



Chart no. 3: Missing trader scheme – Acquisition fraud, source: Europol

3.2. Selected sections of the Penal Code Act of the Slovak Republic concerning VAT frauds

VAT frauds may fall within the definition of the following Sections of the Slovak Penal Code Act No. 300/2005 Coll.:

- § 259 Distortion of Data in Financial and Commercial Records
- § 276 Tax and Insurance Evasion
- § 277a Tax Fraud
- § 278 Failure to Pay Tax
- § 278a Obstruction of Tax Administration

The main offences concerning VAT frauds are described in Section 276 and Section 277a. However Section 278a and Section 259 define offences which usually form a part of the preparation process to commit criminal acts under sections 276 and 277a. Concerning offence described under the Section 276 of the Slovak Penal Code Act 300/2005 Coll. the tax payer is obliged to pay tax to the tax authority of the Slovak Republic, but tax payer pretends that he does not have any tax liability or has lower tax liability than he actually does. Section 278 refers to situations when the tax payer did not pay the tax due to the respective tax authority, however the value of unpaid tax has to exceed the amount of 2 660 EUR to constitute the criminal offence. In regards to the Section 277a the offender pretends that he is entitled to tax deduction, in our case excessive VAT deduction, but the offender either is not entitled to VAT deduction at all, or is entitled to lower amount of deduction than he actually claims from

the Slovak tax authorities.⁹² The benefit which the perpetrator of above mentioned offences gains varies. In offence under § 276 the benefit rests in a fact that the assets of the perpetrator are not decreasing, while the assets decrease would take place if the perpetrator would pay the tax he is actually liable to pay. In offence under § 277a the benefit represents the increment of the assets of the perpetrator, while he asks tax authority to return VAT to which he is not entitled. In both above mentioned offences the fraud is committed against the Slovak Republic causing damages to the State. Harmed subject is basically the Slovak Republic, even if consequently the VAT fraud influences State's citizens and indirectly the EU's citizens too. In case that the harmed subject would be primarily another subject, not the Slovak Republic represented by the tax authority, then would the respective fraudulent behaviour fall within the definition of Fraud as described in § 221 of the Slovak Penal Code Act.

3.2.1. Tax and Insurance Evasion

In terms of Tax and Insurance Evasion, this offence may be committed by failing to register as a tax payer according to the § 4 of the Slovak VAT Act No. 222/2004 Coll. or by non-submitting the tax returns. Businessman may be registered as a VAT payer, however may commit a Tax and Insurance Evasion offence, when he does not submit the tax return to the respective tax authority. The perpetrator is hiding his business activities for example that he is selling the goods to the end consumer. The perpetrator charges VAT to end consumers but he does not pay VAT to the tax authority. He may even submit the VAT return to the respective tax authority, however he does not include all relevant documents of accountancy into the tax return which results in lowering his tax burden.⁹³ In case the businessman does not pay the VAT which is due, the criminal offence under Section 278 Failure to Pay Tax may be committed in case the VAT due exceeds the amount of 2 660 EUR.

The case when the tax payer does submit the tax return, but does not include all transactions into the respective tax return was decided by the Supreme Court of the Slovak Republic in case no. 2 To 7/2010 in which

⁹² Šamko P.: Daňové podvodové konania a ich dokazovanie, Wolters Kluwer, 2015, page 13

⁹³ Šamko P.: Daňové podvodové konania a ich dokazovanie, Wolters Kluwer, 2015, page 80

the businessman did not include all transactions made into submitted tax return however charged the VAT (which he was supposed to pay to the Treasury) to his customers. In course of this action did the businessman obtain unlawful advantage in VAT in amount of 620 590.62 EUR.

The Tax Evasion of VAT may be also committed by lowering tax burden fictionally by pretending increment of VAT which was paid for certain goods or services provided by another subject (supplier) who is also a VAT payer, so called input VAT, however the goods or services provided are only fictional, supply of goods or services never took place. The perpetrator deducts this fictionally paid input VAT from VAT which he is supposed to pay at the output resulting in lowering his tax liability. The invoices used in this type of criminal behaviour are either fictional, may be even issued by non-existent companies, or in some cases invoices are bought from another companies which are doing real business, but they are selling their invoices to other companies to 'help' them to increase the VAT at the input.⁹⁴ The case no. 5 To 4/2009 of the Supreme Court of the Slovak Republic refers to this type of criminal behaviour, where the businessman in the company's tax return included also fictional invoice on purchase of iron plates issued by a fictional company and therefore evaded VAT in amount of 8 487.64 EUR.

Concerning crimes connected to value added tax it is important to differentiate between the behaviour resulting in lowering the VAT payed to the Treasury, the VAT is actually paid but in a lower amount or not payed at all, and behaviour resulting in State returning VAT to the businessman. If the perpetrator unlawfully lowers existing tax liability, this kind of behaviour falls within the Tax and Insurance Evasion offence. In case the businessman lowers his tax liability in an amount resulting in excessive deduction, he is unlawfully given money back from the Treasury, this behaviour falls within the Section 277a of Tax Fraud.

In case of intra-Community fraud, the respective behaviour of businessman may be qualified as Tax and Insurance Evasion in the following course of action. The businessman who is registered as a VAT payer imported goods to the Slovak Republic from other Member States of the European Union. The import of goods, in this case for example cars, was part of intra-Community transaction therefore the imported cars were

⁹⁴ Šamko P.: Daňové podvodové konania a ich dokazovanie, Wolters Kluwer, 2015, page 80

exempted from VAT in EU Member States, but the Slovak businessman was supposed to pay VAT in the Slovak Republic pursuant to VAT rates applicable in the Slovak Republic. If the businessman did not pay the VAT to the Slovak tax authority and consequently sold the goods further in the Slovak Republic including VAT, he 'earned' the VAT which was not paid to the Treasury. However the businessman submitted the tax return, in which he did not include transactions concerning buying and selling the cars, which resulted in lowering company's tax liability. The businessman did not ask the Slovak Republic tax authority for excessive tax deduction, he 'only' lowered his tax liability, therefore offence under § 276 Tax and Insurance Evasion was committed.⁹⁵ Tax and Insurance Evasion can be also committed when the business is conducted with illegal goods. The goods are imported into the Slovak Republic illegally and consequently the goods are sold in domestic market without VAT being paid to the Treasury.

3.2.2. Tax Fraud

The criminal offence of Tax Fraud is an intentional offence and it is important to look closely on gravity of the particular offence described in Section 277a paragraph 1 (minor offence), because if the gravity of a minor offence is of a lesser seriousness in view of mode of its commission, consequences and circumstances of commission, the particular behaviour does not constitute a criminal offence. Punishability of Tax Fraud under § 277a does not vanish using Section 85 or Section 86 – effective regret, however punishability of Tax and Insurance Evasion under § 276 does.

Object of the Tax Fraud is the protection of financial interests of the Slovak Republic against fraudulent behaviours which rests in gaining benefits by pretending entitlement to excessive VAT deduction.⁹⁶

According to the definition of Tax Fraud as stated in Section 277a, in order for this offence to be completed it is sufficient that the offender unlawfully exercises entitlement to excessive VAT deduction in a tax return with aim to earn an illegitimate benefit. Therefore for accomplishment

⁹⁵ Šamko P.: Daňové podvodové konania a ich dokazovanie, Wolters Kluwer, 2015, page 85

⁹⁶ Section 79 of 222/2004 VAT Act of the Slovak Republic

of Tax Fraud offence it is sufficient that the offender exercises an entitlement to VAT deduction, it is not necessary for VAT deduction to be actually granted to the offender by the respective tax authority. From the above mentioned facts it is clear that attempt of Tax Fraud according to § 14 paragraph 1 of the Slovak Penal Code Act is not possible. If the tax authority actually pays the offender back then we can say the offence was completed.⁹⁷

Tax payer fills into the tax return the difference between input VAT and output VAT. If the difference is positive tax payer has an obligation to pay tax to the respective tax authority, if the difference is negative tax payer is entitled to VAT deduction. Tax fraud is committed when the tax payer aims at illegitimate negative difference between the output VAT and input VAT.

The offender may obtain excessive VAT deduction by pretending fictional purchase of goods, where in ordinary course of action the VAT would be already payed to the tax authority by the seller of these goods. However State does not collect the VAT from the seller because there is no taxable transaction taking place (there is no purchase of goods) and as a consequence of this action the offender may obtain excessive deduction while the State has the obligation to pay the offender back.⁹⁸ If the offender includes the taxable acquisitions of goods in his tax return, even if they were not actually carried out, he is 'entitled' to tax deduction in an amount what he declared in the fictional tax return (in case the offender did not sell any goods at the respective tax period). This is also known as fictional increase of input VAT.

The right to deduct VAT is described under Section 51 of VAT Act No. 222/2004 Coll. The respective Section states that tax payer has a right to deduct VAT in case he submits invoices showing entitlement to VAT deduction. Section 79 paragraph 1 of the Slovak VAT Act states that if the tax payer is entitled to excessive tax deduction and cannot deduct this excessive deduction from his tax obligation in the next taxation period, he is entitled to payment of the excessive deduction. The tax authority shall return the tax payer his non-deducted excessive deduction within 30 days.⁹⁹ The difference between these two definitions (right to deduct

⁹⁷ Šamko P.: Daňové podvodové konania a ich dokazovanie, Wolters Kluwer, 2015, page 94

⁹⁸ Šamko P.: Daňové podvodové konania a ich dokazovanie, Wolters Kluwer, 2015, page 97

⁹⁹ Section 79 of 222/2004 VAT Act of the Slovak Republic

and excessive deduction) is crucial in the classifications of criminal offences. Tax and Insurance Evasion offence will occur when the businessman will illegitimately deduct VAT without excessive deduction being granted to him. On the other hand the Tax Fraud offence will be committed if offender will be illegitimately granted or will ask for excessive deduction from the tax authority.

In conclusion, tax payer is obliged to charge VAT to all his customers while the collected VAT has to be payed to the tax authority with the right of the tax payer to lower his tax liability by an amount of VAT the tax payer has already payed when purchasing goods and services from his suppliers i.e. input VAT. Lowering tax liability about VAT payed to tax payer's suppliers is called tax deduction. Excessive tax deduction is a result of the fact that input VAT payed exceeds VAT payed in output.

In the ordinary course of action Tax Fraud looks as follows, the end consumer A buys goods e.g. computers from the tax payer B and A pays for the goods including VAT. The end consumer A and seller B are conducting business in one Member State and the end consumer A does not sell the goods further. Sold goods were for example of 2 000 EUR value, the end consumer payed to seller B value of the goods plus VAT in amount of 400 EUR if we presume that the VAT rate is 20%. Seller B needed some components to construct computers which were sold to the end consumer, therefore he bought these components from his suppliers, seller B paid VAT for these products. For the seller B the process is not finished by paying 400 EUR to the Treasury as it was in case of end customer A. Lets presume that the seller B sold in this particular tax period only the computers for 2 000 EUR (400 EUR VAT). In this scenario seller B may deduct from 400 EUR VAT all value added taxes he payed to his suppliers for goods and services which were used or needed to create a product he was selling e.g. computers and by this action lower his tax liability. If the seller B payed more on VAT to his suppliers than is the value of VAT he received from purchases made by customers, he is entitled to excessive deduction. These facts have to be supported by invoices and submitted in a tax return.¹⁰⁰

¹⁰⁰ Šamko P.: Daňové podvodové konania a ich dokazovanie, Wolters Kluwer, 2015, page 101

3.2.3. Obstruction of Tax Administration and Distortion of Data in Financial and Commercial Records

The offence described under Section 278a Obstruction of Tax Administration is an intentional criminal offence. In Section 278a paragraph 1 and paragraph 2 the offence is qualified as minor offence, therefore it is important to look at the gravity of a particular offence because Section 10 paragraph 2 of the Slovak Penal Code Act may be invoked. Moreover punishability of this offence does not vanish even using effective regret under § 85 and § 86 of the Slovak Penal Code Act. The respective merits described under subparagraphs a) b) c) and d) of § 278a paragraph 1 have one fact in common and so that the offender has to be previously punished for analogical act in administration proceedings according to § 154 of the Slovak Tax Administration Act No. 563/2009 Coll. in previous 12 months. The period of 12 months is counted backwards from the moment of committing the offence and the important event is when the decision of administrative authority concerning previous offence became valid.

Merits of the criminal behaviour stated under subparagraph a) describe situations when the offender in documents submitted to tax authorities includes false data, grossly distorted data or conceals mandatory data b) describe actions of changing, devaluating or destroying documents necessary for correct tax payment, under subparagraph c) the tax payer does not fulfil his announcement obligations imposed by law and under subparagraph d) the tax payer does not fulfil his obligations imposed by law in terms of tax control. All of the above mentioned merits of § 278a aim at the same purpose and so to obstruct tax administration. Not all activities described in letters a) to d) will be considered as criminal offence of Obstruction of Tax Administration due to 12 month period condition mentioned above. The term tax administration is described in § 2 a) of the Act No. 563/2009 Coll.

In criminal behaviour described in § 278a under subparagraphs a) to d) the offender is intentionally trying to affect the tax administration process with the purpose to cover or to make it more difficult for the tax authorities to reveal that the particular businessman is a tax payer or what is the correct amount of VAT the tax payer is obligated to pay to the State's

Treasury. It is not necessary for tax administration to be disabled, the offender's behaviour is aiming at the fact that tax authorities do not have the correct information needed or they may achieve the correct data however with bigger efforts.¹⁰¹

The object of the criminal offence described in § 278a is to protect tax administration and consequently to secure correct detection of tax payers and their tax liabilities.

In terms of criminal act described in § 259 Distortion of Data in Financial and Commercial Records, the relevant paragraphs with regard to VAT frauds are § 259 paragraph 1 subparagraph c) and § 259 paragraph 2 subparagraph b). Section 259 paragraph 1 subparagraph c) is dedicated to submitting false data or grossly distorted data or concealment of mandatory data used for controlling accounting records and Section 259 paragraph 2 subparagraph b) concerns destruction, damage or rendering data unusable or failure to keep records referred to in paragraph 1. The main difference between the criminal offence of Obstruction of Tax Administration and Distortion of Data in Financial and Commercial Records rests in a fact that in terms of Distortion of Data in Financial and Commercial Records, there is no condition that the offender has to be previously punished for analogical act in administration proceedings. In case businessman was found guilty of the offence under § 278a (he had to be previously punished for analogical act according to § 154 of Act No. 563/2009 Coll. in administration proceedings and 12 month period had to be kept) and he would commit the same act again, in this case the businessman cannot be found guilty of the offence of Obstruction of Tax Administration because he did not fulfil the criterion of the previous administrative punishment. However the businessman may be suspected of Distortion of Data in Financial and Commercial Records, because this criminal offence does not have the condition of neither previous administration punishment nor previous criminal punishment. The same analogy would apply in cases when the businessman would behave in a way to obstruct tax administration process by for example destroying data or submitting false data and he was not punished in administrative proceedings in respective 12 month period, or when businessman was punished in administrative proceedings but in time period exceeding 12 months.

¹⁰¹ Šamko P.: Daňové podvodové konania a ich dokazovanie, Wolters Kluwer, 2015, page 224

The businessman could be suspected of Distortion of Data in Financial and Commercial Records offence. Description of the Distortion of Data in Financial and Commercial Records offence is more universal because Obstruction of Tax Administration offence applies only to tax payers and behaviour concerning taxes. Moreover Distortion of Data in Financial and Commercial Records is not limited by previous criminal or administrative punishment.