

Persuasive model of reaction towards tax avoidance in penal fiscal regulations

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Abstract—Tax avoidance is a phenomenon whose legality must be negated. At the same time it must be emphasized that taxpayers who act without reflecting upon their behaviour face criminal liability which starts with the rejection of the taxpayer's application for advance tax ruling and initiation of tax avoidance proceedings. The institutions of voluntary disclosure, correction of tax return and voluntary submission to liability are offered to those individuals or companies who have committed tax-related offences and want to avoid conviction at the end of penal fiscal proceedings.

Index Terms— tax avoidance, penal and fiscal liability, voluntary disclosure, correction of tax return, voluntary submission to liability

I. INTRODUCTION

Article 42 point 1 sentence 1 of the Polish Constitution says: *Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible*, it is a guarantee that the State is responsible for disseminating knowledge of legal regulations so that the citizens know what is crime and what is not. Tax fraud is clearly established in the Penal Fiscal Code whereas tax avoidance is defined in the Tax Ordinance. However, the stance claiming that tax avoidance is a forbidden act – because of the nature of the taxpayer's behaviour aimed at misleading the tax organ with respect to the real nature of economic occurrences that took place in order to obtain undue tax benefit - requires explanation.

Tax fraud is an offence which occurs when an individual or business entity acting contrary to the Tax Act, willfully and intentionally falsifies information on a tax return so that correct assessment of tax becomes impossible. Fraud (or to be more specific tax return fraud) is regarded as all acts penalized in article 56 of the Penal Fiscal Code but also in article 76 (extortion of tax refund) and in articles 76a, 87, 92 of the Penal Fiscal Code. Undoubtedly, should there be indications to issue a decision that tax avoidance did occur, it directly proves that

the truth about actual economic content i.e. the fiscal and legal factual situation of the taxpayer's activity has been concealed. The indefinite criminal regulations formulated by the legislator which make use of descriptions which cannot be unambiguously defined or which are very complex and difficult to understand, stand in stark contrast to the principle of the specificity of legal provisions of a prohibited act. The same objection, however, cannot be raised if the legislator uses indeterminate phrases in the general clause and in the accepted construction of tax avoidance because it helps to reconstruct the material truth and to defalsify the fiscal and legal state to which the taxpayer holds. The infringed criminal norm contained in articles 56 and 76 of the Penal Fiscal Code clearly indicates the person to whom the injunction is addressed and contains features of a prohibited act as well as specific sanctions related to this kind of act (Warylewski, 2003). Even if there are doubts whether a given behaviour of a taxpayer should be classified as tax avoidance, should tax evasion be detected – the entity who undertook the prohibited activity must be charged with tax fraud (Bartosiewicz, 2017). It is wrong to treat tax avoidance as permitted by law though undesired behaviour of taxpayers (Kujawski, n.d.). This 'legality' is only of private-law nature as it refers to the forms of economic turnover which led to the tax avoidance act, and not to the tax avoidance per se, whose consequence is the tax benefit mentioned above.

The injunction to prevent tax avoidance occurrences results from penalisation in the Penal Fiscal Code of acts of attesting untruth by a taxpayer (tax fraud) i.e. providing information which is factually incorrect, this includes arriving at tax consequences on the basis of occurrences which did happen in reality but could not constitute legal grounds thereof (Zgoliński, 2018).

In each penal fiscal case the culpability must be an independently determined element of fiscal crime or fiscal offence, a mere statement of fact that a provision of the financial law has been infringed is not sufficient. Without the penal legal element of culpability, the failure to settle a financial liability (as a financial tort) does not constitute a fiscal crime. Pursuant



to the rule expressed in article 4 § 1 of the Penal Fiscal Code, fiscal crime or offence may be committed – in principle – intentionally or unintentionally only if the statute states so. The culpability may be defined as the attitude of the perpetrator which is chargeable in the light of regulations in force (Konarska-Wrzosek, Oczkowski and Skorupka, 2013). The perpetrator's attitude to the prohibited act may be expressed in the intention to commit a prohibited act or in the failure to comply with the duty of care (Zgoliński, 2011).

II. VOLUNTARY DISCLOSURE

Article 16 of the Penal Fiscal Code enacts the clause of unpunishability based on the voluntary disclosure of the perpetrator. Of critical importance here is the voluntary nature of disclosure of a criminal tax crime or offence to the body authorized to prosecute and the readiness of the perpetrator to step out of the path of crime and to give up the fruits the prohibited act brought. It should be observed that the statute does not require that the notification should be filed voluntarily. The premises behind the perpetrator's decision to disclose are legally irrelevant. If the regulation is to be understood literally, a request to issue an advance tax ruling can also be treated as an act of voluntary disclosure because in case of a completed, planned or a begun activity, the applicant should include information relevant so as to the tax effects of the committed acts. The follow-on statement of the head of the National Revenue Administration on tax avoidance issued following the analysis of the presented factual state, may be treated only as the confirmation that the 'self-denunciation' was justified, although in the phase of submitting the application, the applying entity was only hoping to get a guarantee of impunity. Strangely enough, such interpretation of the institution of voluntary disclosure should be allowed as the entity who has committed tax avoidance notified a relevant body about the wrongdoing through the application for an advance tax ruling. Disclosure is nothing else than providing the law enforcement agency with information previously unknown to them i.e. about all neuralgic elements related to the unlawful act such as time and place of its commission as well as its features (compare the ruling of the Supreme Court of 27 May 2002; V KKN 188/00, OSNKW 2002/11–12, item 113).

The institution of voluntary disclosure is going to gain popularity because the body which must be notified i.e. the head of the National Revenue Administration (conducting the tax proceedings in case of their takeover) is, at the same time, the body authorised to prosecute within its jurisdiction (article 133 Penal Fiscal Code). This will lead to a situation in which the 'optimising' entity will capitalise on the possibility to apply for discharging from penal fiscal liability and consequently, both the application and the positive advance tax ruling will be treated as voluntary disclosure and will protect the entity against criminal liability. Tax proceedings, should tax avoidance be determined, will still be under way. At the same time, pursuant to § 4 article 119a of Tax Ordinance, the party during proceedings may indicate an appropriate action and then the fiscal effects are determined upon such state of affairs which

would occur if the appropriate action would have occurred, provided that the organ accepts the indication and all public imposts are settled by the defendant.

III. CORRECTION OF TAX RETURN

The next institution that leads to relief from liability is a legally effective correction of tax return and settlement of the unlawfully reduced amount of tax together with the amount of potential losses in tax revenue. Also this institution is known to the clause regulations provided for in article 119j of the Tax Ordinance where it regards the taxpayer during proceedings, but it can also concern an entity other than the party to proceedings which were terminated with a decision in a tax avoidance case.

A special institution of voluntary disclosure to be found in article 16a of the Penal Fiscal Code, is addressed to a narrow group of perpetrators who commit tax fraud acts such as submitting tax returns which contain untruths or in which the truth is concealed. *De lege lata* the fiscal crime perpetrators can use a considerably simplified institution of voluntary disclosure provided for in article 16a of the Penal Fiscal Code. This institution may be used without any limitations. It is hard to tell for what reason the perpetrators who give false statements or cover the truth in their tax returns have been privileged in this way by the legislator. Maybe for the State Treasury recovering the due financial inflows is more important than punishing those who try to avoid paying taxes. It does not mean however, that ordinary errors and mistakes made in tax returns will not be punished, because the mistakes, according to the contents of article 10 of the penal fiscal code, do not produce penal fiscal liability.

In order to be able to benefit from the institution provided for in article 16a of the Penal Fiscal Code, it is necessary to submit a legally efficient correction of tax return. There is a stance in judicature which advocates the possibility for the perpetrator of a fiscal crime or a fiscal offence to file a legally effective correction of tax return, which is described in article 16a of the Penal Fiscal Code, also after the wrongdoing has been revealed and after penal fiscal proceedings have been initiated. Such behaviour of the perpetrator should undoubtedly produce an effect stipulated in article 17 § 1 point 4 of the Code of Criminal Proceedings in connection with article 113 § 1 of the Penal Fiscal Code. A possible impunity of the perpetrator will depend on meeting a series of conditions and will refer only to those acts which are related to filing a tax return form (Zgoliński, 2018).

The possibility to correct the tax return is suspended in the basic regulation for the duration of fiscal proceedings or tax inspection – within the scope covered by the proceedings or inspection. Correction of the tax return submitted within this time frame does not produce legal effects. Correction can still be made after termination of tax inspection or tax proceedings – within the scope not covered by the decision determining the amount of the tax liability (article 81b § 1 of the Tax Ordinance). Correction of tax return may be legally effective also within the meaning of the Fiscal Inspection Act. The right

to correct the return can still be exercised after termination of audit proceedings – within the scope not covered by the decision determining the amount of the tax liability. When it comes to tax avoidance, however, the right to correct the return can be exercised on the basis of article 81b § 1a of the Tax Ordinance also during tax avoidance proceedings, before the first instance decision is issued, within 14 days of the date of notification of the decision of the head of the National Revenue Administration about the date of the appointment during which the perpetrator will be able to take a stand on the collected evidence.

It should be remembered, that the paper's deliberations regard cases of tax fraud i.e. intentional acts not just mere errors made in tax returns. Penal fiscal law is insofar as specific – due to its focus on protection of the interests of the State – that in a wider scope it opens the possibility to reward those who commit fiscal crimes. As indicated, with the lack of limitations for submission of the correction of tax return in the regulation of article 16a of the Penal Fiscal Code, it is also not possible to limit this right from the point of view of consequences stipulated in article 16a of the Penal Fiscal Code. The second condition which must be met in order to take advantage of the unpunishability clause is prompt (or within the period prescribed by the approved body) payment of the due public imposts or the amount which would potentially reduce the amount of tax to be paid. The regulation under the current law is the only one in the Penal Fiscal Code which orders the entity to settle also the amount equal to the potential losses in tax revenue, so also in situations when there was no harm done to the State Treasury (Zgoliński, 2018).

IV. VOLUNTARY SUBMISSION TO LIABILITY

The Penal Fiscal Code foresees yet one more institution which offers the possibility to escape punishment. This institution is called voluntary submission to liability and is based on extensive simplification of criminal proceedings and as a consensual way to terminate proceedings, it contains some limitations to legalism (Razowski, 2017). Pursuant to article 42 point 3 of the Constitution of Poland: *everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court*. Culpability is an indispensable constituent of each crime and offence (*nullum crimen nulla contravention sine culpa*). If there are no doubts about the guilt of the perpetrator, first of all it must be determined that the person committed the wrongful act though he or she could have done what was right (Zgoliński, 2018). The contents of article 142 § 5 of the Penal Fiscal Code stipulate that perpetrators willing to carry out voluntary disclosure are under *mutatis mutandis* innocence presumption rule. Therefore it may be inferred that a person applying for voluntary submission to liability due to negotiations with the prosecuting body has a specific, separate position during proceedings. Absence of doubt with respect to the circumstances of a tax crime or a criminal offence is the second threshold condition which entitle the entity to voluntarily submit to liability. Filing the application is a procedural manifestation of a situation in which

a person suspected of breaking the law can make use of a relief. Should the perpetrator plead unguilty of the charges, the prosecuting body must conduct a particularly thorough evaluation of the gathered evidence. When as a result of a criminal tax offence public receivables have been decreased, the regulation obliges the perpetrator to pay the unlawfully reduced sum of public imposts in full amount in order to be able to enter into negotiations whose final result still remains unknown (Zgoliński, 2018). This requirement is aimed to safeguard the public interest. The term 'public imposts' is a matter of legal interpretation in article 53 § 26 and 26a of the Penal Fiscal Code. The term 'public impost reduced by a prohibited act' is, in turn, defined in article 53 § 27 of the Penal Fiscal Code. Interest for default is excluded from the meaning of public receivables, therefore it is not obligatory to pay the interest in order to exercise the right to voluntary submission to liability (Razowski, 2017).

As a rule, the institution of voluntary submission is useful for perpetrators who committed minor deeds of smaller social noxiousness. If a sanction for a given unlawful act is formulated alternatively and accumulatively i.e. it allows choosing between a fine and a more severe type of punishment (restriction of liberty or imprisonment) or administering aggregate sentence of both, the path to the voluntary submission to liability is closed. Application for voluntary submission to liability for perpetrators of criminal tax offences is only possible when the offence is punishable by a fine. In this matter of liability for tax avoidance, the aforementioned means that the institution of voluntary submission to liability is only open to perpetrators of acts contained in article 56 § 2 of the Penal Fiscal Code and 76 § 2 of the Penal Fiscal Code to privileged types – when the sum of public imposts threatened with reduction or already reduced does not exceed, during the time of commission of the act, two hundredfold of the minimum wage.

V. CONCLUSIONS

The preventive approach emphasized in the justification to the amendment to the anti-tax avoidance clause, after taking into account penal fiscal consequences, has a much stronger impact (Sejm.gov.pl, 2018) especially with respect to individual and general prevention as it contributes to shaping legal awareness of citizens. Educating perpetrators is the most efficient form of preventing future crimes, convincing them to accept legal norms in force and producing changes in their personality and attitudes through education is a prevention postulate of a very optimistic nature. However, it seems that the State (subjectively simplified) will be 'satisfied' when the 'harm' is repaired, and the perpetrators punished severely enough so that in the future they will be discouraged from undertaking actions threatened with financial and penal repercussions. Specific infringements of the law, described in Penal Fiscal Law, in the view of V. Konarska-Wrzošek, are committed by perpetrators who generally are not very demoralized. The aforementioned statement is true when it comes to social sphere, however when it comes to financial consequences – it must be emphasized that the perpetrators are

spoilt by money (*pecunia*), which regardless of its origin, in their view, 'does not stink' (*non olet*). Directing the punishment and other legal and penal means towards achieving results in the field of positive prevention should lead to shaping or strengthening the social awareness of inevitability of punishment. Citizens must be aware that breaking the law does not pay and the judgements of the legal system are fair. It is vital to shape civic attitudes that are deeply grounded in respect for the law and in the duty to uphold it (Kalitowski et al., 1999).

The minimum of criminal reaction combined with the reaction of fiscal bodies which is commensurate with potential losses in public imposts, is an assumption which corresponds to the lower end of social tolerance scale and does not constitute an incentive to break the law. The possibility of correcting the tax return provided for in the clause regulations, allows the perpetrators to enter into a kind of an agreement with fiscal authorities, in which they indicate an appropriate activity. This means that the legislator wishes, most of all, to persuade offenders or prospective offenders not to commit tax avoidance acts. Coercion of the State in this matter is the last resort but it can be alleviated by the possibility to be discharged from criminal liability thanks to the voluntary disclosure institution and voluntary submission to liability. The penal fiscal institutions mentioned above clearly place the liability for tax evasion acts in the sphere, which may be described, due to the nature of the regulations, as a persuasive model of execution of public receivables, and the menacing coercion seems to be directed only against a small number of entities, because as a rule, most of the perpetrators are able to exculpate themselves from liability on consecutive stages of tax avoidance proceedings.

VI. REFERENCES

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