



Number: X-KŽ-06/305

Sarajevo, 2 October 2007

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, the Appellate Division of the Section II for Organized Crime, Economic Crimes and Corruption, the Panel composed of Judge Meddžida Kreso as the Presiding Judge and Judges Nedžad Popovac and Finn Lynghjem as Panel members, with legal advisor Željka Marenčić as the record-taker, in the criminal case against the accused Kristijan Škoro for the criminal offence of Tax Evasion in violation of Article 210(1) of the Criminal Code of Bosnia and Herzegovina (CC BiH), deciding on the Appeal by the attorney Midhat Kočo, the defense attorney for the accused, filed from the Verdict of the Court of BiH no. X-K-06/305 of 11 June 2007, following a session attended by the Prosecutor of the Prosecutor's Office of BiH, Edina Hubjer, and the defense attorney for the accused, Midhat Kočo, in the absence of the duly summoned accused Kristijan Škoro, pursuant to Article 310(1) as read with Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH) rendered on 2 October 2007 the following

V E R D I C T

Refusing the Appeal by the attorney Midhat Kočo, the defense attorney for the accused Kristijan Škoro, as unfounded and confirming the Verdict of the Court of BiH no. X-K-06/305 of 11 June 2007.

Reasoning

The Verdict of the Court of BiH no. X-K-06/305 of 11 June 2007 found the accused Kristijan Škoro guilty of the criminal offense of Tax Evasion under Article 210(1) of the CC BiH, for which a fine in the amount of KM 9,000.00 was imposed on the accused, which he was bound to pay within 3 months of the Verdict becoming final. Under the first instance Verdict, pursuant to Article 110 of the CC BiH, the material gain acquired by the above criminal offense to the amount of KM 11,782.40 (the amount of the evaded tax) shall be confiscated from the accused. Furthermore, under the first instance Verdict, pursuant to Article 188(1) of the CPC BiH, the accused shall be bound to pay the costs of the criminal proceedings to the amount of KM 316.00, which he shall pay within 30 days of the Verdict becoming final.

The defense attorney for the accused filed the Appeal on the following appeal grounds under Article 296 of the CPC BiH: essential violations of the criminal procedure, violations of the criminal code and the state of facts being erroneously established, and moved the Appellate Panel of the Court of BiH to uphold the Appeal, reverse the contested Verdict and schedule a new trial.

In the reasoning of the Appeal, the defense attorney for the accused submitted there was an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH as inter alia, the right of the accused to a defense was violated. The defense attorney

submitted that the Court did not keep the record of the main trial within the meaning of Articles 253 and 254 of the CPC BiH (except for the audio recording), which it was bound to do under law and which the Presiding Judge must be mindful of at all times within the meaning of Article 239 of the CPC BiH. A violation of the right of the accused to a defense is further reflected, as submitted by the defense attorney, in the fact that the petition by the defense attorney for disqualification of the Judge handling the first instance proceedings was fully justified, quoting thereby a comment of the single judge presiding the main trial on the petition for her disqualification. The defense attorney further asserted that the text of the contested Verdict is almost identical to the text of the Court Verdict no. X-K-06/308 of 12 June 2007.¹ Moreover, the Appeal reads that during the first instance proceedings, between the hearing of 19 March 2007 and the consecutive hearing of 8 May 2007 (which is a period of over 30 days) not a single action was taken, which is an essential violation of the criminal procedure provisions under Article 207(2) as read with Article 251(3) of the CPC BiH.

The Appeal further reads there was an alleged violation of the criminal procedure provisions under Article 297(2) of the CPC BiH as read with Article 281(1) of the CPC BiH, as the Verdict was based on evidence not presented at the main trial. More specifically, the defense attorney submitted that the statement of the witness Mehmed Tuzlak was tendered into the case file contrary to the statutory procedure, with an entirely erroneous application of Article 273 of the CPC BiH. Another essential violation under Article 297(1)(k) of the CPC BiH, as submitted by the defense attorney, was that the contested Verdict did not effectively reason on the decisive facts and did not explain the reasons for not accepting the finding and opinion of the defense expert witness, Dr. Abid Hodžić, from which a completely opposite conclusion is drawn to that in the Operative Part of the disputed Verdict.

Arguing the violation of the criminal code and erroneously established state of facts, the defense attorney submitted that one can conclude upon analysis of the evidence presented that the charges are intrinsically contradictory, as all criminal actions (according to the reasoning in the Verdict) are carried out by the legal entity Maestral d.o.o. Kiseljak. In this light, the Appeal submitted, it is questionable what statutory provision prescribes the liability of the accused for the operations of this legal entity, even if he is the owner and founder.

The defense argues that the contested Verdict did not give valid reasons as to why it accepted the statement of the witness Mehmed Tuzlak given in the preliminary proceedings rather than his testimony at the main trial. Namely, the defense attorney submitted that it can be concluded from the testimony of the witness Mehmed Tuzlak at the main trial, and from the objective documentation tendered into the case file by the Prosecution, in particular through the finding and opinion of the expert witness Abid Hodžić, that transactions between the companies Maestral d.o.o. Kiseljak and Codex Line d.o.o. Zenica were carried out in accordance with all applicable laws, in a lawful manner, that is, by way of invoices and purchase orders, made (according to the defense attorney) in accordance with Article 9 of the Rulebook on Application of the Law on Sales Tax on Products and Services. It is further asserted that the finding and opinion of the expert witness Kerima Prašljivić was based on irrelevant evidence, on legible and illegible dispatch notes, which

¹ Court Verdict no. X-K-06/305, page 3 paragraph 3, and Court Verdict no. X-K-06/308, page 6 paragraph 2

do not constitute mandatory documents under applicable laws; thus the finding of the expert witness Kerima Prašljivić is inadequate in this particular criminal matter. In this regard, the defense attorney submitted that the Court did not evaluate *these arbitrary conclusions* of this expert witness, but simply accepted them as given.

As for the elements of the criminal offense of Tax Evasion under Article 210(1) of the CC BiH, the Appeal argues that it is a blanket criminal offense, requiring the application of a *lex specialis*, which in this case is the Law on Sales Tax on Products and Services and not the Law on Enterprises, as submitted by the Prosecution expert witness, Kerima Prašljivić. The defense attorney further submitted in the Appeal that the Court may only base its verdict on evidence presented at the main trial within the meaning of Article 281(1) of the CPC BiH. In the case at hand, the defense attorney asserted, the Court did not find there was a violation of the blanket provision of Article 210 of the CC BiH, or a violation of the Law on Sales Tax on Products and Services (Article 8 of this Law), which is an essential element of this criminal offense, which does not exist without this violation. The defense attorney maintained that it is only the tax administration that can establish a tax liability in the tax procedure, which would then be sanctioned through the blanket provision of Article 210 of the CC BiH, which principle was not observed in this particular case.

As submitted in the Appeal, having examined the Operative Part of the Verdict, it is clear that it contradicts the reasoning and the legal basis thereof. Namely, the defense submitted that the Operative Part of the Verdict speaks of fictitious transactions, while the reasoning in the part pertaining to the elements of the criminal offense speaks of the failure to declare lawfully acquired revenues, thus the question arises as to whether one can acquire lawful revenues from fictitious transactions. Furthermore, the defense argued that it ensues from the Operative Part of the Verdict that there were no goods sales between the legal entities of Maestral d.o.o. Kiseljak and Codex Line d.o.o. Zenica, thus making it unclear how can there be any tax liability upon the sale of goods and services².

As it is an indisputable fact that pursuant to Article 5 of the Law on Enterprises and within the meaning of Article 40 of the Law on Procedure for Entry of Legal Entities into Court Register, Maestral d.o.o. Kiseljak is registered as a legal entity; as such it has this capacity regardless of its founder, as such it had obligations relations with Codex Line d.o.o. Zenica, which is why, according to the Appeal, the question arises as to the liability of the accused as the founder and owner. The defense attorney maintained that the disputed Verdict did not give any evidence to this end, which in itself constitutes sufficient ground for the acquittal of the accused.

Finally, the defense attorney draws the conclusion that the disputed Verdict does not have a legal definition of the criminal offense charged against the accused. Namely, the disputed Verdict charges the accused Kristijan Škoro with the criminal offense under Article 210(1) of the CC BiH, although all the actions of the criminal offense were carried out by the legal entity rather than the accused. The attorney submitted that the basic criminal offense depends on the existence of a supplementary provision, which would certainly clarify certain issues; thus the defense attorney wonders whether prior to initiating a criminal

² *The Appeal argues that the condition stipulated under the Law on Sales Tax on Products and Services is exactly the sale of goods and services, so if there is no sale, it is reasonable to assume there is no tax liability either (p. 8 of the Appeal)*

proceeding there should have been an administrative proceeding, in order to establish tax evasion.

The Prosecutor's Office of BiH moved the Court at the session of the Appellate Panel to refuse the Appeal by the defense attorney as unfounded and confirm the first instance Verdict.

Having examined the disputed Verdict within the boundaries of the defense appeal arguments, the Appellate Panel rendered the decision given in the Operative Part for the following reasons:

As for the defense appeal arguments pertaining to the violation of the right of the accused to a defense because the record was not kept at the main trial, the Appellate Panel finds them unfounded. It is true that the defense attorney invokes in the Appeal Article 253(1) of the CPC BiH, reading: "*A record shall be kept of the entire course of the main trial, reflecting literally everything*". However, legal provisions provide for the record to be kept in form of a written record or an audio recording. Thus, Article 155 of the CPC BiH stipulates: "*As a rule, all actions undertaken during the criminal procedure shall be audio or audio-video recorded...*". Throughout the first instance proceedings, the entire course of the proceedings was audio recorded, which record the defense attorney and the accused himself had the right and the possibility to obtain. The defense assertion that the first instance Court did not act according to the law is ill-founded, for the reason that the audio recording constitutes a valid record under the quoted legal provisions. The defense attorney does not in any way dispute the veracity, authenticity or comprehensiveness of the audio recording (which is easily accessible, literate and contains the entire course of the proceedings), thus it remains unclear how could there possibly be an infringement upon the rights of the accused in this light.

The Appellate Panel further found the defense appeal argument pertaining to the issue of disqualification of Judge Korhonen ill-founded. The defense attorney quoted the comment by Judge Korhonen which (as submitted by him) read: "*...I must say I am not familiar with the procedure for disqualification, so first I have to examine this issue of whether I should stay or there should be another judge taking over the case...*" The Panel notes that the instrument of disqualification of a judge provides for disqualification of a judge from the criminal proceedings if there are reasons why it would be inappropriate for the judge to exercise his duty as a judge or raising suspicion as to his impartiality. In any case, suspicion by a party (or defense attorney) as to the professional competence of a judge does not qualify as a ground for disqualification. Subduing such an objection under the legal provisions pertaining to objective impartiality of the Court is wrong. Furthermore, a defense attorney should not comment in his appeal arguments on the competence of the judge (quoting thereby the comments by the judge, who obviously did the right thing upon the receipt of the petition for his disqualification, as can be seen from the case file), but rather indicate to the Appellate Panel the specific procedural steps, rulings or procedures that would constitute appellate arguments provided for under the law. Moreover, as seen from the Appeal itself, the defense attorney submitted the petition for disqualification of a single judge after the beginning of the main trial. If the defense attorney bothered to read Article 32(4) of the CPC BiH, he would have known that such a request must be rejected.

As for the defense appeal argument that the text of the first instance Verdict is identical in certain parts to the Verdict of this Court no. X-K-07/308 of 12 June 2007, the Appellate Panel found that no violation of the criminal procedure provisions ensues from such similarities in the respective texts. The Panel concludes that the first instance Court evaluated adequately and thoroughly all the evidence presented in the case and in this light the Verdict is logical and intrinsically consistent. The Court is satisfied that under the circumstances, alleged similarities or identical parts in its text as in another Court verdict are irrelevant. Inter alia, one should bear in mind that both cases pertained to the same criminal offense (tax evasion under Article 210(1) of the CC BiH), thus similar formulations could be used.

As for the defense assertions that there was an essential violation of the criminal procedure provisions in the first instance proceedings due to an elapse of more than 30 days between the two hearings, the Appellate Panel found this defense argument was entirely unwarranted, not to mention untrue. The Appellate Panel observes that the defense attorney invokes Article 207(2) (as read with Article 251(3) of the CPC BiH), which pertains to a mental disease of the accused in the course of the trial and does not contain a paragraph (2). The Panel believes this was a lapsus or a typing error on the part of the defense attorney, therefore it will evaluate the argument within the meaning of Article 297(2) of the CPC BiH, as only in this manner one can make sense out of this defense appellate argument. Namely, the Panel examined the case file and made the conclusion completely opposite to the defense assertions. Namely, it is clear from the file that between the two hearings mentioned (19 March 2007 and 8 May 2007) there was a hearing held on 16 April 2007. This hearing, entirely omitted in the defense appeal arguments, was postponed exactly upon request by the defense attorney, due to the failure of the defense expert witness Abid Hodžić to appear before the Court. The Panel concludes that the first instance judge acted in an entirely just and correct manner and exercised the option under Article 249(3) as read with Article 250 of the CPC BiH. In accordance with these circumstances, it is evident that there was no breach of the statutory deadline of 30 days between two hearings.

The appeal argument that the contested Verdict was based on evidence not presented at the main trial, that is, that the statement of the witness Mehmed Tuzlak was tendered into the case file bypassing the statutory procedure is entirely ill-based, as this statement was tendered into evidence pursuant to Article 273 of the CPC BiH. This Article clearly stipulates the possibility to use a statement previously given by a witness in the course of his testimony at the main trial for clarification of parts of the witness testimony in both direct and cross examination. A previously given statement is usually used if the person under examination diverges from or says things differently than in the statement from the investigation or if he cannot remember certain circumstances. The statement given earlier by the witness Mehmed Tuzlak at the Prosecutor's Office (on 22 June 2006³) was taken in accordance with the statutory provisions.⁴ The Panel notes that present in the course of the examination was also the defense counsel for the witness Mehmed Tuzlak, so there was no way the witness rights could have been infringed upon. Consequently, the Panel is satisfied that the first instance Court correctly concluded that the statement of the witness is formally correct and therefore there are no obstacles whatsoever to using it in the course of the

³ *Statement of the witness Mehmed Tuzlak no. KTA-334/06 of 22 June 2006.*

⁴ *Inter alia, the witness was instructed of his rights and duties in accordance with Articles 81, 83, 84, 86 and 91 of the CPC BiH*

evaluation of evidence. The first instance Court gave valid and sufficient reasons as to why it accepted this statement, and why it gave credence to it rather than the witness testimony at the main trial.

Having examined the appeal arguments pertaining to the violation of Article 297(1)(k) of the CPC BiH, disputing the finding and opinion of the Prosecution expert witness, Kerima Prašljivić (while giving priority to the finding prepared by the defense expert witness, Abid Hodžić), the Panel notes that what is given through an expert evaluation, in the finding and opinion, is merely a link in the chain of evidence, on which the Court decides in terms of its usefulness and degree of contribution towards casting some light on and resolving the criminal matter. Therefore, a finding and opinion of an expert witness does not exceed the boundaries of evidence and it is susceptible to the court evaluation, both individually and in its correlation with other evidence; it is up to the Court to determine its final probative value. We should note that the CPC BiH does not provide for witnesses confrontation or a supra expert evaluation in case of a disagreement and opposite conclusions in the findings of expert witnesses. In this particular case, the contested Verdict gave a clear and detailed assessment of both findings and opinions, presenting the reasons (entirely accepted by this Court as well) why credence was given to the finding of the expert witness Prašljivić. Namely, when preparing her finding and opinion, the expert witness Prašljivić was using documents relevant to this proceeding, based on which she concluded that Maestral d.o.o. Kiseljak was liable to pay tax on the sale of goods in the total amount of KM 11,782.40, thus the assertion by the defense attorney that this finding was based on irrelevant evidence and that the expert witness Prašljivić proclaimed like a prophet that there was no goods delivery, is entirely ill-founded. Thus the Panel refuted the defense assertion that the first instance Court did not give the reasons why it did not accept the finding and opinion of the expert witness Abid Hodžić, finding it was established entirely correctly in the contested Verdict that the defense evidence, including this finding, does not bring into question the probative value of the Prosecution evidence. Furthermore, the Panel finds that it was correctly established that the defense expert witness prepared his finding based only on the documentation and concluded that there was sale of goods between Maestral d.o.o. Kiseljak and Codex Line d.o.o. Zenica, although the subject of the charges is exactly that the above documents were made only for the reason that the goods were sold to other buyers without the calculation and payment of tax, and to conceal it, the above documents presented a fictitious sale between the companies Maestral d.o.o. Kiseljak and Codex Line d.o.o. Zenica, although there was no actual sale between these companies. Accordingly, it was correctly concluded that the defense thesis that there was an actual sale between the above companies cannot be based on the finding and opinion of the expert witness Abid Hodžić or in material files of the legal entity Maestral d.o.o. Kiseljak.

As for the defense appeal arguments that in the case at hand it was not established that there was a blanket violation of Article 210 of the CC BiH or violation of the Law on Sales Tax on Products and Services⁵ (which is an essential element of the criminal offense), related to which is also the assertion that it is only the tax administration that can establish the existence of the tax base in a tax procedure, the Panel refused it as unfounded. Namely, Articles 135 and 137 of the Law on Administrative Procedure of BiH cover, inter alia, resolving of preliminary issues in the administrative rather than criminal procedure, thus the objection by the defense attorney is ill-founded. If this defense argument were upheld, the

⁵ Article 8 of the Law on Sales Tax on Products and Services

question is what would happen in case the responsible authorities do not initiate any administrative procedure in an administrative matter. One should bear in mind that the standard of proof in the criminal procedure is substantially higher than in the administrative procedure, therefore having the possibility to solve a matter in the administrative procedure does not preclude its resolution in the criminal procedure if it turns out to be relevant for the court decision. In a criminal matter, it is the Court who has the power and jurisdiction to decide on all legal issues sublimated in the criminal offenses charged and cannot be conditioned by the actions of any administrative body.

The Panel refused the defense appeals arguments pertaining to the violation of the criminal code, submitting it is questionable which statutory provision the liability of the accused for the operations of the legal entity Maestral d.o.o. Kiseljak would ensue from, even if he is the owner and founder of the company. Namely, tendered into the case file as evidence is the excerpt from the central base of the register of the companies, making it obvious that the accused Kristijan Škoro is entered as a person responsible for managing the legal entity Maestral d.o.o. Kiseljak. Based on this, the first instance Court has correctly concluded that it is an indisputable fact that the accused is the responsible person, authorized to take all actions and carry out all business activities in the name and on behalf of the legal entity Maestral d.o.o. Kiseljak⁶, in which capacity exactly the accused committed the criminal actions charged. Furthermore, the Court cannot affect in any way the decision of the Prosecutor's Office as to which legal or natural entity it would prosecute. It is by all means a decision of the prosecutor, who can decide pursuant to Article 376 of the CPC BiH not to require initiation of a criminal procedure against a legal entity when the case circumstances indicate that it would not be purposeful. One of the reasons for such (in)action on the part of the prosecutor is a situation when the perpetrator of a criminal offense is the only owner of the legal entity the criminal procedure would be initiated against, which is the case in this particular situation, as already mentioned.

Bearing in mind all of the above, pursuant to Article 310(1) as read with Article 313 of the CPC BiH, the decision was made as given in the Operative Part of this Verdict.

Record-taker

Željka Marenčić
Signature Affixed

**JUDGE PRESIDING
JUDGE**

Meddžida Kreso
Signature and Stamp Affixed

LEGAL REMEDY: This Verdict is not subject to appeal.

⁶ Article 24 of the Law on Enterprises (Official Gazette of the Federation of BiH no. 23/99)