Vilnius University Press

Content lists are available at VilniusUniversity Press

Transformations In Business & Economics
2025, Vol. 24 No 3 (66), pp.88-101.

ISSN 1648-4460 | E-ISSN 2538-872X
https://doi.org/10.15388/Tibe.2025.24.3.4

Chapter: Financial Systems, Institutional Efficiency, and Policy Challenges of Economic and Institutional Structures

Taxation of undeclared income in Montenegro: constitutional challenges

Ilija Vukcevic
E-mail: ilija.v.vukcevic@gmail.com
ORCID:
Affiliation: Institute for Legal Studies, Montenegro
ROR:

Mirko Boskovic
E-mail: boskovicmirko59@gmail.com
ORCID:
Affiliation: Institute for Legal Studies, Montenegro
ROR:

Annotation. In this study, we survey and analyse the system of taxation of 'undeclared income', which essentially refers to cross-assessment of the tax base by the tax authority, which is carried out in situations where the reported income is many times smaller than the property and consumption of a certain individual. In these situations, the tax authorities have provisions at their disposal that give them the opportunity to determine the value of taxpayers' property and consumption, so that if this value is significantly higher than the amount of income they have declared, the authorities have the right to tax the difference. We identify the shortcomings of the subject fiscal mechanism, due to which the competent authority never applied them in practice. A special focus is placed on the issue of the compatibility of these provisions with the Constitution of Montenegro, and the violation of several constitutional principles in the practice of the Constitutional Court of Montenegro will be pointed out. It has been found that the legislator does not properly understand the aim and the role of these fiscal provisions in the overall context of reviewing the origin of property.

Keywords: taxation of undeclared income, Constitutional Court of Montenegro, confiscatory taxation, principle of legality, principle of the unity of the legal order.

JEL classification: H21, H71.

Introduction

The concept of reviewing the origin of property in the context of various measures related to situations of a disproportion between the income and property of individuals includes various measures and policies within a legal system that consists of three different subsystems. The first is the tax law system. In the taxation of the so-called 'undeclared income', the tax authorities have provisions at their disposal that give them the opportunity to determine the value of the taxpayer's property and consumption, so that if this value is significantly higher than the amount of income they have declared, the authorities have the right to tax the difference. The second is the criminal law system. The so-called 'extended confiscation of property' is based on a financial investigation that is conducted in parallel with the conducting of criminal proceedings, and foresees the possibility that the defendant may be deprived of property, where this is disproportionate to his lawful income if the defendant is eventually convicted of any of the criminal offences prescribed by the law. The third is the civil law system. The so-called 'unexplained wealth' is a legal regime that aims to confiscate the assets of natural persons in the event of a discrepancy between

Submitted on February 2020. Accepted on November 2023.

the reported income and expenditure, but without the existence of a criminal judgment (non-conviction-based asset recovery) before the civil courts.

Although the intention to introduce the concept of taxation of unreported income should be evaluated as a significant step forward in a comprehensive review of any disproportion between the reported income of natural persons and their property and consumption, the way in which this has been done in the legal system of Montenegro is very questionable. The wording and also the content of the provisions on undeclared income contained in the Law on Tax Administration, as well as in the Law on Personal Income Tax, do not represent an adequate response to the task set before them. Therefore, it is not surprising that even four years after the adoption of the disputed provisions on the taxation of undeclared income, the competent authority has not tried to apply them in practice. This paper will show that the potential that this type of norm possesses cannot be used because of, on the one hand, a lack of understanding by the legislator in general regarding the matter to which this refers, and on the other hand, its legal nature, which results in an incorrect and insufficient definition of the elements of tax obligation. The consequence of all of the above is that the provisions on undeclared income violate several constitutional principles, i.e. they are in conflict with the established practice of the Constitutional Court of Montenegro.

1. Taxation of Undeclared Income

The legal mechanism of taxation of undeclared income essentially refers to the assessment of the tax base by the tax authority, which is carried out in situations where the reported income (which can be taxed or exempted) is many times smaller than the value of property (immovable and movable), as well as the consumption (especially on luxury items), of a certain individual. In other words, the tax base can be determined by assessing the difference between a taxpayer's expenses for their private needs and/or acquired private property, and the reported income, i.e. profit, if it cannot be proven that this difference is being taxed (Grbesic, 2005) The above implies that the tax authorities are triggered to start a procedure for determining the disparity between the taxpayer's income and expenses, or the acquisition of property or some other significant expenditure (cost). Court practice has shown that the most common 'triggers' for initiating tax proceedings include (1) larger loans to a business or company, (2) larger loans between family members, (3) purchase of real estate or movable property of greater value (cars, boats), and (4) high loan repayment amounts (Gadzo, 2021).

The legislator mentions improved efficiency of the tax system and the prevention of abuses as the objectives of the introduction of disputed provisions, the result of which is the ownership of property that cannot be justified by the lawful income of an individual, which is the objective of the changes to the regulation. The need to prevent the abuse in cases where the value of an individual's property is not justified by its source or where it originates from an 'invisible' source has also imposed the need for an adequate adjustment of the tax procedure. Defining the procedure for determining the origin of property enables to achieve not only fiscal goals, but also social goals. These goals consist of reducing the difference in the economic and social position of taxpayers, i.e. to alleviate the difference between those taxpayers whose property corresponds to the income they earn and those taxpayers where there is a disproportion between these two amounts, which is the basis for the introduction of tax liability. At the same time, taxation of property whose origin cannot be proven by lawful income is one of the effective tools in the fight against corruption. Tax avoidance and tax evasion not only lead to a reduction of public revenues, but also represent a threat to fair market competition. Therefore, the establishment of a mechanism to suppress these phenomena contributes to the building of a market economy (Amendments 01-5956/1).

The introduction of tax liability with regard to undeclared income is defined in an insufficient way, which indicates a lack of understanding of this concept by the legislator. The definition of the term itself, as well as the tax base, can be found in the form of very brief wording in the Article 52 paragraph 2 of the Law on Tax Administration: 'Unreported income is realised income that is determined on the basis of the difference between the value of the property at the end and the beginning of the calendar year, minus the amount of reported income.' Therefore, undeclared income is defined as the value of property at the end of the year minus the sum of the value of property at the beginning of the year and the amount of reported income. However, this definition of the tax base is insufficient because: (1) undeclared income includes not only the amount of property at the end of the year, but also significant expenditures that the taxpayer incurs in the form of consumption within the subject calendar year; (2) assets acquired during the year can be the result of gifts or inheritances received by the taxpayer, or incomes that are not reported because they are not taxable and there was no obligation to report them. Therefore, the tax base on unreported income should represent the difference between the value of property at the end and at the beginning of the calendar year, minus the amount of reported income and the value of property acquired through inheritance, gifts or other legal, non-onerous means, as well as the amount of income that is not taxable (Popovic, 2003).

Similarly, the explanation by the legislator of the provisions in question, which states that any 'property that cannot be justified by lawful income' will be subject to tax, indicates a misunderstanding of the legal nature of this institute. By comparing reported income and acquired property, and by checking this with databases on the possible sources of income and cash flows in a certain tax period, in the preparation of tax supervision a potential disproportion is determined, indicating that it is undeclared income, which may or may not be the result of a criminal act (Lonza, 2016). Individual cases in which the illegal acquisition of property by the commission of a criminal offence has been established are often equated with the disproportion that has been established in administrative proceedings as the difference between the acquired property and the amount of receipts with which it was acquired. Therefore, in the administrative procedure, it is determined that certain property is not taxed, and it is not determined whether this was acquired through criminal activity, i.e. by committing a criminal offence (Kutlesa, 2020).

It is necessary to understand that the tax system, as well as the tax authorities, are not entities that should be dealing with reviewing the lawfulness of the legal basis of a transaction or, more specifically, whether a certain property or income was lawfully acquired or not. In other words, the task of the tax authorities is to detect situations in which there is a disparity (difference) in the reported income of a taxpayer and their expenditures (purchase of movable or immovable property, i.e. consumption) without the assessment of the legality of the acquisition. Whether there is a legitimate legal basis, as well as whether the income has resulted from the commission of a specific criminal offence, is the jurisdiction of the courts. Therefore, the question of the legality of the basis for acquiring some income or property should be exclusively the subject of court proceedings and never tax proceedings. The basic wrong assumption underlying the incorrect definition of the term in question lies in the fact that, if a person cannot or does not want to document the legal basis of acquiring a certain income for the purpose of taxation, this does not mean that it is an illegal acquisition. In other words, the taxpayer can legally acquire property, even though the money with which the property was acquired comes from unreported income, which was again legally earned (Kostic, 2021).

Ultimately, the explanation of the disputed provisions contains the statement that these refer to 'taxation of property whose origin cannot be proven'. This means that the legislator cannot distinguish the basic elements of the subject tax liability, specifically, what the object of taxation is. More precisely, the form of tax in question relates to undeclared income, which means that it belongs to the group of taxes whose subject of taxation is income/revenues. On the other hand, we are talking about property tax when: the object of taxation is property (*per se*), the tax base is its value, and the reason for taxation is the property itself, that is, property in its static form (Jelcic *et al.,* 2002). Therefore, the contested form of tax does not refer to 'taxation of property', as claimed by the legislator in the explanation, but refers to income as the object of taxation.

2. Constitutional Issues

Constitutional courts are a 'counterweight to all established authorities', i.e. bodies that take care of maintaining the balance between the various holders of state power, expressed through the division of power, and thus 'provide a guarantee of respect for the constitution' (Nenadic, 2014). Precisely because the provisions on taxation of undeclared income relate to the very important rights of taxpayers, it is of crucial importance to review them from the perspective of the Constitution of Montenegro. In the practice of the Constitutional Court, it is possible to identify at least three doctrines that are in obvious contradiction with the relevant provisions. These are general principles developed in the practice of the Constitutional Court, which can also be found in the positions of the European Court of Human Rights (*ECtHR*), the Court of Justice of the European Union (*CJEU*), as well as other national constitutional courts.

2.1 Confiscatory Effects

The introduction of a high tax rate of 80% on undeclared income essentially represents a mechanism for reviewing the origin of property in the form of a sanction if a person cannot document the basis of its acquisition. The problem with this legal regime lies in the fact that excessively high tax rates, in practice, result in the confiscation of a taxpayer's property without a court proceeding or decision, which raises the question of the compliance of this measure with the Constitution. Namely, the prohibition of the confiscatory effects of taxes appears in the practice of comparative constitutional judiciaries, as well as in the practice of the ECtHR, as a dimension of the constitutional principle of proportionality, as well as the guarantee of peaceful enjoyment of property. In order to properly understand this problem, the opinions of the practice of the Constitutional Court regarding the application of these two principles, as well as the prohibition of taxation as punishment, can be used.

Article 1 of Protocol No 1 to the European Convention guarantees the right to property, in such a way that every individual or legal person has the right to peaceful enjoyment of their property and that no one can be deprived of their property, except in the public interest and under the conditions provided by law and general principles of international law. When it comes to taxation, Article 1 of Protocol No 1 to the European Convention recognises the right of states to take the necessary measures to ensure the payment of taxes or other duties or fines (as a permitted form of control over the use of property). However, although states have significant discretionary powers in this sphere, they must have certain limits, and the measure limiting a property right must not represent a 'special and excessive burden' for taxpayers: '[...] state interference in the right to peaceful enjoyment of property will be considered contrary to the principles of the Convention if there is no objective and reasonable justification, if it does not pursue a legitimate goal or if there is no reasonable proportionality between the applied measure and the goal it is trying to achieve. This specifically means that it must be taken into account as to whether the legislative measure limiting property rights represents a "special and excessive burden", i.e. whether a fair balance between the requirements of the general interest and individual rights can be achieved by 'less restrictive measures' limiting property right' (U-I No. 12/15, 28 February 2019).

In this context, the ECtHR provides an analysis of the issue on the confiscatory effect of taxes and the protection of peaceful enjoyment of property through a comparative analysis of the constitutional judicial practice of the most prominent European countries (No 49570/11, 25 June 2013):

– The Constitutional Council of France – In decision No 2007-555 DC (16 August 2007) it is held that the requirement deriving from Article 13 of the declaration of 1789 would not be complied with if taxation were to be of a confiscatory nature or [if a certain category of taxpayers were subjected] to an excessive burden in comparison with their ability to pay taxes. The principle of the capping of the proportion of a tax household's income allocated to paying direct taxes, far from infringing the principle of equality before public burden sharing, is intended to avoid a patent infringement of this same principle. (No 49570/11, 25 June 2013)

– Federal Supreme Court of Switzerland – In decisions BGE 106 Ia 342, 349; BGE 128 II 112, 126, the mentioned Court held that a taxation scheme that is confiscatory in its effects and not limited in time would infringe the essence of the right to property. To date, the Federal Supreme Court has not found any taxation scheme to be confiscatory. [...] Decision No. 2P.139/2004 contains the following passage: '[...] it is not compatible with Article 26 of the Federal Constitution if an annuity for life, inherited by bequest, of initially CHF [2,200] per month is – regardless of the ability to pay other taxes of the person in receipt of the pension – taxed at 55% in total, in terms of inheritance and income taxes as well as other expenses, which (taking into account the tax sum due for over CHF 200,000) were necessary for their financing (Decision P.1704/1984, published in: ASA 56 p. 439 et seq.). In that specific case the specific circumstances were relevant because the heir could not secure their own existence after paying the taxes for the annuity for life.' (No 49570/11, 25 June 2013)

The long-established general rule of the jurisprudence of the Federal Constitutional Court of Germany is that the right to property will not be violated by the establishment of tax burdens, unless they have confiscatory effects and thus suppress appropriate business activities or other income-generating activities. The German Constitutional Court decided that the combined property tax, which should be understood as a tax on presumed income, and the tax burden of income tax, including the burden of any tax on its transfer, may not exceed half of the taxpayer's income (Englisch, 2011). In recent court practice (in 2006), this court concluded that the right to peaceful enjoyment of property was not violated even if the total tax burden reached 57.58% of the total income (Popovic, 2011).

In the area of tax, the principle of proportionality implies that taxes cannot be excessive. The principle of proportionality is generally interpreted as imposing only a marginal limitation on the taxing power of governments, in the sense that they cannot impose confiscatory taxes (Vanistendael, 1996). Even when it applies to taxation, it does not prevent the executive authorities of states from establishing progressive tax rates in the context of the ability-to-pay principle. In most European countries, this principle represents the dividing line between taxation and expropriation (confiscation) of property (Greggi, 2007). There are scholars (Crespo, 2010) who consider confiscatory taxation a specific feature of the ability-to-pay principle. The Constitution of Spain (subsection 31.1), which explicitly prescribes this guarantee, can serve as an example: 'All shall contribute to the sustenance of public expenditures according to their economic capacity through a just tax system based on the principles of equality and progressiveness, which in no case shall be of a confiscatory scope.'

Additionally, taxation cannot be a punitive measure, which is the clear position of the Constitutional Court practice in the context of the guarantee of peaceful enjoyment of property (U-I No 12/15, 25

December 2017). Similar stances can be found in the practice of the Constitutional Court of Croatia, which prohibits the introduction of taxes for non-use of real estate, which would thus indirectly impose an obligation on owners to use said real estate. Such a limitation of the right to ownership of real estate exceeds the limitation of ownership rights allowed by the Constitution, because it was not done for the achievement of a legitimate goal prescribed by the Constitution, nor is it proportionate to the nature of the need for the limitation: the taxpayer is punished because they have failed to use the real estate (U-I-1559/2001 and U-I-2355/2002, 21 February 2007).

The aim of taxation is not to punish. It is clear that a tax rate of 80% essentially means the confiscation of property without a judicial procedure and decision, because in most cases the taxpayer will not be able to pay the obligation due to the amount of the tax debt, so the only way to settle it will be forced collection precisely on the property acquired on the basis of undeclared income. From the above, it can be concluded that the 'punishment' of persons who have not declared all the income on the basis of which they acquired property of significant value should be achieved through court proceedings of confiscation of property and not by a high tax burden, which would essentially mean the confiscation (seizure) of property.

2.2 Principle of Legal Certainty

The standardisation of the procedure for determining the tax liability in the case of unreported income is full of imprecisions, inaccuracies and obvious errors in the formulation of the matter in question. All this obviously brings the relevant provisions into conflict with the constitutional principle of legal security as 'part of the principle of the rule of law' (Jug, 2014), as a dimension of the broadest constitutional concept of the 'rule of law' (Arlovic, 2014). Namely, based on the practice of the Constitutional Court, the requirement of legal certainty stems from the principle of the rule of law, contained in Article 1 paragraph 2 of the Constitution, and implies that the legal provision is accessible to and predictable for its addressees, 'the formal aspect of the rule of law' (Lauc, 2016), i.e. so that they can really and concretely know their rights and obligations in order to behave in regards to them. More precisely, the legislative text must be clear and precise in accordance with the particularity of the matter that it normatively regulates, thus preventing any arbitrariness in the interpretation and application of the law, i.e. removing uncertainty in the addressees of the legal provision regarding the final effect of the legal provisions that are directly applied to them. Additionally, depending on the field of law, legal certainty can be a stronger or weaker concept. Thus, the requirement of legal certainty is stronger in tax or criminal law (Van Hoecke, 2002). The most common case of imprecision is vagueness, i.e. when the law has several meanings, and it is not known which of them is correct. This type of vagueness arises from two causes: the imperfection of language and the use of vague terms (Lukic *et al.,* 2000).

In this sense, the ECtHR, in the case of the Sunday Times (No 1) v. the United Kingdom, established for the first time the standard of legality which must be met in order for the term 'law' in the phrase 'prescribed by law' to be considered a law (No 6538/7426, April 1979). Two requirements arise from this expression:

Firstly, the law must be adequately accessible: [citizens] must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, [the law must be foreseeable, for] a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable [citizens] to regulate [their] conduct: [they] must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. (CDL-PI(2022)004, 2022)

Similarly, in Malone v. United Kingdom, the ECtHR further developed the concept of 'lawfulness' by linking it to the prohibition of abuse of executive powers (No 8691/792, 2 August 1984): 'Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.'

The principle of legal certainty expresses the fundamental premise that those subject to the law must know what the law is, so as to be able to plan their actions accordingly (Tridimas, 2006). Those stances can be found in the case practice of the CJEU:

[...] a rule framed in such terms does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability remains a matter of uncertainty [...] Such a rule does not, therefore, meet the requirements of the principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects [...]. (318/10 Société d'investissement pour l'agriculture SA)

Therefore, the principle of legal certainty of EU law requires that legal provisions be clear, precise and predictable in terms of their consequences, especially when they may have unfavourable consequences for individuals or companies (Hilling, 2013). We also find such rules in the practice of the Federal Constitutional Court of Germany, which requires that a certain regulation be predictable for its addressees:

Freedom requires the reliability of a permanent system, because freedom, above all, means the ability to organise one's own life. An essential condition for the realisation of freedom is that the circumstances and factors that can have a long-term effect on one's plans, their implementation, especially in the light of their effects, must be predictable. (2BvL.26/81, 20 April 1982)

The Constitutional Court adheres to these positions in its established practice and considers that a certain regulation, in order to be in accordance with the principle of the rule of law, must be clear and precise:

Within the meaning of the Convention, if state regulations or individual measures of human rights restrictions want to comply with the concept 'in accordance with the law', they must be available and predictable, and indicate the scope of the discretionary right entrusted to the authorised bodies and, in a sufficiently precise formulated manner, regulate the use of that discretionary right, in order to provide appropriate protection to citizens from arbitrary decision-making. (U-I No 27/12, 24 July 2015)

In this context, a certain regulation, in order to comply with the principle of legal certainty, must be precise in both a nomotechnical and essential sense, as well as be applicable in practice:

Therefore, the Constitutional Court found that the contested provisions of Arts. 3 and 4 of the Law are determined in multiple contradictory ways, in a nomotechnical and essential sense, to be imprecise, because their content is wrong in meaning and, when it comes to starting and ending the procedure that should be carried out according to them, which directly violates the principle of legal certainty [...], the principle of legal certainty is violated, which, with the principle of the supremacy of law, implies that the law is applicable in practice and predictable in terms of effect, in order to ensure legal certainty for all persons to which it refers. (U-I No 13/14, 30 May 2014)

The definition of tax liability with regard to undeclared income is formulated in an insufficient and imprecise manner when it comes to its several elements. The definition of the very concept of the tax base in Article 52 paragraph 3 of Law on Tax Administration is given in the form of a very brief wording that opens up important issues when it is applied in practice. Thus, unreported income is realised income that is determined on the basis of the difference between the value of the property at the end and the beginning of the calendar year, minus the amount of the reported income. However, the question arises as to whether it is possible to reduce the basis by the value of property acquired by means of inheritance, gifts or in another legal and non-onerous way, as well as by the amount of income that is not taxable.

Furthermore, the prescribed form of tax control, within which the procedure for determining the tax liability in the case of unreported income is carried out, is defined by the legislator as 'field control', in accordance with the Article 82a paragraph 2 of the Law on Tax Administration which means that it is 'performed in the business premises of the taxpayer or in another location determined by the head of the tax authority that performs control'. Such a formulation is in direct contradiction to the legal nature of the procedure for determining unreported income, which is a classic form of office control. Namely, practically the entire subject procedure consists of an analysis of the available documents related to the acquisition of property, income or consumption, and an insight into comparative legislation, e.g. Croatia (Law on Income Tax, Nos. 115/16, 106/18, 121/19, 32/20 and 138/20); hence, it is obvious that practically, the entire procedure takes place in the premises of the tax authority (office control).

Errors in the formulation of provisions are also confirmed by the following paragraph 2 of Article 82a of the Law on Tax Administration, which prescribes that, in the case of unreported income, the tax liability will be determined using a method of assessment of the tax base by comparison 'with a person who performs the same or similar activity'. It is clear that this kind of formulation is in direct contradiction to the nature of the procedure for determining unreported income, which aims to determine the difference in the value of the taxpayer's property and their reported income. In the end, due to the specificity of the matter in question, the provisions regarding the tax procedure should also be regarded as insufficient due to the absence of numerous elements of the procedure that concern the realisation and protection of the rights of taxpayers. It is sufficient to state that the procedure in question, which encroaches on the taxpayer's constitutional right to peaceful enjoyment of property, did not foresee explicit deadlines for actions, either on the part of the tax authority or on the part of the taxpayer. In addition, there are no provisions on the burden of proof; these have proven to be particularly problematic in this type of procedure in other legal systems. These represent legal loopholes, which allow for different interpretations and introduce legal uncertainty into the procedural rules (Pajvancic, 2005; Ševčík, 2025).

2.3 The Principle of the Unity of the Legal Order

The next constitutional principle that is clearly being violated when it comes to the norms on taxation of undeclared income is the principle of the unity of the legal order. This principle is one of the elements that make up the content of the principle of the rule of law in its legal meaning (Pajvancic, 2009). Nowadays, the hypertrophy of legal provisions reigns in the developed world. The problem is no longer the number of legal provisions, but the fact that they are unclear, inconsistent and contradictory. Certain laws governing a certain area override the provisions of laws governing another area; or with one law, the legislator often intervenes in a large number of other laws using an emergency procedure (Korpic-Horvat, 2015). Since the legal system represents a dynamic and relatively coherent legal unity of general legal provisions, an important requirement of the legal system is its formal connection of a large number of general legal provisions. Each legal system contains many legal provisions that contradict each other, but they are still valid, since they have not been sanctioned by the competent authority in the appropriate prescribed procedure, that is, they are determined as illegal and annulled (Vukadinovic, 2012). The term 'antinomy' refers to the opposition between two provisions. Antinomies consist of 'the impossibility of applying them at the same time, the way the two provisions of positive law are expressed, that they can be applied by themselves and are not subordinated to each other by some imperative legal provision' (Perleman, 1983).

According to the practice of the Constitutional Court, the Parliament, as a legislator, has the authority to enact laws that determine rights and obligations in a general and abstract manner with regard to legal issues, which, in terms of the Constitution, are considered issues of interest to Montenegro. However, this does not mean that the legislator, on the basis of free judgment, can pass laws at its own discretion, which implies derogation from the principles established by the Constitution and systemic laws for a certain area (U-I, Nos. 6/14 and 9/14, 17 April 2014). The limits of the legislator's authority are regulated by the Constitutional Court within the framework of the principle of the unity of the legal order, which derives from Article 145 of the Constitution: the compatibility of legal regulations. This article stipulates that the law must be consistent with the Constitution and ratified international treaties, and any other regulation must be consistent with the Constitution and the law. The first dimension of this principle in the practice of the Constitutional Court refers to the hierarchy of general legal acts, which essentially means that lower legal acts must be in accordance with higher legal acts:

[...] the Constitutional Court also had in mind the constitutional principle of unity of the legal order (*Article 145 of the Constitution*), which implies the mutual compatibility of all legal regulations in Montenegro [...] The principle of the rule of law, as the highest value of the constitutional order of Montenegro, is realised through the application and protection of the principle of compatibility of legal regulations. It implies that the law must be in accordance with the Constitution and confirmed and published international treaties, and other regulations must be in accordance with the Constitution and the law. (U-I No. 12/15, 25 December 2017)

More precisely, laws must be in accordance with the Constitution and international treaties, and by-laws must be in accordance with the laws: '[...] a decree, due to its legal nature, as an act for the execution of the law, must be in accordance with the law and cannot 'go' contra legem' (U-II No. 14/15, U-II No. 15/15 and U-II No.19/15, 14 October 2015).

In comparative constitutional judicial practice, the unity of the legal order (apart from the criterion of legal hierarchy in relation to general legal acts, the question of the mutual relationship of laws in the same or different areas of the legal order) was imposed as a very important principle (Prica, 2018). This means that the basic principles and legal institutes provided for in the laws that regulate one area of social relations in a systematic manner should be respected in special laws, unless that systemic law expressly prescribes the possibility of regulating the same issues differently (Ilic, Markovic, 2015). In other words, this principle dictates that the basic principle and legal institutes provided by laws regulating one area of social relations in a systemic manner (systemic laws) should be applied in special laws (ordinary laws), unless the systemic law prescribes the possibility of regulating related issues differently (Hadzi Stevic, 2022).

These principles are also contained in the practice of the Constitutional Court, which fundamentally distinguishes between systemic laws and 'ordinary' laws:

[...] violation of the principle of the unity of the legal order from Article 145 of the Constitution, which implies the mutual conformity of all legal regulations in Montenegro, in principle excludes the possibility that the law regulating one area can change the individual legal solutions contained in the systemic law regulating that or another area. (U-I No 15/15, 4 October 2015)

The contents of this rule are clearly visible in the practice of the Constitutional Court of Serbia, which separates it into two parts. The first concerns the relationship between two laws from different legal areas: '[...] the possibility is excluded that the law regulating one legal area can amend individual legal solutions contained in the law defining another legal area' (IUz – 225/2005, 19 April 2012). The second concerns the relationship between laws within the same legal field:

[...] a distinction is made between systemic laws that comprehensively regulate an area and ordinary laws that do not... The unity of the legal order requires that, in a case where an 'ordinary' law contains special rules and legal exceptions to the systemic law in a particular area, these legal exceptions must rely entirely on the rules in the systemic law [...]. (IUz – 185/2018, 25 April 2019)

Guided by the doctrine of the Constitutional Court that the provisions of one law must be in accordance with the provisions of the systemic law that regulates the same area, we easily come to the conclusion that the provisions on taxation of undeclared income violate the constitutional principle of the unity of the legal order. One of the key elements of the tax liability is the method of calculation and payment, which is prescribed in completely opposite ways in the framework of the two legal texts that regulate the taxation of unreported income. In Article 52 paragraphs 2 and 4, the systemic Law on Tax Administration stipulates that the determination of tax liability is carried out by the tax authority when the taxpayer does not calculate, incorrectly calculates the tax, or does not report the realised income when this is prescribed by the tax law. More precisely, the tax liability is determined by a tax decision. The tax calculated in this way is considered final and it is not necessary to submit a tax return (Cipe, Uljanic, 2015).

In contrast to the aforementioned, the Law on Personal Income Tax stipulates the obligation to calculate and pay taxes contrary to the provisions of the system law. Namely, Article 42 paragraphs 1–3 of the Law on Personal Income Tax establishes that income tax is calculated annually by submitting a tax return. This is the case also regarding the tax liability from Article 10a of this law 'on undeclared income, which is determined on the basis of the difference between the value of the property at the end and at the beginning of the calendar year minus the amount of declared income, the personal income tax amounts to 80% of the tax base'. Therefore, the systemic law prescribes the assessment of tax liability based on the tax decision issued by the competent authority, which is in accordance with the legal nature of this form of tax, while the special law prescribes the opposite – the principle of self-taxation whereby taxpayers themselves determine their tax liability by submitting a tax return. As a result, a logical question arises: how do taxpayers submit a tax return regarding income that they have not declared?

Conclusions

Although the intention of introducing the concept of taxation of undeclared income should be evaluated as a significant step forward in a comprehensive review of the disparity between the reported income of individuals and their property and consumption, the way in which it has been done is very questionable. The wording and the goal of the provisions on undeclared income contained in the Law on Tax Administration, as well as in the Law on Personal Income Tax, are not an adequate response to the task that has been set before them. This is confirmed by the fact that, even four years after their adoption, the tax authority has never attempted to implement them. The definition of the goals and concept of this legal mechanism suggests that the legislator does not sufficiently understand all the dimensions of its legal nature. The tax base is defined in such a way that undeclared income is determined as the value of property at the end of the year minus the value of property at the beginning of the year, and the amount of reported income is not sufficient, because: (1) unreported income includes not only the amount of property at the end of the year, but also the significant expenditures that the taxpayer realises in the form of consumption within the same calendar year; (2) property acquired during the year can be the result of gifts or inheritances received by the taxpayer, or incomes that are not reported because they are not taxable and there was no obligation to report them. In addition, the explanation of the provisions in question states that any 'assets that cannot be justified by lawful income' (Amendments 01-5956/1) will be subjected to taxation, which indicates a misunderstanding of the legal nature of this institute by the legislator. The task of the tax authorities is to detect situations in which there is a disparity in the reported income and property of the taxpayer, without investigating the legality of the acquisition, which is within the exclusive jurisdiction of the court. Therefore, in the administrative (tax) procedure, is the focus is on determining whether certain income is taxed, and not whether it is the result of a criminal act. Similarly, by stating that the subject provisions refer to 'taxation of property whose origin cannot be proven' (Amendments 01-5956/1), it is obvious that the legislator does not understand the basic elements of the disputed tax liability, specifically, what the object of taxation is. The contested form of tax does not refer to 'property taxation', as claimed by the legislator in the explanation, but refers to income as the object of taxation.

When it comes to the compatibility of the provisions on taxation of undeclared income with the case practice of the Constitutional Court, it is obvious that they violate three constitutional doctrines. The introduction of a high tax rate of 80% on undeclared income essentially constitutes a mechanism of confiscation of taxpayers' property without a judicial procedure or decision. Essentially, in the majority of cases, the taxpayer will not be able to pay the obligation due to the amount of the tax debt, so the only way to settle it will be forced collection of the property acquired on the basis of the undeclared income. Prohibitions on the confiscatory effects of taxes, as well as the imposition of tax liability as a penalty, can be found in the practices of comparative constitutional judiciaries, as well as in the practice of the ECtHR, and represents a dimension of the constitutional principle of proportionality, as well as a guarantee of peaceful enjoyment of property. Furthermore, the procedure for determining tax liability in the case of undeclared income is full of ambiguities, inaccuracies and obvious errors in the formulation of the matter in question, which obviously brings them into conflict with the principle of legal certainty as part of the principle of the rule of law. Namely, based on the practice of the Constitutional Court, the legal text must be clear and precise in accordance with the particularity of the matter that it regulates normatively, thus preventing any arbitrariness in the interpretation and application of the law, i.e. removing the addressee's uncertainty about the legal provision regarding its final effect. It is sufficient to state that the procedure in question did not provide for explicit deadlines for legal actions, both on the part of the tax authority and on the part of the taxpayer, nor provisions on the burden of proof. In the end, the disputed provisions clearly violate the principle of the unity of the legal order contained in the practice of the Constitutional Court, which implies the mutual conformity of all legal regulations in Montenegro, which, in principle, excludes the possibility that a law regulating one area may change individual legal solutions contained in the systemic law regulating that or another area. One of the key elements of the tax liability, namely the method of calculation and payment, is prescribed in completely opposite ways within the framework of the two legal texts that regulate the taxation of undeclared income. Based on the systemic law, the tax liability is determined by a tax decision made by the competent authority, which is in accordance with the legal nature of the form of the tax in question, while the special law prescribes the principle of self-taxation: the taxpayer calculates and pays the tax liability by submitting an annual tax return.

Literature

Arlovic, M. (2014), "The relationship between the Constitutional Court of the Republic of Croatia and the judicial authority in the Republic of Croatia", *Proceedings – Constitutional Court Protection of Human Rights and Fundamental Freedoms*, Constitutional Court of Montenegro, p.57.

Amendments to the Proposal of the Law on Personal Income Tax, No. 01-5956/1, 23 April 2021, available at, https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/145/2501-14510-16-2-21-3-3.pdf, (15/01/2025)

Cipe, K., Uljanic, I. (2015), *Income Tax Law with Commentary*. Zagreb: Institute for Public Finance.

Constitutional Court of Croatia, U-I 1559 2001 and U-I-2355 2002, 21 February 2007.

Constitutional Court of Montenegro, U-I, Nos. 6/14 and 9/14, 17 April 2014.

Constitutional Court of Montenegro, U-I No.13/14, 30 May 2014.

Constitutional Court of Montenegro, U-I No. 27/12, 24 July 2015.

Constitutional Court of Montenegro, U-II Nos. 14/15, 15/15 and 19/15, 14 October 2015.

Constitutional Court of Montenegro, U-I No.15/15, 4 October 2015.

Constitutional Court of Montenegro, U-I No. 12/15, 25 December 2017.

Constitutional Court of Montenegro, U-I No. 12/15, 25 December 2017.

Constitutional Court of Montenegro, U-I No. 12/15, 28 February 2019.

Constitutional Court of Serbia, IUz – 225/2005, 19 April 2012.

Constitutional Court of Serbia, IUz – 185/2018, 25 April 2019.

Constitution of Spain, available at, https://www.tribunalconstitucional.es/es/tribunal/normativa/normativa/constitucioningles.pdf (22/01/2025).

Compilation of Venice Commission opinions and reports concerning legal certainty, European Commission for Democracy through Law (Venice Commission), CDL-PI (2022)004, Strasbourg, 21 March 2022.

Court of Justice of the European Union, 318/10 Société d'investissement pour l'agriculture SA (SAIT) v État Belge (5 July 2012).

Crespo, C.A.D. (2010), "The 'ability to pay' as a fundamental right: Rethinking the foundations of tax law", *Mexican Law Review*, Vol. 3, pp.49-64.

Englisch, J. (2011), "The Impact of Human Rights on Domestic Substantive Taxation – the German Experience", *Human Rights and Taxation in Europe and the World*, in: Kofler, G., Maduro, M.P., Pistone, P. (eds.), International Bureau of Fiscal Documentation.

European Court of Human Rights (25 Jun 2013) Appl. No. 49570/11 (Gáll vs. Hungary).

European Court of Human Rights (26 April 1979) Appl. No. 6538/74 (Sunday Times (No. 1) vs. United Kingdom).

European Court of Human Rights (2 August 1984) Appl. No. 8691/79 (Malone vs. United Kingdom).

Federal Constitutional Court of Germany, 2BvL.26/81, 20 April 1982.

Gadzo, S. (2021), "Taxation of the disproportion between assets of individuals and reported receipts – Croatian practice and open issues", *Tax Evening*, Faculty of Law, University of Belgrade.

Greggi, M. (2007), "The Masa Investment Group as a 'Nec Plus Ultra' Case for the Application of the European Convention on Human Rights to Tax Law?", *INTERTAX*, Vol. 35, No 6/7, Kluwer Law International, pp.369.

Grbesic, B., Juric, M., Skugor, M. (2005), "Tax supervision", *Business journal*, Zagreb, Croatia, pp.105-112.

Hadzi Stevic, B.Dj. (2022), "The principle of coherence in the decisions of the Constitutional Court of Serbia on the unity of the legal order", *Proceedings of the Faculty of Law in Novi Sad*, No 1. pp.265-268.

Hilling, M. (2013), "Justifications and Proportionality: An Analysis of the ECJ's Assessment of National Rules for the Prevention of Tax Avoidance", *INTERTAX*, Vol. 41, No 5, Kluwer Law International BV, The Netherlands, pp.301-303.

Ilic, P.G., Markovic, M. (2015), "The contribution of the Constitutional Court of Serbia to the rule of law", *Proceedings: The Role of the Constitutional Court in Building the Rule of Law*, Constitutional Court of Montenegro, pp.61-64.

Jelčic, B., Loncarevic Horvat, O., Simović, J., Arbutina, H. (2002), "Financial law and financial science", *National newspaper*, pp.425-428.

Jug, J. (2014), "Application of legal principles in the decisions of the Supreme Court of the Republic of Croatia", *Legal principles in legal theory and judicial decision-making*, pp.7-11.

Korpic Horvat, E. (2015), "The significance of the Constitutional Court of the Republic of Slovenia in achieving the rule of law", *Proceedings: The Role of the Constitutional Court in Building the Rule of Law*, Constitutional Court of Montenegro.

Kostic, S. (2021), "Commentary on the draft Law on the Origin of Property and special tax", in *Tax Evening*, Faculty of Law, University of Belgrade, pp.2-3.

Kutlesa, B. (2020), "Disparity – Determination of other income based on the value of acquired property and other expenses in relation to legally acquired receipts", *Novelties in Administrative Law and Administrative Judicial Practice*, pp.25-29.

Lauc, Z. (2016), "The principle of the rule of law in theory and practice", *Legal Journal*, Vol. 32, No 3–4, pp.47-53.

Law on Income Tax (2016), *Official Gazette*, No. 115/16, 106/18, 121/19, 32/20, 138/20.

Lonza, P. (2016), "The role of financial investigations of the origin of assets in criminal proceedings", *Tax Bulletin*, No 3/2016.

Lukic, R.D., Kosutic, B.P., Mitrovic, D.M. (2000), "Introduction to Law", *Public Enterprise Official Gazette FRY*, pp.517-520.

Nenadic, B. (2014), "The principle of separation of powers and constitutional judicial control with special reference to the experience of the Constitutional Court of Serbia", *Legal Word*, Vol. 39, pp.63-67.

Pajvancic, M. (2009), *Commentary on the Constitution of Republic of Serbia.* Berlin: Konrad Adenauer Foundation.

Pajvancic, M. (2005), "Serbia between the constitution and constitutionality", *Library of Helsinki*, No 22, Belgrade: Helsinki Committee for Human Rights in Serbia.

Perleman, H. (1983), *Law, Morality and Philosophy.* Belgrade: Nolit.

Popovic, D. (2011), *Tax Law.* 7th Revised Edition. Faculty of Law, University of Belgrade.

Popovic, D. (2003), "Commentary on the Law on Tax Procedure and Tax Administration", *Cekos In*, pp.100–101.

Prica, M. (2018), "The unity of the legal order as a constitutional principle and the legal regulation of the legal order area – at the same time a presentation on the internal legal system", *Proceedings of the Faculty of Law in Nis*, Vol. LVII, No 18, p.111-119.

Ševčík, P. (2025), „Systémové směřování a novelizace § 127a občanského soudního řádu v roce 2024“, *Právník*, No 4, p.340, [Systemic direction and amendment of Section 127a of the Code of Civil Procedure in 2024, *in Czech*] .

Tridimas, T. (2006), *The General Principles of EU Law*, 2nd Edition. Oxford: Oxford EC Law Library.

Van Hoecke, M. (2002), *Law as Communication.* London: Bloomsbury.

Vanistendael, F. (1996), "Legal Framework for Taxation – Vol. 1", *Tax Law Design and Drafting*, ed. Victor Thuronyi, *International Monetary Fund*.

Vukadinovic, G. (2012), "Principles of the legal system", *Proceedings of the Faculty of Law in Novi Sad*, Vol. 4, pp.23-28.

Acknowledgements

ĮMONIŲ VALDYMAS (CG) IR APLINKOSAUGOS ATSKAITOMYBĖ (ER): KINIJOS FINANSŲ IR NEFINANSINIŲ SEKTORIŲ DUOMENYS

Ilija Vukcevic, Mirko Boskovic

Santrauka. Šiame straipsnyje empiriškai tiriamas įmonių valdymo (CG) ir aplinkosaugos atskaitomybės (ER) ryšys Kinijos finansų ir ne finansų sektoriuose 2015–2021 metais. Pasitelktas savarankiškai sukurtas aplinkosaugos ataskaitų teikimo indeksas (ERI), susijęs su rankine turinio analize. Be to, taikytas ataskaitų teikimo dažnumo palyginimas (RFC) ir porinės imties T-testas. Jais siekta palyginti abiejų sektorių aplinkosaugos ataskaitų teikimą ir pranešti apie galimus pokyčius, įvykusius prieš ir po Kinijos vertybinių popierių reguliavimo komisijos (CSRC) 2018 m. atliktą įmonių valdymo gairių peržiūrą. Šis straipsnis nauju požiūriu prisideda prie egzistuojančių tyrimų, susijusių su įmonių valdymu ir aplinkosauga, taikant savarankiškai sukurtą ERI, kad būtų galima įvertinti aplinkosaugą tiek Kinijos finansų, tiek ne finansų įmonėse iš suinteresuotųjų šalių teorijos perspektyvos. Politikos formuotojai ir reguliavimo institucijos Kinijoje ir užsienyje, norėdami patenkinti suinteresuotųjų šalių poreikius ir pagerinti įmonių aplinkosaugos atskaitomybę, turėtų sutelkti dėmesį į siūlomą valdymo sistemą.

Reikšminiai žodžiai: nedeklaruojamų pajamų apmokestinimas; Juodkalnijos Konstitucinis Teismas; konfiskacinis apmokestinimas; teisėtumo principas; teisinės tvarkos vientisumo principas.