

CRIMINAL LIABILITY IN THE COMMISSION OF TAX DEFRAUD AND ITS REPUTATIONAL IMPLICATIONS

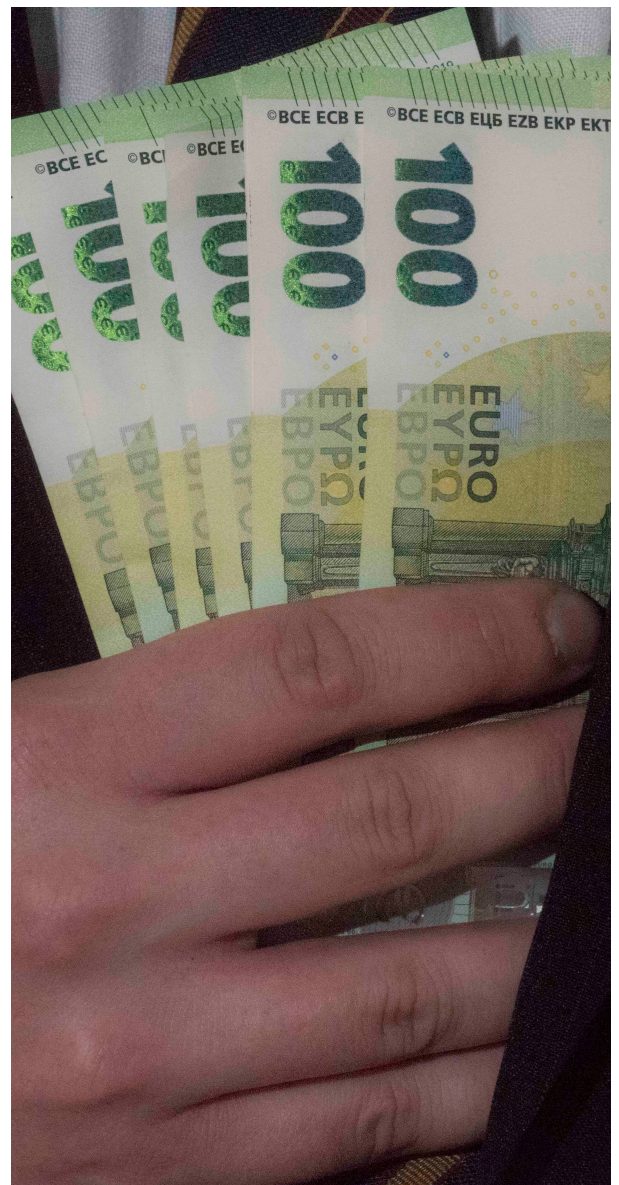
BY PUBLIO CORTÉS

The presentation I made two weeks ago at the last International Congress of the Law Professionals Committee of the World Compliance Association, Panama chapter, had the criminal responsibility in the commission of tax fraud and its reputational implications for the organizations as its central axis.

During the first part, an analysis was made regarding the following question: **Will cases of tax fraud really be started in Panama?**

There was some background presented on the matter of collection, economic recovery and actions that are being taken by different entities such as the Tax Administration and the Public Prosecutor Office.

In the past two years, the tax revenue collection has decreased, although it is not the only factor, the pandemic is the main reason for the current collection problems, which represents a great challenge for the Tax Administration.



On the other hand, according to studies by the International Monetary Fund (IMF) on Panama, ... "The public sector debt went from 42 ¼% of GDP in 2019 to 64% of GDP in 2020." In addition to the debt, there are other factors: Panama was the sixth country in the world that had the largest drop of its GDP in 2020, expert voices speak of 6 years to recover the level of employment that existed before the pandemic and expenses have not decreased, on the contrary: the State has had to invest more on health expenses, subsidies, and others to alleviate the effects of the pandemic.

On the other hand, we have an uncertain international scenario, the economic recovery is being affected, among other reasons, by the appearance of new variants of COVID-19 and there is concern about the effects that the end of aid packages may have and when the end of the bank moratorium, specifically in Panama.

To summarize, the Tax Administration of Panama is obliged to improve collection, despite the difficulties. It is the first time in history that a Panama Tax Administration has the tool of tax fraud as a crime. This tool allows you to collect more directly, because it has a mechanism through which the person who confesses and pays, is freed from the criminal problem (just once), it also allows you to collect more indirectly, because it increases the feeling of risk.

Based on the foregoing, it can be inferred that the Panama Tax



Administration is highly likely to use the tax fraud regulations and in fact it is already giving clear signals in their publications on social media and in the beginning of recent specific cases. The mere fact of the creating a position of a tax evasion and fraud chief is one more sign that the DGI is going to investigate and process this type of cases.

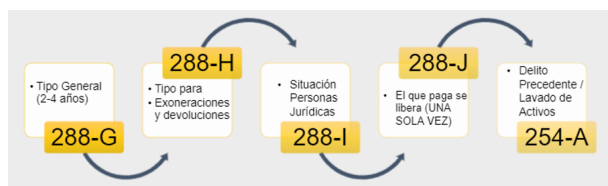
In conclusion, the answer to the initial question is that, of course, tax fraud regulations will be applied in Panama, therefore, organizations must take this element of context into account in their risk analysis.

What is Criminal Liability for Tax Fraud?

In my opinion, the regulatory system on tax fraud in Panama is not clear, concrete, and not unequivocal, this element of imprecision represents the highest risk for organizations derived from the issue of tax fraud in Panama.

To start understanding the system, it is necessary to jointly analyze the norms of both the Criminal Code (CP) and the norms of the Procedural Tax Code (CPT), with the observation that some CPT norms that apply to the subject, they are curiously not only procedural norms, but they are substantive criminal norms also.

The regulations of the Criminal Code



In Panama, tax crimes are in a chapter of the criminal code called "crimes against the national treasury".

The first crime is under article 288-G. This rule indicates that the tax fraud can be committed for the benefit of the actor or another person and whenever the determination of the tax obligation is fraudulently altered. The conduct contemplates a prison sentence of 2 to 4 years. It will only be a crime if the amount defrauded is equal to or greater than US\$300,000.00.

To finish defining the conduct, you must go to the rules that are in another code, called the "Tax Procedural Code", whereas specific cases of "tax fraud" are indicated.

The second type of offense is found in article 288H of the Criminal Code. This rule creates an additional assumption. This time it is about taking advantage of tax benefits and exemptions. If said use

of tax advantages is made fraudulently, two penalties are applied: one imprisonment and the other is a fine.

For example: if a corporate-accounting structure is generated simulating to comply with the requirements of a Real Estate Investment Company (REIT or SOCIMI, in Spain), to fraudulently benefit from tax incentives.

In the case of the prison sentence, it is the same: 2 to 4 years. And the fine it is an amount equal to the amount defrauded and a maximum of 3 times that amount.

As in the first type, we only speak of crime when the amount defrauded is equal to or greater than US\$300,000.00.

The next criminal tax regulation of the Criminal Code is article 288 I. In short, this provision says that if the person who commits fraud or benefits from it is a corporation, there will be no prison sentence. Instead, it will only apply a fine of a minimum equivalent to the tax defrauded and a maximum of twice that amount. It is reiterated that we only speak of crime when the amount defrauded is equal to or greater than US\$300,000.00.

The other criminal tax regulation of the Criminal Code to comment on, is the one under article 288 J. According to this article, in both previous cases, and regardless of the procedural phase in which the payment is made, the person under investigation can be released if he/she pays the amount defrauded and its formal accessories (interest and

finances). This benefit only applies one time.

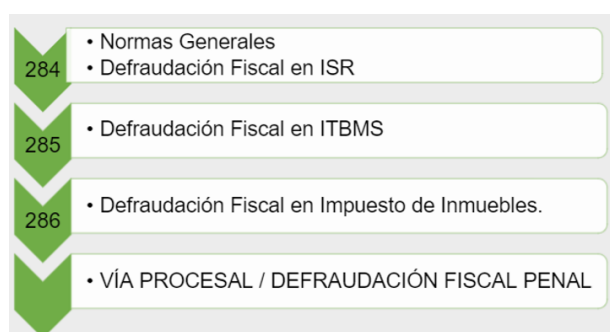
The last tax criminal regulation of the Criminal Code, which we must comment, is article 254A. According to this provision, the tax fraud regulations analyzed above are considered a precedent offense for money laundering.

In general, money laundering has a penalty of 5 to 12 years in prison. However, in the specific case of money laundering when the preceding crime is tax fraud, the penalty is 2 to 4 years in prison.

Furthermore, if a corporation is used as an instrument, there will be no prison sentence. Instead, only a fine of one to three times the amount defrauded.

Rules of the Tax Procedure Code

The main regulations are presented from the substantive and procedural point of view, namely:



The general rules of the Procedural Tax Code, seem to reduce the matter only to taxes, I do not feel it as comprehensive as the Criminal Code when it refers to "tributos" which is a broader idea, including another sort of public income as Social Security.

Now, initially the Procedural Tax Code considers all taxes as potential objects of criminal fraud. However, it only goes into defining behaviors specifically on Income Tax; VAT; and in the Property Tax.

It is not clear if the fraud in other national taxes could be considered as a crime once they reach the determined amount. Nor is it very clear what the specific behaviors might be.

Speaking of the minimum amount, there is also great confusion about how the minimum amount affecting the Treasury is determined to make it a crime. We do not know, for example, if the different impacts of taxes can be added together or if, in the same tax, you can accumulate the impacts of different fiscal years.

Regarding the procedural route, the Procedural Tax Code establishes that the Tax Administration cannot send cases directly to the Public Prosecutor Office when it considers that there is a crime, requesting that those responsible be investigated and prosecuted.

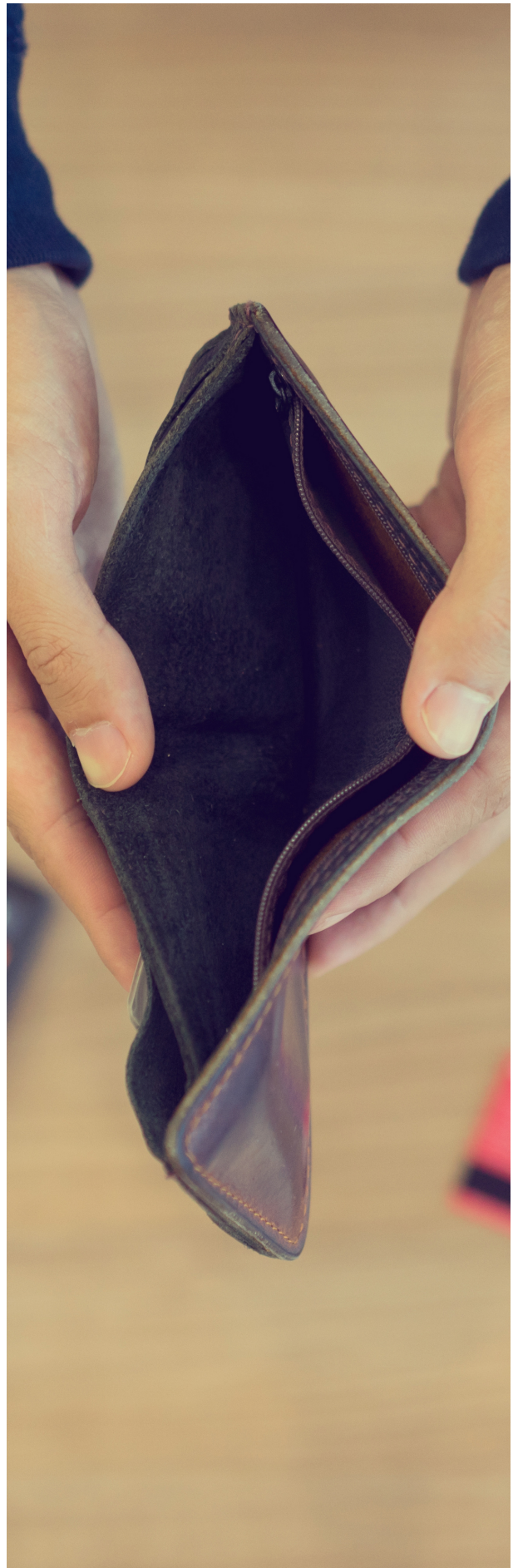
Instead, the Tax Administration must send the cases to the Administrative Tax Court so that they can qualify them and then it can decide whether to send the cases to the Public Prosecutor Office.

Elements that increase the level of reputational risk due to Criminal Tax Fraud

In a final section of the conference, we highlighted other elements that increase the reputational risk for this

type of crime, including the following:

- DIFFUSE and imprecise criminal conduct that leave taxpayers at the mercy of the authorities' discretion.
- FAKE generic and prior exclusion of the possibility of engaging in criminal conduct or complicity by professionals and technicians who advise on tax matters.
- Weak training and lack of experience in Criminal Law and Criminal Procedure Law in administrative system operators: Tax Administration and the Administrative Tax Court.
- Weak training and lack of experience in Tax Law in judicial system operators: Public Prosecutor Office and Judicial Branch.
- International pressure for results, which can generate collateral damage such as unfounded convictions.



FINAL COMMENT

My recommendation for companies that want to reduce reputational risks and risks of administrative sanctions and criminal convictions, is have a preventive risk management on tax fraud at the top of the list, and the best way to prevent is to receive high-level technical advice to timely identify, opportunities for improvement to act in advance on these risks.

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