FAVORABLE INTEREST RATE ON A LOAN - SOCIAL ASSISTANCE OR A MEANS OF OBTAINING UNCONTROLLED INCOME?

VÝHODNÁ ÚROKOVÁ SADZBA ÚVERU - SOCIÁLNA POMOC ALEBO PROSTRIEDOK ZÍSKANIA NEKONTROLOVANÉHO PRÍJMU?

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https://doi.org/10.33542/SIC2024-2-01

ABSTRACT

A market-oriented economy and dynamic changes in the needs of society are often associated with the use of loans and credits. Monitoring the growth of indebtedness of natural persons and legal entities is important from the point of view of the stability of the financial market. From the point of view of the fiscal interests of the state, loans can be perceived precisely in the context of interest and their assessment as taxable income. By not recognizing contractual interest as taxable income, the essence of a tax offense is fulfilled, the detection of which is relatively difficult to almost impossible. The above applies in particular to natural persons. Our research has shown that in the Slovak Republic there is no mechanism, for example between banks and the tax administrator, which would reveal the non lege artis actions of the taxpayer, which also damages the fiscal interests of the state.

ABSTRAKT

Trhovo orientovaná ekonomika a dynamické zmeny potrieb spoločnosti sa často spájajú s využívaním pôžičiek a úverov. Monitorovanie rastu zadĺženosti fyzických osôb a právnických osôb je dôležité z hľadiska stability finančného trhu. V optike fiskálnych záujmov štátu možno pôžičky vnímať práve v kontexte úrokov a ich posúdenia ako zdaniteľného príjmu. Nepriznaním zmluvného úroku ako zdaniteľného príjmu dochádza k naplneniu skutkovej podstaty daňového deliktu, ktorého odhalenie je pomerne náročné až takmer vylúčené. Uvedené platí osobitne pre fyzické osoby. Náš výskum ukázal, že v Slovenskej republike neexistuje mechanizmus, napríklad medzi bankami a správcom dane, ktorý by odhalil konanie daňovníka non lege artis, čím sa poškodzujú aj fiskálne záujmy štátu.

I. INTRODUCTION

Taking into account the economic and social background of slovakian natural persons, we can state the legal institute of the loan has become relatively common in their lives. In the interest of securing one's own home, it is even permissible to state the fact that without borrowing financial resources it is not often possible to acquire ownership of real estate and thus secure one's own "living space". In the Financial Stability Report as of November 2019, the National Bank of Slovakia (hereinafter also referred to as the "NBS") stated that indebtedness is related to the long-term strong sentiment of Slovak households to realize

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residential real estate.[3] Furthermore, in the last report on financial stability from November 2023, the NBS states that, despite the relatively sharp increase in interest rates, the sector would households and businesses should continue to repay their loans without more significant problems. Another will be a key factor in the future economic development, especially development on the labor market. Loss of employment, or a more significant drop in income would put the most heavily indebted people in difficulties.[4]With a certain degree of legal abstraction, it is possible to assert that the legal order of the Slovak Republic allows to "borrow money" through the legal institutes of loan and credit. The loan is a contractual type arising between natural persons (non-entrepreneurs) and is further specified in the provisions of § 657 and § 658 of Act no. 40/1964 Coll. The Civil Code as amended (hereinafter referred to as the "CC" or also as the "Civil Code"). Under the loan agreement, one party, referred to as the creditor, leaves the things designated by type to the other party, referred to as the debtor, and the debtor undertakes to return items of the same type after an agreed period.[5] The credit, as the second institute, arises from a loan agreement, which we classify as absolute trades, and its regulation is contained exclusively in the wording of Act no. 513/1991 Coll. Commercial Code as amended, in concreto §§ 497 - 507 (Resolution of the Supreme Court of the Slovak Republic Case No: 5 Cdo 120/2010). Given the purpose of the article, our attention is focused on concluding a loan agreement between natural persons - non-entrepreneurs[6], or the cash type of the loan. The current legislation distinguishes between: 1. a monetary loan, and 2. a non-monetary loan. The distinction is based on the definition of the content of the subject of the loan, while maintaining the rule that the subject of the loan must be determined by type. [7]

The current legislation of the Slovakian Civil Code allows the parties to agree on interest, which according to legal theory is a form of repayment addressed to the creditor, the title of temporary loss of disposition of funds entrusted to the debtor on the basis of a loan agreement. The legislator thus leaves it up to the parties to the contractual relationship whether to agree on interest and in what amount.[8] This confirms the optional nature of the marked legal provision and we do not consider the negotiation of contractual interest to be an essential requirement of the loan agreement. The presented result is also confirmed by the judgment of the Supreme Court of the Slovak Republic of 31st January 2011, Case No: 4 Cdo 267/2010, which concluded that the contractual interest[9] are subject to the contractual freedom of the parties to the legal relationship, which, however, does not automatically constitute the absence of a contractual interest rate ceiling, referring to the principle of good morals. However, if the interest respects

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3 National Bank of Slovakia. Financial Stability Report, November 2019. [online]. November 2019. [Accessed 20 May 2024]. Available from: https://nbs.sk/publikacie/sprava-o-financnej-stabilite/.

4 National Bank of Slovakia. Financial Stability Report, November 2023. [online]. 20. November 2023. [Accessed 20 May 2024]. Available from: https://nbs.sk/publikacie/sprava-o-financnej-stabilite/, read more, page 47.: „*The degree of risk of financial difficulties is largely related to whether you households create a sufficient amount of reserves in good times a cushion for worse times. Shares of households at risk of financial difficulties they are based on the assumption that a quarter of households save funds from their income in the form of savings for worse times. The NBS analysis shows that if all households behaved this way, the risk of financial difficulties in an unfavorable scenario could be avoided up to a fifth of households that would otherwise be exposed to this risk.*"

5 SVOBODA, JAROMÍR et al. *Civil Code. Comment*. Fourth Edition. Bratislava : EUROUNION, 2000. p. 570.

6 A natural person is a subject of civil law and can be a participant in civil law relations, provided that he has the capacity for rights and obligations - VOJČÍK, PETER et al. *Substantive Civil Law I.* Košice : Pavel Jozef Šafárik University in Košice, 2010. p. 94.

7 LAZAR, JÁN et al. *Substantive Civil Law II*. Bratislava: Iuris Libri, 2014. p. 140.

8 However, low interest rates can serve several functions. On the one hand, a low interest rate may signal a certain social aspect of a loan provided by a creditor to a debtor, where the creditor's primary interest is not to get rich at the expense of the debtor but to help him in his difficult situation. However, this view is contradicted by the fact that if a person with sufficient funds (the creditor) wanted to help another who lacked financial resources (the debtor), he would provide him with a zero-interest cash loan, or even donate the money to such a person.

9 § 658 CC par. 1: "*Interest may be agreed on a money loan*."

the requirement of good morals, which is considered differently in the context of the decision-making activity of judicial authorities, then it is possible for interest to be agreed in any amount.

The aim of the research presented in this article is an evaluation using legal analysis of the disparate legal regulation of interest on loans, not only from the point of view of the fiscal interests of the state. Despite the increase in indebtedness, the aforementioned is often not considered taxable income according to Act no. 595/2003 Coll. on income tax as amended (hereinafter referred to as the "ITA"). We draw attention to the institution of determine the tax under the aids, the absence of which may lead to considerations of the tax administrator's complicity in a tax offense. Even considering the relatively marginal literature in this area, the partial goal of our research was to assess whether the control of interest is more demanding compared to other taxable incomes, which can lead to more frequent tax evasion. As part of our research, we used other scientific methods when, using deduction, we investigated the generally perceived institution of interest as tax revenue. Specific factual situations were induced and attention was focused on possible tax evasion using the method of scientific abstraction. We also formulated our own de lege ferenda proposals using synthesis. On the basis of the above and a comparison of domestic and Czech legislation, we established the following hypothesis: In the Slovak Republic, there is no sufficient control mechanism between the banks and the tax administrator, which uncovers non lege artis actions of the taxpayer in connection with the non-recognition of income resulting from the interest on the loan provided.

II. THE LOAN AND ITS ALLOWABLE CONTRACTUAL INTEREST

Neither the Civil Code nor other legal regulations of the legal order of the Slovak Republic explicitly specify the maximum amount of admissibility of the contractual interest arrangement. From the wording of § 658 par. 1 of the Civil Code shows that contractual interest is subject to the contractual freedom of the parties to the legal relationship, namely the creditor and the debtor. The autonomy and the absence expresis verbis refinement of the maximum permissible height of contractual interest tempted to misuse-result, and although the amount of interest depends solely on the mutual agreement of the parties to the loan and not subject to any restriction. However the amount of contractual interest is in reality, de facto, limited. According to wording of § 39 of the Civil Code, the interest agreement may not be defeated by good morals. Similarly, the provision of § 3 par. 1 of the Civil Code specifies that the rights and obligations arising from civil law relations must not be in conflict with good morals. It is precisely good manners that form the limit of the maximum contractual interest rate for a loan. However, there is no legal definition of the term "good manners" in the legal order of the Slovak Republic. Settled case-law presented by the Judgment of the Slovak Supreme Court dated 26th April 2012, Case No: 5 Cdo 26/2011 (hereinafter referred to as the "Judgment 1") define good morals as a „*set of social, cultural and moral rules of conduct which is in accordance with generally accepted relations between people and moral principles of social establishment and which has proved a certain immutability in historical development, capturing the essential historical tendencies that are shared by a crucial part of society and have the nature of basic norms*“. Imperfect legislation thus implies that the assessment of the conformity of good morals and the amount of contractual interest depends on the legal opinion of the court in question, taking into account the stable decision-making activity of judicial authorities.[10] However, what are the true limits of the agreement on the amount of interest on the loan provided between natural persons? We consider that in order to maintain the validity of the legal act, it is necessary to express this extent in figures.[11] However, the question of legal assessment remains whether it is legally correct to set a uniform level of contractual interest that would be generally valid

[10] SVOBODA, JAROMÍR et al. *Civil Code*. *Comment.* Bratislava: EUROUNION, 2005. p. 606.

[11] A contrario , according to § 39 of the Civil Code: "*A legal act which, by its content or purpose, contradicts the law or circumvents it or transcends good morals is invalid.* "

and acceptable. Doubt is raised by the need to assess each case individually and with due care. As part of the legal assessment of this problem, the Supreme Court of the Slovak Republic stated in the Judgment 1 that the amount of interest disproportionate and contradictory to good morals, which significantly exceeds the usual interest rate at the time of the arrangement of loan should be such limit. The threshold is usually determined taking into account the highest interest rates provided by banks for loans and borrowings in force at the time of the conclusion of the specific loan agreement.[12] In the conclusion of the above, it is simply possible to be critical here. Altogether, we state that the absence of a numerical expression may result in the invalidity of this legal act.[13]

Individual approach of individual courts,[14] when comparing the agreed interest on a loan and the usual average interest at the time of the conclusion of contract, are a necessary precondition for the fair protection of infringed rights and legally protected interests.[15] At the same time, we are of the opinion that in assessing the adequacy of the agreed contractual interest rate, it is fundamental to apply the same criteria, not only to correctly determine the possible invalidity of a legal act, but also to properly assess the possible elements of the crime of usury.[16]

The above mentionned analysis lead us to consider whether it is legally correct to monitor the agreed amount of interest in the case of a monetary loan agreement. The immanent purpose of the loan is to borrow money and not to monitor the validity of a legal act. A contrario, application practice shows that up to the legislative expression of the maximum contractual interest will always need the amount of interest and its admissibility subject of law. E.g., although the information on the amount of the contractual interest is relevant for the person of the debtor, if he is in an unfavorable social situation and does not have the possibility to obtain a loan with a lower interest rate, he will conclude a loan agreement under any conditions. In other words, even if the contractual interest contradicts good morals and the debtor does not challenge the validity of the legal act, the loan agreement will be a valid legal act that the debtor will perform. The person of an "honest" debtor can, as a result of his social situation, pay extra for a dishonest creditor who takes advantage of the difficult life situation of the debtor.

In the conclusion of the above, it can be declared that the exact expression of the amount of contractual interest, even on the basis of judicial decisions, could increase legal certainty of

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12 In assessing the adequacy of the agreed amount of interest on a cash loan, account must be taken, inter alia, of the motives, purpose and circumstances of the act. The adequacy of the contractual interest rate in the relevant period was compared with the usual interest rate from the practice of financial institutions, based on data from the National Bank of Slovakia (Judgment of the Supreme Court of the Slovak Republic Case No: 1Cdo / 109/2019).

13 In this context, see the finding of the Supreme Court of the Slovak Republic in decision 1Cdo/109/2019 dated 16.12.2019: *the Court of Appeal assumed that the relationship between the participants in the Loan Agreement was not a consumer relationship and that the provisions of Act No. 129/2010 Coll. on consumer loans or § 52 et seq. CC on consumer protection and the plaintiffs do not enjoy the protection that belongs to consumers. Subsequently, I found out that a loan agreement with a maturity of 1 year with an interest rate of 36 % was concluded, it exceeds the government regulation to accept a limit of 1.5 % for consumer contracts, so he could not come to the conclusion that an interest rate of 36 % for a period of 1 year is unreasonable, and therefore contrary to good morals. The defendant is a natural person who, as a creditor, provided a loan to other natural persons. It therefore depended on the court's decision to determine in a specific case whether the amount of the agreed interest is or is not in acco dance with good morals. He pointed to established judicial practice, which took the position that when assessing the adequacy of the agreed amount of interest for a money loan, the overall circumstances of the act, its motives and the purpose it pursued must be taken into account. When assessing the adequacy of the agreed amount of interest, he equated the agreed interest with the usual interest rate from the practice of financial institutions in the relevant period. It was based on NBS data, according to which the average interest rate on loans was 10.80 %. By comparing the loan in question with a consumer loan and the maximum allowable repayment for consumer loans in the relevant period, he found that the maximum accepted loan amount was 34.50 %, which is only 1.5 % less than the agreed interest rate of 36 %, and therefore came to the conclusion, that the interest rate agreed in this way is not inconsistent with good morals*.“ – compare with MASLÁK, MAREK. Consumer Code - yes or no? In: *Journal for legal science and practice.* 2018. Vol. 26, no. 3.p. 562-564.

14 In connection with the assessment of the amount of agreed contractual interest, see also the Czech case law, namely the Judgment of the Supreme Court of the Czech Republic Case No: 21 Cdo 1484/2004.

15 ŠTEVČEK, MAREK et al. *Civil Procedure Code. Comment*. Prague : CH Beck, 2016. p. 25-33.

16 § 235 of Act no. 300/2005 Coll. Criminal Code as amended (hereinafter referred to as "Criminal Code").

natural persons and legal entities. Moreover, it can reduce the number of court proceedings in which courts rule on the invalidity of a legal act (loan agreements), or those related to contractual interest conflicting with good morals or imminent crime of usury.

Reflecting this problem, we point to the adjustment of interest in arrears, the maximum permissible limit is determined by a legal regulation in the form of Government Regulation no. 87/1995 Coll. implementing certain provisions of the Civil Code as amended.[17] The regulation in question de lege lata expresses the upper limit of this interest and, similarly, contractual interest could be regulated by law. It can be reasonably assumed that a precise legislative definition of the maximum allowable amount of contractual interest would result in increase in legal certainty and the elimination of legal questions regarding the fairness of the agreed interest.

III. CONSEQUENCES OF NON - RECOGNITION OF INTEREST

Monitoring the amount of contractual interest on a cash loan between natural persons is important not only in the visibility of its admissibility or the validity of a legal act. The amount of interest is also decisive for the determination of the proper fulfillment of the tax obligations associated with interest and the subsequent derivation of tortious liability.

With a certain degree of legal abstraction, we can label the performance of the loan as the income of a natural or legal person with the status of a debtor. However, this premise does not apply in absolute terms. If we perceive the loan in the context of the "ITA" legislation, it is still possible to subsume the performance resulting from the loan under the term income in the sense of the content of the provisions of § 2 par. c) "ITA", but this income cannot be confused with the term taxable income. In order to mark the income of the natural or legal person with an adjective "taxable", there must be cumulatively fulfilled two conditions, namely AD 1) it is the income that is subject to tax and AD 2) it is not exempted from tax according to "ITA" and international agreements. According to § 2 par. b) "ITA" the subject to personal and corporate income tax is an income from the taxpayer's activities and from the disposal of the taxpayer's property, except for income, which represents a special tax based specifically in the provision of § 12 "ITA". On the basis of the above, it is difficult to imagine a situation where the loan would represent income from the activities of the taxpayer or from the disposal of his property. The fact that the loan is not a taxable income also follows from the statutory wording of the "ITA", which excludes the loan from the taxpayer. In concrete, according to § 3 par. 2 of the mentionned law, the subject of personal income tax is not a loan.

Vice versa, the above-mentioned interest is in terms of "ITA" taxable income, but only if it is the income of natural person.[18] Diction of § 7 par. 1 letter c) "ITA" subsumed interest and other income from the loans and borrowings under investment income, and it provided that the income tax is not income pursuant to § 6 par. 1 letter d) "ITA".

Taking into account the above-mentioned application cases, when the creditor of a natural person (taxpayer) was in the tax period[19] interest paid on loans or credits granted, it can be stated that the creditor is obliged to file a tax return and pay tax in the amount of 19% of the special tax base, that is 19% of the amount of interest received on interest and loans provided. In the context of the above, it is necessary to emphasize that the special tax base can not be identified with the so-called "total" tax base and to add to this tax base or a special tax base.

[17] For the area of commercial law relations and the right to interest on arrears, the amount of the said interest is determined taking into account the wording of Government Regulation no. 21/2013 Coll. implementing certain provisions of the Commercial Code as amended. - On this, see: § 369 - 369d of Act no. 513/1991 Coll. Commercial Code as amended - SUCHOŽA, JOZEF et al. *Commercial Code and related regulations. Comment*. Bratislava : Eurounion, 2016. p. 898-913; PATAKYOVÁ, MÁRIA et al., *Commercial Code. Comment. 4th edition*. Bratislava : CH Beck, 2013. p. 1218-1238.

[18] In the case of a corporate income tax, it is necessary to emphasize the fact that interest on the loan is from the tax according to § 13 par. 2 letter f) "ITA" exempted.

[19] Pursuant to the wording of § 2 par. l "ITA"is the tax period for a period of one calendar year.

The reason is the income from capital assets represents the so-called a special tax base, which in accordance with § 15 letter a) point 4 of the "ITA" taxes at a separate rate of 19%, regardless of the amount of the special tax base itself.

In the context of the above, and with regard to not sufficient public legal awareness, particularly legislation tax law can be presumed condition where the interest for the provided credit or loan is indeed personal income subject to income tax, but on the part of individuals there is a declaration in tax returns.[20] This results in non-payment of the tax on the special tax base. Failure to file a tax return, that is filing an incomplete tax return[21] represents not only an administrative offense under § 154 par. 1 letter a) in connection with § 154 par. 1 letter e) of Act no. 563/2009 Coll. on Tax Administration (Tax Code) and on amendments to certain acts as amended (hereinafter referred to as "TC" or also as "Tax Code"). The described procedure of the taxpayer in the visibility of criminal law fulfills the features of the factual nature of a possible single-act concurrence of criminal offenses of obstruction of tax administration pursuant to § 278a of the Criminal Code and the criminal offense of tax and insurance reduction in § 276 of the Criminal Code.[22]

Based on the basic factual nature of the crime of reducing taxes and insurance premiums,[23] we refer to the legal opinion of the Supreme Court of the Slovak Republic in the Resolution of 15.04.2014 Case No: 4 Tdo 43/2013, in which it ruled that the object of the crime in question is the interest of the state in the correct assessment of tax as a mandatory statutory amount, which a natural or legal person pays from his income to the state budget in a predetermined amount and within specified deadlines.[24] The crime of tax reduction is a special type of fraud in relation to an individually determined object. A tax reduction is defined as any intentional act of the offender, as a result of which a tax lower than the statutory tax is levied, or which is not levied at all (Resolution of the Supreme Court of the Czech Republic Case No: 4 Tdo 1557/2016). The perpetrator is, above all, the taxpayer if, by intentional conduct, it causes the statutory tax not to be levied on him at all, or it was levied on him in less than the statutory amount.

As regards the perception of the concept of tax from the point of view of criminal law, it must be stated that the Criminal Code does not contain a legal definition of tax. Criminal law is relatively strictly based on the constitutional text, namely Article 59 par. 2 of the Constitutional Act no. 460/1992 Coll. The Constitution of the Slovak Republic, as amended (hereinafter referred to as the "Constitution of the Slovak Republic"), pursuant to which taxes may be imposed either by law or on the basis of law. Thus, only such a mandatory monetary payment can be considered as a tax, which is marked as a tax by the legislator himself, in the conditions of the Slovak Republic by the National Council of the Slovak Republic. This implies a legal question, namely whether the term tax can be understood in the narrower sense, as a tax under individual substantive tax legislation, such as personal and corporate income tax, or more broadly, when the term tax we also understand tax in the sense of tax procedural law, namely the Tax Code.[25] The reason is the fact that it is the legislator who in the provision of § 2 par. b)

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[20] The obligation to file a tax return is specified in more detail in the provision of § 32 "ITA".

[21] The elimination of the shortcomings of the tax return is also related to the incomplete tax return. KUBINCOVÁ, TATIANA. Call for elimination of deficiencies in the tax return and abbreviated levying procedure. In: *Acta Iuridica Sladkoviciensia XIII*. Brno : MSD, 2018. p. 5-15.

[22] "*Anyone who reduces taxes, social security contributions, public health insurance or old-age pension contributions to a small extent shall be punished by imprisonment for one to five year.* "

[23] In the context of the content of the article and the crime of tax reduction and insurance under § 276 of the Criminal Code, we will further limit our attention to the part of the factual nature of the crime, which concerns only tax reduction and we will use only the phrase "tax reduction crime" to describe the crime in the appropriate grammatical form.

[24] IVOR, Jaroslav et al. *Criminal Law: special part II. 1st edition* . Bratislava : IURA EDITION, 2006. p. 232; IVOR, Jaroslav et al. *Substantive criminal law: special part II*. Bratislava : Wolters Kluwer, 2017. p. 251.

[25] ŠAMKO, PETER. *Tax fraud proceedings and their proving*. Bratislava: Wolters Kluwer, 2015. p. 19-22.

of the slovakian Tax Code specifies the tax as a tax according to special regulations, including interest on arrears, interest and fines according to the Tax Code or special regulations, local fee for municipal waste and small construction waste according to a special regulation[26] and a local development fee according to a special regulation[27] The answer is the wording of the Tax Code, which defines only the legaldefinition of tax only for the purposes of the Tax Code. Legal theory of criminal law has established that for the purposes of criminal law, the term tax means: AD 1) income tax;[28] AD 2) value added tax;[29] AD 3) motor vehicle tax;[30] AD 4) excise duties;[31] from 2018 also AD 5) insurance tax,[32] AD 6) local taxes AD 7) from 31. December 2023, Act No. 507/2023 Coll. on the compensatory tax to ensure the minimum level of taxation of multinational business groups and large national groups and on the amendment of Act no. 563/2009 Coll. on tax administration (tax code) and on amendments to certain laws as amended. Under the term tax regime it is not possible to exclude corporate income tax, respectively other fees.

The concept of tax and fee from the point of view of legal theory, especially tax law, cannot be identified. "*The tax is a mandatory non-refundable, enforceable and, as a rule , non-purpose and recurring monetary payment of natural and legal persons, collected by law by the state and local authorities in favor of public budgets and special purpose funds to cover public expenditures in a predetermined amount and with a specific due date.* ".[33] Legal theory defines a fee as a public benefit (compulsory cash payment) imposed by the state or local authorities on other (compulsory) entities. The obligor of the fee is the entity (natural person, legal entity, state) that caused the activity of a certain institution. The fee thus serves to reduce the costs incurred, such as court or administrative fees.[34]

In the context of the contractual interest and interest rate, it can be stated that if the interest exceeds the amount 1.400 Eur a tax liability of more than 266 Eur will arise.[35] If the tax is not paid, the objective aspect of the criminal offense of tax reduction pursuant to § 276 of the Criminal Code is fulfilled.

The subject of a criminal offense pursuant to § 276 of the Criminal Code may be any criminally liable person, whether a natural person or a legal entity.[36] The Supreme Court of the Czech Republic in the Resolution of 14.08.2019, Case No. 7 Tdo 715/2019 stated, inter alia, that the perpetrator and accomplices of the criminal offense may be not only taxpayer but anyone, whether a natural or legal person who, by his intentional conduct, causes the statutory tax was not or another subject (natural and legal person) measured either at all or not to the legal extent. The tax subject and the subject of the crime of tax reduction need not be the same.

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26 Act no. 582/2004 Coll. on local taxes and local fees for municipal waste and small construction waste, as amended.

27 Act no. 447/2015 Coll. on the local development fee and on the amendment of certain laws, as amended.

28 "ITA".

29 Act no. 222/2004 on value added tax, as amended.

30 Act no. 361/2014 Coll. on motor vehicle tax and on amendments to certain acts, as amended.

31 Act no. 98/2004 Coll. on excise duty on mineral oil, as amended; Act no. 106/2004 Coll. on excise duty on tobacco products, as amended; Act no. 609/2007 Coll. on excise duty on electricity, coal and natural gas and on the amendment of Act no. 98/2004 Coll. on excise duty on mineral oil, as amended, as amended; Act no. 530/2011 Coll. on excise duty on alcoholic beverages, as amended.

32 Act no. 213/2018 Coll. on insurance tax and on amendments to certain acts.

33 KUBINCOVÁ, SOŇA. *Taxes, fees, duties and other mandatory payments: (definitions and legislation)*. Banská Bystrica : Matej Bel University, 2009. p. 39; KUBINCOVÁ, SOŇA and LEITNEROVÁ, LUCIA. *Financial Law. Part I. Legal regulation of budgets, currency, foreign exchange law and financial market law*. Banská Bystrica : Matej Bel University Publishing House - Belianum : Matej Bel University, Faculty of Law, 2015. p. 48.

34 SIDAK M et al. *Financial Law*. Bratislava: CH Beck, 2014. p. 269-272.

35 The determination of the financial limit in the form of an amount of more than 266 Eur results from the correlation of the provisions of § 276 par. 1 Criminal Code "*Who will reduce the tax to a small extent ...* " and the wording of § 125 par. 1 Criminal Code "*Minor damage means damage exceeding the amount of 266 euros*. "

36 For this, see § 3 of Act no. 91/2016 on the criminal liability of legal persons and on the amendment of certain laws as amended.

It is therefore not possible to confuse tax liability and criminal liability for tax reduction (Judgment of the Supreme Court of the Slovak Republic Case No: R 26/1968). The perpetrator will be any criminally liable person who, by his intentional conduct, causes the tax not to be assessed either by himself or by another (third) taxpayer, either at all or not to the extent provided by law, in our case "ITA".[37]

The wording of the legal text of the criminal offense of tax reduction pursuant to § 276 of the Criminal Code in conjunction with § 17 of the Criminal Code[38] requires the offender to act intentionally, at least indirectly. If a person whose proceedings show signs of a criminal offense of tax reduction pursuant to § 276 of the Criminal Code cannot be proved intentionally at fault, a contrario person acted negligently, the conduct of this person may only fulfill the characteristics of an administrative tort pursuant to § 154 "TC", even if the tax was reduced to a greater extent (R 13/1984).[39] Sanctions specified in the Tax Code are subsequently imposed for an administrative offense.[40]

In the conclusion of the said Supreme Court of the Czech Republic in the Resolution of 26.04.2006 Case No. 5 Tdo 411/2006 ruled, inter alia, that in the criminal offense of tax reduction in § 276 of the Criminal Code, ignorance of the law, in concreto of tax legal norms, cannot be regarded as a negative error of law. It is a negative legal error only in cases where the offender does not know that his actions are criminal in the sense of the law, when his ignorance relates to the content of the criminal law.

For the occurrence of criminal liability in § 276 of the Criminal Code, it is sufficient if the perpetrator is aware of the decisive facts on which the taxpayer's or taxpayer's tax liability depends, such as having a taxable supply, which is also interest on the loan or interest provided by us.[41] The factual nature of the criminal offense of tax reduction will thus be fulfilled by non-declaration, concealment, taxable income, usually by not filing a tax return or by filing an incomplete tax return. However, in connection with the identified criminal offense and the filing of a tax return, several different legal opinions can be observed within the decision-making activity of judicial authorities.

The Supreme Court of the Czech Republic in the Resolution of 21.07.2005 Case No: 8 Tdo 790/2005 ruled that the criminal offense of tax reduction can also be committed by intentional failure to file a tax return, and thus by concealing a taxable supply, because the tax administrator is not obliged to determine the amount of unrecognized tax under devices, but is entitled to presume the zero tax. Vice versa, Senate of the Supreme Court of the Czech Republic 11 Tdo in the Resolution of 12 February 2003 Case No: 11 Tdo 265/2002 stated the legal opinion that

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[37] IVOR, Jaroslav et al. *Substantive criminal law: special part II*. Bratislava : Wolters Kluwer, 2017. p. 251. Seen also: MADLIAK, JOZEF et al. *Substantive Criminal Law. General Part I.* Banská Bystrica : Matej Bel University Publishing House – Belianum, 2015. p. 209.

[38] "*Intentional fault shall be required for the criminalization of an act committed by a natural person, unless this law expressly provides that fault through negligence is sufficient*. "

[39] The decision of the European Court of Human Rights allowed the simultaneous or gradual conduct of tax proceedings and criminal proceedings, which are proceedings of a criminal nature, in the sense of the so-called Engel criteria. In addition to the temporal and factual context, the European Court of Human Rights has qualified as a condition for the admissibility of double punishment and non-violation of the " ne bis in idem " prohibition 1) the obligation to examine the object (alt. subject) of protection of a legal norm, 2) the obligation to take into account the sanction imposed in a previously closed procedure and in a procedure in which the sanction is yet to be decided in order to avoid excessive punishment and 3) and take into account the proofs already made (Judgment of the European Court of Human Rights Case No: 24130/11 and 29758/11, A and B v. Norway, dated 15.11.2016).

[40] KUBINCOVÁ, TATIANA. Selected issues of imposing sanctions in tax administration. In: *Banská Bystrica Castle Days of Law: proceedings of the 3rd year of the international scientific conference on the topic, Vígľaš, SK, 23-24 November 2017.* Banská Bystrica : Matej Bel Bel - Belianum University Publishing House, 2017. p. 132-143.

[41] The offense of tax evasion and see the see - PÚRY, FRANTIŠEK. Tax evasion - the limits of legal tax optimization. In: *Criminal tax law. Proceedings of the contribution from the first international conference, Prague, CZ, 27 October 2006*, Prague : CH Beck, 2007. p. 1-10.

the legal feature of tax reduction in the sense of § 148 par. 1 Criminal Code[42] it is not just the failure to submit a tax return. If the tax administrator knows about this tax liability of the taxpayer and does not act, then the tax administrator participates in reducing the tax. According to the Senate 11 Tdo, however, failure to file a tax return may be a criminal offense of tax reduction only in cases where the taxable person is not registered with the tax administrator and is not obliged to file a tax return, unless he has incurred a tax liability. According to the legal opinion of the Supreme Court of the Czech Republic (Senate 8 Tdo) presented in the Resolution of 21.07.2005 Case No. 8 Tdo 790/2005, in the event that the tax administrator did not use the institute of tax assessment according to aids, did not violate the provisions of the law , because he was entitled to assume that the taxpayer did not incur tax liability in the relevant period.

The resulting legal dichotomism was not resolved until the Grand Chamber of the Supreme Court of the Czech Republic, which in its Resolution of 28.03.2012 Case No. 15 Tdo 1671/2011 ruled on the correctness of the legal opinion of the Chambers of 8 Tdo and 5 Tdo, namely the reduction of the tax is any action of the offender, as a result of which the taxpayer (liable person) is taxed lower than it should have been assessed and paid, or this compulsory payment is not levied at all. The reason for the tax reduction can also be committed by intentionally failing to file a return for this tax while concealing the taxable supply, because in such a case the tax administrator is entitled to assume a zero amount of tax for the taxpayer.

In the conclusion of the above-cited court decisions, we take a legal opinion which is not entirely in line with the legal opinions of judicial authorities, presuming only the authority and not the duty of the tax administrator to determine the tax under the aids. The reason lies in the change of legal text, which has meanwhile occurred, as well as the need to distinguish that these are decisions of courts of the Czech Republic, where a different legal order applies than in the territory of our Slovak Republic. Concerning the legislation valid and effective in the Czech Republic and at the time the subject of judicial decisions (§ 44 par. 1 of Act no. 337/1992 Coll. of the Czech National Council on the administration of taxes and fees) and today (§ 145 par.1 of Act No. 280/2009 Coll. the Tax Code, as amended), it can be stated that the tax administrator is really only entitled and not obliged to determine the tax according to the aids. A similar legal regulation also applied in the territory of the Slovak Republic (§ 42 par. 1, of Act No. 511/1992 Coll. on the administration of taxes and fees and on changes in the system of territorial financial authorities). However, currently valid legislation in the territory of the Slovak Republic, specifically § 48 par. 1 of the Tax Code, uses the wording, "*The tax administrator shall determine the tax base and determine the tax according to the aids ...*". The cited legal regulation does not even partially indicate the possibility of action of the tax administrator when using the legal institute of tax determination under the aids. A contrario, it clearly follows that in the event that a taxable entity does not fulfill its legal obligations, the tax administrator automatically takes up the activity. In the conclusion of a aforementioned citation, the obligation of the tax administrator to determine taxes according to aids can be assumed. We derive the presented legal opinion mainly from the duties of the tax administrator according to § 3 par. 1 and par. 5 of the Tax Code, when the interests of the state and municipalities are protected in the administration of taxes, the so-called fiscal interests. The tax administrator is obliged to perform actions in the administration of taxes on his own initiative, if the legal conditions for the origin or existence of a tax claim are met, even if the tax entity has not properly or at all fulfilled its obligations. This is an expression of the principle of officiality.[43]

[42] The paragraph designation of a criminal offense corresponds to the legal regulation valid and effective at the time of the commission of the act, in concreto it is Act no. 140/1961 Coll. Criminal Code. In the conditions of the legal regulation currently valid in the territory of the Slovak Republic it is § 276 of the Criminal Code, and in the conditions of the legal regulation currently valid in the Czech Republic the mentioned criminal offense is further specified in § 240 of Act no. 40/2009 Coll. Penal Code in amended.

[43] KUBINCOVÁ, SOŇA. *Tax Code. Comment. 1st edition*. Bratislava : CH Beck, 2015. p. 33.

It is the finding of facts through the aids that leads to the correct determination of the tax liability, determination and subsequent collection of tax, which according to § 2 par. e) of the Tax Code represents a tax receivable until its due date.

To us, the presentation of the obligations of the tax authorities to determine the tax under the aids and in connection with the fulfillment of the constitutive elements of the crime of tax evasion, said that would contradict the logic to hold a legal opinion on a tax return in connection with the lack of activity of the tax authorities and its determination by aids, would mean a liberation reason[44] for the taxpayer. Assessing the criminal offense of tax reduction in terms of whether the tax administrator has complied with legal obligations and determined the tax under tjhe aids, where under the legislation, especially "ITA", the taxpayer is liable, would lead to unjustified shift of liability for breach of duty. With some degree of legal abstraction, we could even talk about complicity, the taxpayer and the tax administrator, because, in essence, both have breached their legal obligations and the tax has been reduced. That legal opinion is therefore unacceptable.

IV. CONTROL MECHANISM DE LEGE FERENDA

Respecting the activities of the National Bank of Slovakia, which in accordance with § 1 par. 3 letter a) of Act no. 747/2004 Coll. on financial market supervision and on amendments to certain acts, as amended, supervises the financial market as well as in connection with the methodological guidelines, we tried to find out whether there is a technical system that would help banks monitor incoming cash payments of their clients. In its response, the "NBS" stated that, in accordance with the applicable legislation, it is not authorized to supervise natural and legal persons, as these, as bank clients, are not supervised entities of the National Bank of Slovakia. Entities with the status of "supervised" are precisely defined by the wording of § 1 par. 3 letter a) of Act no. 747/2004 Coll. on financial market supervision and on amendments to certain acts, as amended. The "NBS" further stated: "*Provision of loans between natural persons who are also clients of the bank, in accordance with Act no. 40/1964 Coll. Of the Civil Code, as amended, is not subject to supervision by the National Bank of Slovakia pursuant to the Supervision Act.*" [45] We approached commercial banks in the Slovak Republic about this issue, but they did not give us an answer. Based on the above, it can be assumed that even if banks have an internal prevention and control mechanism based on complex rules, in which a combination of several factors enters, it is not in their interest to present it publicly. Ad absurdum, if this obligation so-called. additional prevention is not required by law, it would be illogical to make its operating conditions available even if there is possible abuse.

In the correlation of the control mechanism created and operating at the level of protection against money laundering and protection against terrorist financing and the problem of tax evasion here presented, consisting in tax reduction by not filing a tax return and non-payment of interest tax as taxable income according to § 7 par. 1 letter c) "ITA" is of the legal opinion that in detecting the above-mentioned criminal activity, the application of the already existing system should be extended to the area of examining the origin of tax liability. We derive the de lege ferenda proposal from the fact that already banks, as liable persons,[46] cooperate with the financial intelligence unit, which reports an unusual transaction attempts, its execution or its rejection. If the facts indicate that a criminal offense has been committed, the financial intelligence unit shall refer the matter to the law enforcement authorities. At the same time, it

[44] As a certain liberating reason for the criminal offense of tax reduction according to § 276 of the Criminal Code, only the institute of effective remorse according to § 86 of the Criminal Code can be mentioned, in concreto according to § 86 par. 1 letter d) Criminal Code.

[45] The " NBS " reply to the Request for Information dated 10.03.2020 sent by e-mail and marked as no. z .: 100-000-223-782, no. file: NBS1-000-048-318 dated 17.03.2020.

[46] For more details, see: § 5 of the " AML " Act.

also provides information obtained in the course of its activities to the tax administrator and state administration bodies in the area of taxes, fees and customs,[47] if relevant for tax administration. Basically, correlate cooperation on the one hand between financial-intelligence unit and criminal justice and financial-intelligence unit and state authorities in the field of taxation on the other hand, implies the condition of the existing monitoring a particular element, in this case an unusual transaction and the terms of cooperation, providing information on this operation to other authorities.

In the conclusion of the above, it is mainly in the interest of the state to monitor and evaluate whether the tax entity has paid the tax in the proper amount (lege artis). This is possible only if the taxpayer's taxable income is fully ascertained, which also includes the contractual interest on the loan. Unless a mechanism for "detecting" contractual interest is created, it will be used as an effective tool to maximize creditors' incomes. In tax law, stability of the introduced changes, proper design of the amendments as well as preparation of the taxpayer for the new solutions are particularly important.[48] As we mentioned in the introduction, this income will come from high interest rates from honest debtors, whose social situation will worsen, but if the creditor is not monitored, he will receive a relatively high income free of tax and delinquent liability for non-compliance. On the other hand, the absence of a control mechanism helps to conclude only fictitious loan agreements, whether with an average or excessive interest rate, where interest will be used as a tool to launder the proceeds of crime.

The control system referred to functional operation will have AD 1) use legislative technique, and to define imane another significantly , which would suggest that it is the income from loans and AD 2) sufficient information and - technical mechanism that would prove monitor, detect, examine whether the tax obligation has been fulfilled and send the abstracted data in an automated manner to state administration bodies in the field of taxes, primarily to tax administrators in accordance with their competence determined by the Tax Code. In connection with the above, it happens that tax legislation often supports and stimulates the tax planning of citizens, whose subsequent action consists in transforming these rules to their advantage.[49]

The creation of an effective control mechanism, perhaps also in the sense of the proposal de lege ferenda presented by us, would also mean the marginalization of the now frequently used system, where only those taxes are monitored by tax administrators, resp. in the context of "ITA", taxable income, which results in the highest income for the state, alt. taxes that the tax administrator is aware of represent the largest possible tax evasion are monitored. This favors the criterion of quantity of collection, while marginalizing the quality of tax collection. At the same time, it should be kept in mind that the creation of a control mechanism, in order to collect taxes more efficiently, requires setting priorities that would set specific objectives and indicators so as to contribute to a fairer tax system.[50]

We are of the opinion that if the proper provision of state services to citizens as a consideration for tax collection is to be ensured, tax administration and tax collection must also be more efficient and actively respond to problems of application practice, thus maximizing efforts for legislative and technical solutions to identify and all taxable income is duly taxed.

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47 See: the wording of § 2 of Act no. 35/2019 Coll. on financial administration and on amendments to certain acts, as amended.

48 GAJEWSKI J. DOMINIK, OLCZYK A.Changes In Polish Tax Law In Response To The Covid-19 Pandemic Against The Comparative Legislative Changes In The Czech Republic And Slovakia.[online]. In: *STUDIA IURIDICA Cassoviensia*., Vol. 12. 2024, no. 1. p. 87 – 98, ISSN 1339-3995. [Accessed 20 May 2024]. DOI 10.33542/SIC2024-1-05 Available from: https://doi.org/10.33542/SIC2024-1-05.

49 GRIBNAU, HANS. Corporate Social Responsibility and Tax Planning: Not by Rules Alone. In: *Social & Legal Studie*, [online]. 26. May 2015. Vol. 24, no 2, p. 225 - 250. [Accessed 10 April 2024]. DOI 10.1177/0964663915575053 Available from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610090.

50 BRADLEY, WENDY. Tax Prats and Citizen Stakeholders: Professionalism in the Gap Between Tax Priority Setting and Tax Policymaking. In: *Social & Legal Studies*, [online]. 24. May 2015. Vol. 24, no. 2, p. 203 - 224. [Accessed 22 May 2024]. DOI 10.1177/0964663915574013 Available from: https://doi.org/10.1177/0964663915574013.

V. CONCLUSION

The article was focused on a specific contractual relationship between natural person loans to non-entrepreneurs and the consequent effects. We are aware that the existing obligations in modern society represent various rights and obligations, in relation to which the situations we describe are narrow-profile. However, we believe that it is the pointing and subsequent analysis of the selected institute that reveals further links with institutes, the non-respect of which may be related to possible criminal activity. Our analysis described a loan between natural person non-entrepreneurs can be to arrange for contract financial benefit or social assistance, while respecting the non-business plan. The parties knowingly and unknowingly violate existing legislation, and in the case where the agreed contractual interest contradicts good morals, resp. shows only the signs of the crime of usury and also the non-recognition of interest as a taxable income, which can lead to the crime of tax reduction. What is therefore important is not the purpose of the creditor's conduct, but the content of the obligation and the subsequent conduct of the natural creditor in relation to the award of interest as taxable income

Thanks to the detailed study, application practice and the opinion of the National Bank of Slovakia that we obtained, in the last chapter we took the liberty of stating several de lege ferenda considerations[51] regarding the prevention of law violations and the improvement of the existing control mechanism. In response to the synthesized knowledge, its transfer into practical application and subsequent analysis with reference to rich judicial law, we confirm the correctness of the hypothesis established in the introduction.

Despite this, we highlight the positive status of the loan institution as a tool that individuals can use to respond to an adverse social situation. The flexibility of the loan lies mainly in the speed of obtaining funds, without the need for complex or time-consuming intermediate steps. In this context, we draw your attention to the Covid-19 pandemic, during which many people have disrupted their stable financial background. It is therefore particularly important that the loan from the relevant state supervisory authorities becomes a more controlled institution and thus improves the analyzed control mechanism.

KEYWORDS
loan contract, contractual interest, taxed income, tax evasion, tax control mechanism

KĽÚČOVÉ SLOVÁ
zmluva o úvere, zmluvný úrok, zdaniteľný príjem, daňové úniky, mechanizmus kontroly dane

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[51] „*During the last few years, the European Parliament and the European Commission have co-hosted several highlevel symposia on the future of taxation in the European Union (EU). Here's our take on the intriguing question: what might we reasonably expect for the future of taxation in the EU?"* - GASPAR VITOR. RUUD de MOOIJ. Guest Editorial: The Future of Taxation in Europe. In: *Intertax* [online]. 2024. vol.52, Issue 6/7 (2024) p. 438 – 441 [Accessed 8 June 2024] Available from: https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TAXI\TAXI2024044.pdf.

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