115/16, *N Luxembourg and others v. Skatteministeriet*, ECLI:EU:C:2019:134 of February 26, 2019

³² Directive of the Council 2003/49/EC on a common system of taxation applicable to interest and license payments between affiliated companies of different Member States OJ L 157/49 of 26/ 6/ 2003

³³ CJEU, Case C- 115/16, *N Luxembourg and others v. Skatteministeriet*, ECLI:EU:C:2019:134, para. 82

evasion or abuse of the Directives, even in the absence of national or contractual provisions providing for such a denial.³⁴ The Court points out that the Union law cannot cover abuses by economic entities.³⁵ Furthermore, in this decision the Court clearly highlighted the constitutive elements of the abuse of rights identified in its *Emsland Starke* case decisions³⁶ and *O. and B.*³⁷ The Court thus considers that in order to prove abuse it is necessary to prove an objective element, i.e. the totality of objective circumstances from which it follows that the goal set by the Union law has not been achieved (despite their formal compliance), but also a subjective element which is reflected in the intention to achieve the convenience arising from the regulations of the Union in a way that artificially creates the conditions necessary for its realization.³⁸ There is no doubt that the principle of abuse of rights through the work of the Court of Justice of the EU has been established as a general principle of law, and the previously analyzed decision in the joined cases *N Luxembourg and Others v. Skatteministeriet*, certainly upgrades and affirms it in the area of tax issues. The analyzed decisions of the Court of Justice of the EU undoubtedly indicate its engagement aimed at preventing the achievement of tax convenience in case of identified abuses of rights.

7. CONCLUDING REMARKS

In the Republic of Croatia, there is a satisfactory legal framework for combating tax abuses. As can be seen from the paper, the Republic of Croatia has incorporated all relevant European directives into its legal corpus through amendments to the law, thus harmonizing with the European law. For any anti-abuse provision, it is extremely important that it be prescribed in a way that ensures legal certainty and that its implementation is fair and subject to scrutiny and examination through the proceedings of national and European courts. Despite the satisfactory legal framework, i.e. despite the existence of satisfactory legal regulations in the field of abuse in tax issues, it was found that cases of abuse of rights or tax evasion still exist in the Republic of Croatia. How to overcome the existing situation? It seems that in the Republic of Croatia the problem is not in the regulations themselves but in the insufficient desire and will of those who should apply it to report cases of abuse and that the perpetrators are sanctioned in an appropriate manner and within a reasonable time. Timely and appropriate sanctioning of perpetrators would

³⁴ CJEU, Case C- 115/16, *N Luxembourg and others v. Skatteministeriet*, ECLI:EU:C:2019:134, para. 122.

³⁵ CJEU, Case C- 115/16, *N Luxembourg and others v. Skatteministeriet*, ECLI:EU:C:2019:134, para. 120, see also the Decision of the Court in case CJEU, Case C-356/15, *Commission v. Belgium*, ECLI:EU:C:2018:555 of July 11, 2018, para. 99.

³⁶ CJEU, Case, C110/99, *EmslandStärke*, ECLI: EU:C:2000:695, Decision of December 14, 2000, para. 52. and 53.

³⁷ CJEU, Case, C456/12, *O. i B*, ECLI: EU:C:2014:135, Decision of March 12, 2014, para. 58.

³⁸ CJEU, Case C- 115/16, *N Luxembourg and others v. Skatteministeriet*, ECLI:EU:C:2019:134, para. 124

contribute to the realization of special, but also general prevention from committing of these abuses. However, as long as the regulation remains just a letter on paper without any or selective application, the abuse will continue to exist. Therefore, the solution to this problem undoubtedly lies in the consistent and fair application of regulations, and the same requires political and social will, which is obviously lacking in the Republic of Croatia.

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ODABRANA PITANJA ZLOUPORABE PRAVA U POREZnom SUSTAVU REPUBLIKE HRVATSKE

Cilj rada jest analizirati zlouporabe prava u hrvatskom poreznom sustavu koje su počinili članovi trgovačkih društava kapitala, a koje su utvrđene prilikom provođenja poreznog nadzora. U kontekstu navedenoga, valja naglasiti da u Republici Hrvatskoj, sukladno važećoj zakonskoj regulativi, članovi trgovačkih društava kapitala u pravilu ne odgovaraju za obveze trgovačkog društva, što je rezultiralo mogućnošću članova navedenih društava da počine cijeli niz zlouporaba prava. Tako je prilikom provođenja poreznih nadzora u Republici Hrvatskoj evidentirana pojavnost osnivanja novih trgovačkih društava s ciljem prenošenja dobiti na njih nakon što se prethodno društvo prezaduzilo, što je rezultiralo nesposobnošću društva da podmiri svoje kratkoročne i dugoročne financijske obveze prema vjerovnicima.

Kako bi se realizirao postavljeni cilj, u radu se analiziraju pravni okvir Republike Hrvatske i njegova usklađenost s propisima Europske unije u kontekstu zlouporabe prava u poreznom sustavu kao i odgovornosti članova trgovačkih društava kapitala. Posebna pozornost u radu posvećuje se analizi pojedinih slučajeva zlouporabe te njihova sagledavanja kroz prizmu odluka hrvatskih i europskih sudova. U zaključku rada, autori iznose prijedloge odnosno preporuke za poboljšanje detektiranih problema.

U kontekstu metodologije rada, valja naglasiti da su se relevantni podaci prikupili primjenom analize i sinteze, a prilikom izrade rada korištene su komparativna, induktivna i deduktivna metoda te metoda kompilacije.

Ključne riječi: *zlouporaba prava, trgovačka društva, prividni pravni poslovi, porezni nadzor*