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THE NATURE OF THE SECONDARY TAX LIABILITY PROVISION IN SERBIAN TAX LAW[1]

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Abstract

The secondary tax liability provision, in its function of addressing tax abusive structures, appears to have been applied only rarely, if at all. In a previous study, the author argued that this provision should be used as an instrument to combat tax evasion and fraud. Building on that conclusion, the present paper aims to examine the anti-avoidance character of this domestic provision and its potential application in combination with other anti-evasion and anti-avoidance rules. Given that legal certainty is undermined when taxpayers cannot reasonably anticipate the application of a legal norm, and considering that tax authorities possess an underutilized mechanism for addressing tax evasion and avoidance, the analysis adopts a legal-dogmatic and content-analysis approach with particular reference to the case law of the Court of Justice of the European Union.

Keywords: *secondary tax liability, tax avoidance, tax evasion, value-added tax, joint and several tax liability*

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INTRODUCTION

The Serbian Law on Tax Procedure and Tax Administration (2002, art. 31) contains a secondary tax liability provision composed of several parts, each serving a specific function but leading to the same outcome: a person may be held liable for the tax owed by another taxpayer. This paper focuses exclusively on the part intended to combat tax abusive structures (the Law on Tax Procedure and Tax Administration - LTPTA, 2002, art. 31, par. 2, bull. 2). The relevant rule provides that a person who assists or facilitates another in evading tax may be held liable for the amount of tax that the other person has evaded and owes (LTPTA, 2002, art. 31, par. 2, bull. 2).

In foreign literature, there has been extensive debate on secondary tax liability and joint and several tax liability in the field of VAT (Baker, Perrou & Pistone, 2023, pp. 85 – 117; Ismer & Fuchs, 2024, pp. 1- 22; Lejeune & Kesteren, 2026; Spies, 2022, pp. 1 – 32; Terra & Kajus, 2024, p. 796). These discussions have focused on the nature of these rules and their practical role in combating tax evasion and avoidance. In contrast, such analysis remains largely absent in the domestic literature. The author was the first to initiate a scholarly debate on the nature of the secondary tax liability provision in Serbia (Vasović, 2025; Vasović, 2024). In a previous paper, the author concluded that the secondary tax liability provision can serve as an effective tool for combating tax evasion and fraud (Vasović, 2025). However, its potential role as an anti-avoidance measure was not examined. On this basis, the present study addresses two main research questions. First, can secondary tax liability provision function as an anti-avoidance rule, in addition to its established anti-evasion role? Second, can it be applied in conjunction with other rules aimed at countering abusive VAT arrangements to the same taxpayer and in relation to the same transaction? To answer these questions, the analysis adopts legal-dogmatic and content-analysis methods. The legal dogmatic method will be employed to analyze national legislation and EU Directives, while the content analysis method will be used to examine the case law of the Court of Justice of the European Union.

The paper is structured in two parts. The first part clarifies the distinction between tax evasion and tax avoidance. The second part addresses the research questions by examining the anti-avoidance character of the secondary tax liability provision and its potential application alongside other anti-evasion and anti-avoidance rules. The paper also seeks to provide recommendations for domestic tax authorities on the effective use of this provision, with the aim of enhancing legal certainty by enabling taxpayers to better anticipate its application.

TAX EVASION AND AVOIDANCE

In this section of the article, a brief distinction will be drawn between tax evasion and tax avoidance, as the paper primarily focuses on the tax-avoidance dimension of the secondary tax liability provision. In a domestic context, tax avoidance refers to exploiting weaknesses or gaps in poorly designed legislative provisions within national law (Bergedahl, 2018, p. 11). It is important to note that tax avoidance schemes involve taxpayers acting within the law with the aim of minimizing or eliminating the tax that would otherwise be payable to the state. Tax avoidance is best explained in the case law of the Court of Justice of the European Union, which holds that avoidance or abuse[3] exists where the conditions for obtaining a tax benefit are artificially created in order to secure a fiscal advantage as the main objective, without any genuine economic purpose (Case C-110/99, 2000, para. 39). This marked the starting point for the principle of the prohibition of abuse of law, which was first established as a general principle in the field of VAT (C-255/02, 2006) and later extended to direct taxation (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, 2019). The principle consists of both objective and subjective elements. The objective element is met where the purpose of the relevant rules has not been achieved, while the subjective element is satisfied where, in light of objective facts and circumstances, the intention was to obtain a benefit from EU law by artificially creating the conditions required for obtaining it (C-255/02, 2006, para.67). The principle of prohibition of abuse of law is actually a method of interpreting other EU law principles and rules that directly or indirectly grant rights connected to taxes, operating in a similar, but not identical, way to a GAAR, and which aims at achieving the principle of equality in EU tax law (Dourado, 2011, p. 470).

In addition, the notion of "abuse" is also defined in the EU Anti-Tax Avoidance Directive (Directive 2016/1164, art. 6) as:

"An arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. An arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality."

Accordingly, both in the case law of the CJEU and under the ATAD Directive, the objective and subjective elements must cumulatively be present for an arrangement or transaction to be classified as abusive. When these conditions are met, national tax authorities may apply GAAR provisions in administrative proceedings to tax such arrangements appropriately. However, this does not automatically result in criminal liability, such as prosecution for tax evasion or fraud. To conclude, both "tax avoidance" and "tax abuse" essentially refer to the same idea: exploiting a legal provision in a way that was not intended by the legislator.

In summary, where a taxpayer seeks to prevent a taxable event from arising, this constitutes tax avoidance (Uckmar, 1983, pp. 20 – 21). By contrast, where a taxable event has already occurred and the taxpayer fails to declare it, provides incorrect information, or submits fictitious documentation to the tax authorities, such conduct amounts to tax evasion (Uckmar, 1983, pp. 20 – 21). However, it can sometimes be very difficult to determine whether a scheme has characteristics of tax evasion or tax avoidance, especially when the wording of a legal provision is not sufficiently clear (Slemrod & Yitzhaki, 2000, p. 21 – 22). There are however typical evasion schemes

[3] The term "abuse" is essentially used to describe what is generally referred to as tax avoidance outside the EU, particularly in non–civil law countries. See: de la Feria, 2008, p. 396

that can be identified in the field of direct and indirect taxation (Smith & Keen, 2007, pp. 7 – 10):

- **Not reporting all sales.** A trader may declare only part of their sales, altering records and accounts accordingly
- **Failure to register.** The most common cases under VAT involve relatively small businesses operating near the turnover threshold for compulsory registration that fail to register, thereby avoiding both the VAT they would otherwise owe and the associated compliance costs. Moreover, when commencing a business activity, a taxpayer is required to register, and failure to do so constitutes tax evasion, as the resulting business income remains undeclared.
- **Misclassification of commodities.** When traders make supplies subject to different tax rates, or include transactions that fall outside the scope of VAT (such as exempt supplies), they may reduce their tax liability by overstating the share of sales allocated to lower-taxed or exempt categories.
- **Omission of self-deliveries.** Goods or services produced by a business and consumed by the owner or employees, which are in principle taxable, may go undeclared.
- **Missing trader Fraud.** A missing trader established in one Member State acquires goods from another Member State VAT-free and then sells them with VAT included, but does not remit that VAT to the tax authorities (Frunza, 2020, p. 6). This may also lead to carousel fraud, where the same goods are repeatedly circulated within a transaction chain to facilitate VAT evasion (Frunza, 2020, pp. 6 - 7).
- **Fraudulent claims for tax credits or refunds.** Under the principle of neutrality, taxpayers are allowed to offset input VAT against output VAT. To commit evasion, they may fraudulently overstate the amount of input VAT and subsequently claim a tax credit or request a refund (Smith & Keen, 2007, p. 4).

Anti-evasion and anti-avoidance provisions are of great importance, particularly in countries such as Serbia, where the level of tax evasion/avoidance is significant. For example, in 2024, the Tax Administration reported that more than 17 billion Serbian dinars in tax were avoided, representing the highest recorded amount since 2015 (Ministarstvo finansija – Poreska uprava, 2025, p. 29). This indicates a relatively low level of tax morale in Serbia and highlights the need for effective measures to combat tax avoidance and evasion. In the following chapter, the author will focus on the secondary tax liability provision and examine its nature.

SECONDARY TAX LIABILITY PROVISION IN SERBIAN PROCEDURAL TAX LAW

The secondary tax liability provision forms part of national procedural tax law and stipulates that it applies to persons who contribute to or assist in the non-payment of another person's tax (the avoidance of tax) (LTPTA, 2002, art. 21, par. 2, bull. 2). Such persons may be held liable for the amount of tax that remains unpaid (LTPTA, 2002, art. 21, par. 2, bull. 2). The author has previously addressed this issue and demonstrated that, due to its origins in the German Tax Code, the secondary tax liability provision exhibits the characteristics of an anti-evasion rule (Vasović, 2025, pp. 125 – 126). The German Tax Code uses terms such as "tax evasion" rather than "tax avoidance," indicating that combating tax evasion was the primary objective of the provision. In contrast, the Serbian secondary tax liability provision employs the term "tax avoidance" without providing a clear definition. As noted in the earlier paper on which this article builds, there is a significant level of confusion in domestic tax law regarding the distinction between "tax evasion," "tax fraud," and "tax avoidance" (Vasović, 2025, pp. 125). In addition, given that the wording of the domestic provision closely resembles that of the joint and several tax liability provision in the VAT Directive 2006/112[4], as interpreted in the case law of the CJEU (Case C-384/04, 2006), the author concluded in his previous paper, based on this analogy, that the primary objective of the domestic secondary tax liability provision is the suppression of tax evasion. However, since the term "tax avoidance" is explicitly used, the question arises whether the domestic provision could also be applied to combat tax avoidance and thus function as a form of general anti-avoidance rule (GAAR). This issue will be examined in the following subsection.

Secondary tax liability provision as an anti-avoidance rule

One of the main characteristics of GAARs is the existence of objective and subjective elements as can be seen in the previous chapter. For the purpose of further analysis, we shall use the principle purpose test (PPT) as the most accepted GAAR with a unique definition, and the GAAR from the ATAD Directive (2016/1164), and compare their elements to the secondary tax liability provision. First, let us examine article 10, paragraph 7 of the Base erosion and profit shifting (hereinafter: BEPS) Action 6 that incorporates the PPT (OECD 2015, art. 10 para. 7):

"Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention."

In addition, the ATAD Directive (2016/1164) provides that "a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances" (Council Directive 2016/1164, art. 6).

[4] VAT Directive 2006/112, Art. 205: "In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT."

Both GAARs stipulate subjective and objective elements, and in this regard we will also mention the principle of prohibition of abuse of law that consists of the subjective and objective element as well. Regarding the subjective element, to determine if obtaining a benefit was one of the principal/main purposes of any arrangement or transaction that resulted directly or indirectly in a benefit, requires an assessment of all relevant facts and circumstances. The purpose of the arrangement represents a subjective element, where the existence of that element can be proved only by taking into account objective factors (Chand, 2018, p. 22). Denis Weber states that "the subjective test in the PPT rule (the principal purpose) is objectified by the reasonableness test where it is reasonable to conclude (objective analysis), having regard to all relevant facts and circumstances (means: objective facts and circumstances) that obtaining tax benefit was one of the principal purposes of any arrangement or transaction" (Weber, 2017, p. 49). The revelation of the pure intention of the taxpayer should include a subjective analysis of the taxpayer's state of mind (Elliffe, 2019, p. 63). As it is very hard to carry out subjective analysis, to prove the subjective element it is always required to conduct objective analysis.

On the other side is the objective element of a GAAR providing that granting a benefit is in accordance with the object and purpose of the relevant provisions of the law/convention (Chand, 2018, p. 24). In addition, Blazej Kuzniacki is of the opinion that for the revelation of the purpose and the object of the relevant provision, one should take into regard the context and the purpose of the entire tax treaty (in this case, a domestic tax law) and its operative purposes (Kuzniacki, 2018, p. 262).

That being said, one could ask if the secondary tax liability provision contains subjective and objective elements. The author concluded in his previous article that the secondary tax liability provision leans on the joint and several tax liability form the VAT Directive 2006/112 that has clear subjective element that requires that the person who is held jointly and severally liable, based on objective circumstances, knew or should have known that they were involved in transactions aimed at avoiding the payment of VAT/fraudulent activities (Vasović, 2025, p. 127). The subjective element in joint and several tax liability provision exists, but to reveal it and to prove if the person consciously participated in, or contributed to tax avoidance/evasion, only objective factors, relevant circumstances and facts should be taken into consideration in a case-by-case analysis. There is no consensus as to how taxable persons can demonstrate that they did not and could not have known that they participated in a fraudulent transaction (Ismer & Fuchs, 2024, p. 3). Whether taxable persons knew or should have known that they were involved in a fraudulent transaction needs to be determined by the referring court.[5] Therefore, as the VAT Directive (2006/112) does not provide a legal basis or procedures regarding the evidence of abuse/avoidance/evasion/fraud, this criterion is to be determined

[5] This is also the stance taken by CJEU in many cases repeatedly: C-512/21, *Aquila*, 1 December 2022, ECLI:EU:C:2022:950 paras. 31-33; C-596/21 *Finanzamt M*, 24 November 2022, ECLI:EU:C:2022:921, paras. 37-39; C-227/21 *HA.EN.*, 15 September 2022, ECLI:EU:C:2022:687, para. 27; C-281/20, *Ferimet*, 11 November 2021, ECLI:EU:C:2021:910, para. 50; C-656/19, *BAKATI,* 17 December 2020, ECLI:EU:C:2020:1045, para. 83; C-610/19, *Vikingo*, 3 September 2020, ECLI:EU:C:2020:673, para. 66.

according to domestic law (Ismer & Fuchs, 2024, p. 3). On the other hand, the secondary tax liability provision requires that the taxpayer has contributed to or assisted in the non-payment of tax, which implies that the taxpayer knew or should have known, on the basis of objective facts and circumstances, that another participant in the transaction chain would avoid paying tax (Vasović, 2025, P. 127). This indicates that the provision contains a subjective element (the purpose test), similar to that found in general anti-avoidance rules (GAARs). Where a taxpayer is aware that the purpose of a transaction is to avoid the payment of tax, the subjective element is considered to be satisfied.

Regarding the objective element, with the use of literal interpretation, one could say that the secondary tax liability provision does not incorporate the mentioned element. However, if a person participates in tax abusive transactions, that person does not act in accordance with the specific provision and the law in its entirety. If we apply Kuzniacki's opinion, one should take into account not only the specific provision that is abused, but also the object and purpose closely related to that provision such as the object and purpose of the entire chapter in which the provision is included, or even the context and the purpose of the entire domestic tax law as well, if that is the reasonable interpretative approach in given circumstances. Take a missing trader company as an example. Imagine that a missing trader does not file a periodic VAT tax return, or it does, but with false information regarding its supplies. This kind of activity is usually punishable in accordance with criminal codes. In addition, it is not in accordance with an article stipulating that a taxable person is obliged to file tax returns with accurate information regarding their supplies (LTPTA, 2002, art. 25). VAT is based on the principle of taxation proportionate to value added at each stage of the supply chain, with an exclusion of VAT-exempt supplies with or without the right to deduct input VAT (Milošević, 2014, p. 44). If a missing trader does not pay VAT on their supply, the mentioned principle that the domestic VAT laws is based on is jeopardized. All in all, to determine the objective element, the context of the entire domestic tax law, and not only the abused provision, should be taken into account, because it leads to reasonable consequences in line with the legislative intention of domestic legislature.

To conclude, secondary tax liability provision consists of subjective and objective elements, like the GAARs, and can serve as an anti-abuse/avoidance (Waerzeggers & Hillier, 2016, p. 1) tool However, what is different from a GAAR, is the extended ability to tackle tax evasion and fraud schemes where the VAT or other kind of taxes end up unpaid. In the following section, we will examine whether the secondary tax liability provision can be applied in conjunction with other anti-evasion and anti-avoidance rules.

The interaction between the secondary tax liability provision and other anti-evasion and anti-avoidance rules.

The author demonstrated in the previous article that the joint and several tax liability provision under the VAT Directive 2006/112 can serve as a model for a clearer definition of the domestic secondary tax liability provision (Vasović, 2025, pp. 126 –

128). On this basis, the author examines whether joint and several tax liability can be applied in conjunction with other anti-evasion and anti-avoidance rules.

One might assume that, since the purpose of both the joint and several tax liability provision and the secondary tax liability provision is to recover tax not paid by another taxpayer in the supply chain, the application of joint and several/secondary tax liability becomes unnecessary and redundant if that objective has already been achieved through another anti-evasion or anti-avoidance measure. However the CJEU took a different approach. In 2025, the CJEU held that joint and several tax liability may be applied concurrently to the same person who has already been denied the right to deduct input VAT in respect of the same transaction (Case C-276/24, 2025, par. 9). However, this is permissible only where, following a tax audit, it is established, based on the objective facts and circumstances, that the recipient of the goods knew or should have known that the transaction was connected to VAT evasion or fraud (Case C-276/24, 2025, paras. 45 - 46). In addition, the tax authorities must demonstrate that tax evasion or fraud has actually occurred within the supply chain, rather than merely presuming its existence (C-512/21, 2022, par. 34).

In this context, joint and several tax liability may be understood as a form of sanction for participation in transactions aimed at tax evasion. In its case law, the Court of Justice of the European Union has primarily focused on the Court-made rule of denying the right to deduct input VAT in cases involving fraud. However, an important question arises as to whether joint and several liability may be applied together with other anti-evasion and anti-avoidance measures within the VAT system, with such liability functioning as a form of sanction for involvement in fraudulent transactions. It may be reasonably expected that such a combined application is possible, particularly in light of recent decisions of the Court, which suggest a broader interpretation of anti-evasion provisions.[6] As previously argued by the author, joint and several liability may serve as a basis for interpreting secondary tax liability rules in Serbian law. This suggests that domestic provisions could be applied in conjunction with other anti-evasion and anti-avoidance rules. For example, this approach could also involve the application of the open market value rule (Value-added tax Act, art. 17b), as introduced by Article 80 of the VAT Directive 2006/112. In such a case, even after the tax base has been adjusted, one of the parties involved in the transaction could still be required to pay the additional tax as a result of the application of secondary tax liability.

The potential punitive effect of the secondary tax liability provision may deter taxpayers from participating in abusive tax arrangements. However, it may also lead to situations of double taxation, which both the VAT Directive 2006/112 (art. 1) and Serbian VAT Act (art. 1, art 27) generally seek to prevent (Famulska & Rogowska-Rajda, 2018, pp. 88 – 89). VAT is designed as a neutral tax, so each taxable person is entitled to deduct input VAT from the tax due, so that they effectively bear tax only on the value they add, rather than on the full transaction price. This principle of

[6] For instance, in a recent judgment, the Court of Justice of the European Union held that, in order to safeguard VAT revenues in cases of tax evasion, joint and several tax liability in the field of VAT may be imposed on a person who is not even a taxable person for VAT purposes: C-1/21, 2022.

neutrality is a core feature of the VAT system. Nevertheless, the question arises whether, in cases of tax evasion or avoidance, such punitive effects and instances of double taxation may be justified in order to safeguard VAT revenues. The case law of the Court of Justice of the European Union suggests that such outcomes can be justified in the context of combating fraud. Accordingly, if Serbia were to adopt a similar approach, it would not necessarily be contrary to European legislation. However, such an approach would require further clarification of the domestic provision. This would enhance legal certainty by allowing taxpayers to better anticipate its application, while also providing tax authorities with a more effective tool for combating tax evasion, fraud, and avoidance.

CONCLUSION

The provision on secondary tax liability in Serbian tax law is one of several norms that remain largely unused in practice. This is mainly due to its broad formulation and the unclear meaning of certain key terms. In a previous study, the author concluded that this provision represents an appropriate measure for combating tax evasion. However, its anti-avoidance dimension was not examined at that time. In the present analysis, the author considers whether the objective and subjective elements, typically required for the application of a general anti-avoidance rule, are present, and reaches an affirmative conclusion.

This suggests that the provision on secondary tax liability may function as a form of general anti-avoidance rule, with an extended role in addressing structures related to tax evasion. Following that conclusion, a further question arises: can this measure be applied together with other anti-evasion or anti-avoidance rules to the same taxpayer in the same factual situation? In the field of VAT, the author has previously shown that the concept of joint and several tax liability can serve as a useful tool for interpreting the domestic provision on secondary tax liability. Building on this approach, the present paper examines the case law of the Court of Justice of the European Union. This case law indicates that, where tax authorities establish, on the basis of objective facts and circumstances, that tax evasion has occurred within a supply chain, the rule on joint and several tax liability may be applied together with another anti-evasion measure to the same taxpayer and in relation to the same transaction.

If the rule on joint and several tax liability can serve as an interpretative tool for the domestic legislator, at least in the field of VAT, and given Serbia's aim to join the European Union, it may be concluded that the provision on secondary tax liability can be applied together with other anti-evasion and anti-avoidance rules. Such an approach could have a positive effect for the fiscus, as it may act as a form of sanction for participation in transactions where tax remains unpaid. At the same time, it may lead to double taxation, which is generally not allowed in VAT due to the principle of fiscal neutrality. However, the case law of the Court of Justice of the European Union shows that such outcomes may be justified where the aim is to protect VAT as a key source of revenue for both the European Union and national budgets. If the Serbian legislator chooses to follow this approach, the provision should be further clarified in order to reduce legal uncertainty. Clearer rules would help taxpayers understand the possible consequences of its application, while also encouraging tax authorities to apply the provision more consistently and effectively in combating tax evasion and avoidance, thereby supporting public revenues.

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PRIRODA ODREDBE O SEKUNDARNOJ PORESKOJ OBAVEZI U SRPSKOM PORESKOM PRAVU

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Apstrakt

Sekundarna poreska obaveza postoji u Zakonu o poreskom postupku i poreskoj administraciji, ali usled nedovoljne njene definisanosti ostaje neupotrebljena. U ranijem radu, autor je zastupao stav da bi ovu odredbu trebalo koristiti kao instrument za borbu protiv poreske evazije i prevara. Polazeći od tog zaključka, ovaj rad ima za cilj da ispita anti-abuzivni karakter ove domaće odredbe, kao i njenu potencijalnu primenu u kombinaciji sa drugim anti-abuzivnim/evazionim pravilima, a prema istom poreskom obvezniku u okviru iste transakcije. Imajući u vidu da je pravna sigurnost narušena kada poreski obveznici ne mogu razumno da predvide primenu određene pravne norme, kao i činjenicu da poreski organi raspolažu nedovoljno iskorišćenim mehanizmom za borbu protiv poreske evazije, analiza u radu zasniva se na pravno-dogmatskom metodu i metodu analize sadržaja, uz poseban osvrt na praksu Suda pravde Evropske unije.

***Ključne reči**: sekundarna poreska obaveza, izbegavanje plaćanja poreza, poreska evazija, porez na dodatu vrednost, zajednička i solidarna poreska odgovornost*