

CRITICISM OF INTERPRETATIVE DECISION NO. 4 OF 12.03.2016 OF
GACD OF SCC. INADMISSIBILITY OF A CIVIL CLAIM IN THE
CRIMINAL PROCEEDINGS

I. Introduction

1.1. Interpretative decision No. 4 of 12.03.2016 of the General Assembly of the Criminal Divisions (GACD).

On 12.03.2016 the General Assembly of the Criminal Divisions of the Supreme Court of Cassation took the following decision on interpretation case No. 4 of 2015:

„1. As a result of the crimes under art.255 of CC, art.255a of CC and art.256 of CC, resp. art.255-257 of CC (SG, issue 62/97) property damage is incurred to the state (in case of evasion of taxes which are supposed to enter the central budget). The crime under the abovementioned provisions of CC corresponds to a tort pursuant to art.45 of OCA.

1.1. The perpetrator bears civil liability for the tort under art.45 of OCA.

1.2. For the implementation of the procedure under chapter twenty-eight of CPC the tax obligations subject to the accusations of a crime under art.255, art.255a and art.256 of CC, resp.art.255-257 of CC(SG, issue 62/97) shall be recovered and the implementation of the procedure under chapter twenty-nine of the CPC requires the taxes to be recovered or secured.

2. Where an audit instrument under the TSIPC is enacted for the tax obligations - subject to the accusation - and such act establishes tax obligations the type, amount, period and taxable person of which are identical to those referred to by the prosecution, the civil claim pursuant to art.45 of OCA for property damages, filed by the state through the minister of finance for joint consideration during the criminal proceedings, is admissible.

3. The perpetrator of the crime under art.255, art.255a and art.256 of CC, resp. art.255-257 of CC (SG, issue 62/97) may be both a natural person legally representing the taxable person - company/ sole trader registered in the Trade Registry and any other natural person (proxy pursuant to a power of attorney under OCA and CA, a commercial representative, accountant or another person), who effectively carries out the actions and functions on behalf of the taxable person - trader”.

The GACD of SCC presented the following reasoning:

On point 1- „The crime under art. 255 and art. 255a of CC, respectively art. 255-257 of CC (SG issue 62/97) directly and immediately causes property damage /losses/ to the state equal to the tax liabilities of a large/particularly large amount evaded by the perpetrator or another person, which had to enter the state budget as an income within the required terms. Tax fraud is an effective crime which directly and immediately causes property damages equal to the amount received without legal grounds...**The crimes under art. 255 and art. 255a of CC, respectively art. 255-257 of CC (SG issue 62/97), which cause damages to the state, fully implement the factual elements of the tort“.**

On point 1.1: „The crime referred to in the accusation... represents the legal grounds of the civil claim of the aggrieved party in the criminal proceedings as a procedural method of seeking liability from the perpetrator pursuant to art.45 of OCA. **The tax relation between the state and the taxable person - company - is damaged by the committed crime under art. 255, art. 255a. Therefore the civil claim in the criminal proceedings is not a claim for a tax receivable from a legal entity, taxable person, but a claim for compensation for damages caused by a tort under art. 45 of OCA“.**

On point 2.: „The main prerequisite for the civil claim is the aggrieved person, resp. the damaged legal entity to have suffered damages resulting from the crime. The damages shall be the direct and immediate consequence of the crime referred to in the accusation...**The state, acting through the minister of finance, is also entitled to file a civil claim for compensation if it has suffered damages resulting from the crime. It has locus standi to enter as an equally entitled subject and to be constituted as a civil claimant...** The effective audit instrument establishes a claim for enforcement of the public legal obligation of the taxable person. Its grounds correspond to the existing ones pursuant to the law. The civil claim raised by the state, acting through the Minister of Finance under art. 45 of OCA, represents a request for the award of a compensation for the property damages caused by the perpetrator of the crime. The tort represents grounds for the claim. Every effective crime has such a nature. Hence, the request of the state contained in the civil claim brought against the perpetrator - claim for compensation - has different legal characteristics based on the effective audit instrument against the taxable person - a tax claim... This is why the opportunity of the state to file a civil claim within the criminal proceedings represents independent procedural means of protection of rights and legal interests through the general prohibition not to incur damages to a third party under art. 45 of OCA. This defence does not compete with the other ones referred to in the special tax procedure and they do not substitute each other “

1.2. EXPRESS RESERVATION under point 1 and point 2 of Interpretative decision No. 4 of 12 March 2016 on interpretation case No. 4/2015 of GACD of SCC¹

On point 1: „We do not agree with the proposition in the decision of the majority that the civil claim in the criminal proceedings for a crime under [art. 255](#), [art. 255a of CC](#) ([art. 255 - 257 of CC](#), SG, issue 62/97) is not a claim regarding tax receivables of the state against a taxable person, but is a claim for compensation of damages resulting from a tort under [art. 45 of OCA](#)“.

Reasoning: „The tax obligation arises ex lege as a result of the tax event - received income - and represents an amount which shall be paid to the state budget pursuant to the relevant tax laws within the term and in the amount established therein. In case of evasion of the establishment or payment of taxes of large amounts or particularly large amounts, as well as in case of non-payment of tax due, which does not fall within the hypothesis of a crime, the state is deprived of the relevant amount... Due to these specifics the claims under [art. 255 of CC](#), [art. 255a of CC](#), resp. [art. 255 - 257 of CC](#) (SG, issue 62/97) differ from the common tax evasion. Even though the damages to the state in both cases are incurred as a result of the lack of payment of due tax, in the first case the state is aware of its receivable, while in case of concealment or evasion (for example through false accounting or lack of systematic accounting, etc. - hypotheses of [art.255](#), para.1, point 1-7 of CC) the tax authorities are not aware of the liability. In the second case, after revealing the tax crime the rightful claimant - the state - will accrue the tax receivable as **an asset under the tax relation and not as a compensation for a tort.**

Hence, the amount due in case of tax crimes under [art. 255 of CC](#), [art. 255a of CC](#) , resp. [art. 255 - 257 of CC](#) (SG, issue 62/97) is always related to a tax under the tax relation, i.e. the claim does not originate from a tort, but from the taxable income which was received and concealed by the perpetrator“.

On point 2.: „The response to the question whether a civil claim is admissible against the accused in the criminal proceedings for the award of a compensation for property damages of the state, equal to the evaded tax where the establishment or payment of the tax due is evaded, is negative.“.

Reasoning: „Hence, regardless of the occurrence and parallel existence of these relations - the tax and the tort ones, the state is not entitled to two receivables for the same property claim incurred by a single legal fact - the

¹ The express reservation is not published on the website of the Supreme Court of Cassation.

income received by the taxable person. **If the state would be entitled to a compensation for tort, on one side, and to a tax receivable - on the other, this means that it would be entitled to receive twice property compensation arising from non-payment within the legally established term or concealing of a tax liability.** The two separate grounds - the tax relation and the tort one exist in parallel in case of tax crimes and have the same subject matter, which excludes the liability of the same perpetrator on both grounds. Otherwise, if the perpetrator is also a taxable person, they would be held liable for the property damages resulting from the tort, equal to the unpaid tax. If a procedure under the TSIPC has been implemented in parallel with an effective audit instrument, the claim under art. 45 of OCA would be inadmissible due to the lack of legal interest for payment of the receivable... First of all, the tax does not arise from the tort, but from the tax event - the income received. Second, the tax relation precedes the tort one. Third, the tax obligations remain executable regardless of the grounds for the criminal liability and its settlement”.

II. Tax tort. Tax liability and tax relation. Parties. Public legal reparation of the tax liability. Inadmissibility of the civil claim under art. 45 of OCA for tax crimes.

Pursuant to art. 60, para. 1 of the Constitution of the Republic of Bulgaria „Citizens shall be obligated to pay taxes and fees, established by statute, according to their income and property “. [Art. 84, point 3 of the Constitution](#) provides that the National Assembly shall establish the taxes and determine the amount of central-government taxes and cannot delegate this obligation to the executive authorities².

The current legislation does not provide a legal definition of the terms “tax”³ and „tax tort“. Tax is a public receivable of the state, which may exist only if established by a law which determines its amount. Interpretative decision No. 1 of 07.05.2009 of GACD indicates that the tax is: „a public state receivable, which is mandatory, gratuitous and non-refundable and is guaranteed by state coercion. This public subjective right of the state corresponds to the obligations of the citizens set out in art. 60, para. 1 of the Constitution of the

² Decision of the Constitutional Court of 9 February 1996 on constitutional case No. 2 of 1996, reporting judge Georgi Markov

³ „One of the main characteristics of taxes is the legality of their grounds, amount and subjects. The law is the only source of tax law, as provided by the Constitution in Art. 60, para. 2 and Art. 84, point 3 of CRB. The law provides for the factual elements which lead to tax liabilities, the competent authorities and their competences regarding the establishment of the precise amount of the tax for the relevant taxable person, as well as the other liabilities related to the main tax liability - for tax registration, submission of a tax return, cooperation with the tax authorities. However, the liability for payment of taxes arises on the due date determined by the relevant tax law, regardless of whether the liability is established by an act of the tax administration”/Interpretation decision No. 1 from 07.05.2009 of GACD of SCC/

Republic of Bulgaria (CRB) for payment of taxes and fees established by law, corresponding to their income and property. On the other hand, the differences between taxes, excises, duties, mandatory social insurance contributions and fees are indisputable. Therefore, we shall agree that the “evaded taxes” referred to in the crimes set out in the claim, include only taxes - value added tax, income tax, profit tax, excise as an indirect tax, local taxes”.

In its interpretative decision 1 of 07.05.2009 the GACD of SCC correctly maintains that: „For the purposes of the required interpretation of the interrelation between the administrative and criminal institutes and provisions, we need to **discuss the tax relation as a type of administrative relation, arising and developing between the state (represented by the competent tax authority) and the natural or legal persons**. It covers the establishment of the tax base, the issuance of the tax act, the determination of the tax amount and the execution of the liquid and chargeable tax receivable”.

The tax relation is a public -legal relation and the effective tax relation (the tax claim) also has such a nature. The veritable tax relations⁴ are always monetary relations and the establishment and collection of the tax liability may be carried out only by public means and through state coercion.

Tax legislation shall not be broadly interpreted and cannot be implemented by analogy with regards to the determination of the tax basis and the tax due. This corresponds to the principle of legality of taxes introduced by the provision of [art. 60 CRB](#)⁵. Pursuant to [art. 46, para. 3 of the Statutory Instruments Act](#) penal, administrative and disciplinary liability may not be justified by interpretation. Pursuant to [art. 60 of the Constitution of the Republic of Bulgaria](#) tax obligations shall be established by law.

We should also note, that an effective decision of the administrative courts regarding a repealed/ amended audit instrument is mandatory for the criminal court⁶. This effective court decision shall be taken into consideration by the criminal court with regards to the taxation factual elements.

⁴ **The subject matter** of the veritable tax relations is the payment of the tax liability which shall be carried out by the taxable person in favour of the state budget

⁵ *Decision No. 13229 of 8.12.2015 of SAC on adm.case No. 6024/2015, II division, rapporteur chairman Angel Kalinov - „The Supreme Administrative Court of the Republic of Bulgaria maintains the same thesis in its Interpretation decision No. 3 of 06.06.2008 on interpretation case No. 2/2008, explicitly noting that **“tax liabilities may not be established through interpretation, tax laws cannot be subjected to narrow, broad interpretation or be applied by analogy”**. In addition, Decision No. 3 of 9 February 1996 on c.case No. 2/1996 of the Constitutional Court of the Republic of Bulgaria establishes that „the principle of legality of the tax obligations refers to all elements determining the tax amount - the taxable person, tax base and tax rate”.*

⁶ Art.297 of CPC- „An effective judgment shall be binding upon the court which has rendered the said judgment and on all courts, institutions and municipalities in the Republic of Bulgaria“ § 2. Of TSSPC: „The provisions of

The constitutional principle of legality of taxes refers to “all elements determining the amount of tax - the taxable person, tax base and tax rate, etc. Tax provisions which are not established by law are unconstitutional“⁷.

„Tax tort“ is a concept created by the legal theory. It represents a faulty illegal violation of the public-legal regulations established by the legislator, requiring payment of taxes pursuant to the income and property of the taxable persons. The damage from the tax tort is the tax liability, which always has a public legal nature⁸. Reparation of damages incurred by the tax tort may be carried out only pursuant to the TSIPC, through the conduction of an inspection procedure under art. 108, para. 1 of TSIPC⁹. Tax obligations arise ex lege and become chargeable upon the implementation of the taxation factual elements - occurrence of the tax event. Therefore, the audit instruments only have a declarative and not a constitutive action. In this regard, in the process of establishing the tax liability which is always aimed at remediation, the state as a public entity acts with state coercion. Any dualistic approach - tax and civil - with regards to tax liabilities is inadmissible. The receivables of the state for tax liabilities are always collected upon application of the administrative procedure - TSIPC.

Since the tax debt - the amount of the tax liability is established by law and depends on the income and property of the taxable person, there are no other damages and the legislator has not provided for such. The damage from the tax liability represents a public liability of the taxable person, who has concealed or evaded the tax or has committed a tax fraud. No other damage exists out of the tax liability pursuant to the legal regulations introduced by the state. This may be explained by the fact that only the direct, foreseeable and immediate damages are subject to compensation. These damages caused by the tax tort are equal to the tax liability. The civil remedies under art. 45 of OCA for public liability related to tax debts, are inadmissible. The special law - TSIPC excludes entirely the application of art. 45 of OCA, pursuant to the principle **lex specialis derogat legi generali**. **The legislator has explicitly assigned the task of determining**

the Administrative Procedure Code and of the Code of Civil Procedure shall apply to any cases unregulated by this Code”.

⁷ A decision of the Constitutional Court of 9 February 1996 on constitutional case No. 2 of 1996, rapporteur judge Georgi Markov

⁸ Argument from Art. 162, para. 2, point 1 of TSSPC.

⁹ Tax obligations and obligations for compulsory social-insurance contributions shall be ascertained by an audit instrument under Article 118 herein. The conduct of inspections and the proceedings for establishing, securing and collecting excise duty liabilities shall be governed by the Tax and Social Insurance Procedure Code unless provided otherwise in this Act /Art.104 of EDTWA/. The establishment, guaranteeing and collection of local taxes are carried out by employees of the municipal administration pursuant to the [Tax and Social Insurance Procedure Code](#). Appealing of the related acts shall be carried out pursuant to the same procedure /Art.4, para. 1 of LTFA /.

tax claims to the income authorities, respectively excise claims to the customs and claims for local taxes to the municipal administration. The active subject in the tax relation is not the state, but its authorities - the income authorities, customs and municipal administration. The taxable person is a passive subject.

On the other hand, only natural persons bear criminal liability for tax crimes. The Bulgarian legislation does not apply the institute of corporate criminal liability of legal entities. If the legal entity has evaded taxes, has committed a tax fraud, only the participant in the substantive tax relation bears tax liability. The liability of third persons regarding tax claims is always subsidiary¹⁰. The liability of third parties - members of management bodies, managing director, procurator, commercial representative, commercial agent shall be ascertained by an audit instrument /art.21, para. 1 of TSIPC/.

Art. 20 of TSIPC introduces the major principle of sequence upon reparation of damages resulting from a tax tort. The security and enforcement are initially directed against the property of the taxable person, for whose tax or social insurance liability the members of the management bodies or their managing directors are held liable. Based on the provisions of art. 21, para. 3 of TSIPC „Third party liability shall lapse with the lapse of the obligation in respect of which the said liability has been ascertained by an effective instrument. In such case, amounts paid shall be refunded according to the procedure established by Section I of Chapter Sixteen herein“. Practically, the enacted interpretative decision No. 4 of 12.03.2016 grossly violates the constitutional principles of art. 60 and art. 84, point 3 of legality of taxes and the procedure for implementation of the liability of taxable persons.

¹⁰ „Liability of a third party - member of a management body, procurator, commercial representative or a commercial agent

Art. 19. ((Amended, SG No. 94/2015, effective 1.01.2016) (1) Any person who, in his/her capacity as a member of a management body, managing director, procurator, commercial representative or commercial agent of an obligated person referred to in Items 1 and 2 of Article 14 herein conceals any facts and circumstances which he/she has been obligated to state to the revenue authority or the public enforcement agent and, as a result of this, any obligations for taxes or compulsory social-insurance contributions cannot be collected, shall be liable for the uncollected obligation.

(2) Any person who, in his/her capacity as a member of a management body, managing director, procurator, commercial representative or commercial agent of an obligated person referred to in Items 1 and 2 of Article 14 herein, who effects in bad faith any payments in kind or in cash from the property of the obligated person, constituting a hidden profit or dividend distribution, or who alienates any property of the obligated person gratuitously or at prices substantially lower than the market prices, as a result of which the property of the obligated person diminishes and, for this reason, any taxes or compulsory social-insurance contributions are not paid, shall be liable for the obligation up to the amount of the payments effected or up to the amount of the diminution of the property, as the case may be “ TSSPC

I believe that if an interpretative decision clearly and unambiguously contradicts the main law - the Constitution - and TSIPC, it shall not be considered mandatory for the judicial and executive authorities, the local government authorities and any other authorities issuing administrative acts. The above conclusion is based on the principle that interpretative decisions are only issued on the application and interpretation of the law and do not create new legal regulations and orders.

Conclusions:

1. The interpretative decision enacted on the applicability of the claim under art. 45 of OCA in the criminal proceedings directly violates the constitutional provisions - art. 60 and art. 84, point 3 of TSIPC;

2. Tax liability /damage/ resulting from the tax crime is realized only upon application of the public legal procedure - TSIPC, since damage reparation is legally set out in a special law; In addition to the tax liability, which shall be remedied under TSIPC, civil liability for damages cannot be sought. Therefore, the claim under art. 45 of OCA is inadmissible.

3. The state is not a party pursuant to art. 84 of CPC, since it is not a legal entity damaged by the crime under art. 255-255a and art. 256 of CC, including for art. 255-257 of the same code /SG, issue 62/97/. With regards to the tax liability, the state acts with imperium, not as a private legal entity;

4. The liability of third parties - members of a management board, managing director, procurator, commercial representative, commercial agent is always subsidiary and is realized only with an audit instrument in the sequence referred to in art. 20 of TSIPC.

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