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Tax oddysey – tax evasion which ends with penalty?

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Abstract—**The doctrine states that tax evasion is a legal action, albeit not tolerated by the state. The legality of tax evasion is of private law character, under the Tax Law tax evasion results in deprivation of the illegal tax benefit. Self-assessment which is non-compliant with the factual proceeding of the taxed actions, is penalized by the Penal Fiscal Law as tax fraud. The objective of this paper is to indicate the limits beyond which legal actions, procedurally compliant with the Tax Law, become criminal. The doubts raised by the taxpayer through acting contrarily to the objective and the spirit of the Tax Law may bring not only financial consequences but also criminal penalty.**

Index Terms— tax evasion clause, penal fiscal law

I. INTRODUCTION

The normative tax evasion clause was inserted in Section IIIa of the Act of 29 August 1997 – Tax Ordinance – hereinafter referred to as T.O. – amended on 13 May 2016. In accordance with the wording of the provision in Article 119a Section 1 and 2 T.O. (material content of the clause) – an action taken primarily in order to earn tax benefits, contrary to the subject and the objective of provision of the tax law in given circumstances, shall not result in tax benefit if the performance was fake (tax evasion). In the above situation the tax effects of the action taken are determined on the basis of such a state of affairs which could potentially exist if the relevant action was taken. In literature it is stated that 'the new provisions in Section IIIa of Tax Ordinance include (…) the term of tax evasion; they refer to (…) legal but adverse actions of the tax payers' (Kujawski, 2016). However, it seems that this legality is only of private law character, concerning the forms of business transactions, which result in tax evasion, not tax evasion itself, the result of which is the abovementioned tax benefit. Illegal tax benefit, resulting from a fake performance, in circumstances contrary to the subject and the spirit of the provision, remains financial gain obtained at the expense of a public entity, which is definitely prohibited and also penalised as broadly defined tax fraud. It is unnecessary to be Cicero to claim that tax evasion may result only from important legal actions and real, not apparent, declarations of will (Kujawski, 2016); at the same time it is 'incomplete truth', because the actual tax status is basically created by important and legal actions under civil law. 'Tax evasion in its essence is compliant with the letter of particular tax provisions; it derives the tax effects from their disposition' (Kujawski, 2016), therefore particularly favourable conditions for the occurrence of this phenomenon are caused by the unthinking use of the linguistic interpretation, at least by the deciding body, because the tax payer evading tax undoubtedly considered the wording of the provisions to obtain the beneficial result in terms of taxes. The statement of the Constitutional Tribunal that 'the interpretation of the constitutional obligation of taxation determined in the act cannot lead to the conclusion that within the obligation there lies a legal principle by the taxpayer is forced to pay the maximum tax determined in the act' is legitimate, albeit regardless of how the taxpayer runs their business, they should pay the tax in the amount corresponding to the general assumptions of the tax structure, including the granted tax exemptions. Citing B. Brzeziński – taxation should be 'adequate' (Brzeziński, 2002).

II. FACTUAL BASIS

There is an opinion that in case of discovery of a tax evasion act, the tax effects are assigned to the action which did not exist, but – according to the tax office – must have taken place. Article 217 of the Polish Constitution states that taxation, public levies, determination of subjects and objects of taxation, and tax rates shall be applied under the act. One can make an allegation against the strategy applied by the head of the National Revenue Administration, which involves 'substituting' the action taken by the taxpayer with an 'adequate action' for which there are determined tax effects, which infringes the prohibition of analogy and is disadvantageous to the taxpayer. However, with this approach the tax and legal factual status is determined by the disclosure of the real substance of a 'fake action' and in this regard it corresponds to the material truth. Tax provisions are

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applicable to the determined factual state as an "adequate action", and not to the declared state. In other words - according to the factual character of the actions taken by the taxpayer, not the presented "facade" which was justified mainly by gaining the planned tax benefit. The basis of any resolutions in the tax proceedings must be the factual arrangements which correspond with the reality, thus they are real (Hanusz, 2018). Such arrangements provide a possibility of creating an image that will reflect the objective reality which the body is interested in (Iserzon and Starościak, 1970). The factual basis of the resolution, which would be the reflection of the factual state, may be this way compared to the tax and legal factual status included in the tax law (Hanusz, 2018).

The tax effects of tax evasion are not determined for formal and legal fiction (Filipczyk, 2018) (for the state of affairs that never took place), because it concerns the real substance of events that provide the subject of taxation, and not the formal and legal characteristics (including the name) of the action under taxation; it rather concerns the reality than the form of the action taken. Some authors who comment on tax evasion claim that in case when the body issues a decision, it does not reproduce the proceeding pattern of the general and abstract norm, but – using the norm of competence – it creates (constructs) this proceeding pattern (Bartosiewicz, 2018). However, in the author's opinion the function of the head of the National Revenue Administration consists in accessing the reality, not constructing the proceedings patterns, because the tax law does not create any orders or – it only determines the consequences of the actions taken (Brzeziński, 2004) (this is also the function of the Polish anti-abuse clause).

III. PENAL AND FISCAL LIABILITY

The only legal act in which there can be specified the consequences of committing fiscal deeds and bearing the responsibility for those deeds is the Penal Fiscal Code**.** The characteristic of penal fiscal deeds is the fact that their level of social harm must be higher than negligible. The amount of 100.000 zlotys, which constitutes a distinction between tax-indifferential deeds and tax evasion, is a particular regulation of the legislator, which definitely determines the level of social harm reflected in the threshold amount, exceeding of which triggers the reaction of the state. Penal and fiscal liability is based on an individual guilt which is connected with the necessity to charge the offender due to the criminal offence. In general, the regulation of Article 4 Section 1 of the Penal Fiscal Code indicates that specified deeds, prohibited in the code can be committed only deliberately. Article 4 Section 2 of the Penal Fiscal Code includes the characteristics of the deliberate subject party which features the intention to commit a prohibited act in two basic forms of deliberate intent: a direct intent, when the offender wants to commit a prohibited act, and a conditional intent, when the offender has no straight intention, but assumes a possibility of committing a prohibited act and accepts this possibility. Both forms of deliberate intent are based on the awareness of the possibility of committing a prohibited act, whereas the conditional intent is always accompanied by some direct intent, even the one which is criminal-law-irrelevant; it never occurs independently.

The deliberate intent and its form must be proved, at least on the basis of indirect evidence, obtained by logical reasoning based on the whole evidence. The circumstance excluding the guilt or derogating it is e.g. the offender's mistake. The offender is wrong when they perceive the reality or its significant element in an inadequate way (Konarska-Wrzosek, 2018). In terms of responsibility for the effects of tax evasion, the error with respect to statutory definition and error with respect to law are important. The first mistake concerns the circumstances of the prohibited act. The wrong conception of the offender shall be an obstacle in charging them and threatening them with prosecution – the act must be of conscious and deliberate character, so that the offender can be accused of reprehensible and deliberate action. The second of the abovementioned mistakes was determined as unawareness of punishability of the act committed by the offender (the offender does not know that their acting is lawlessness penalised as fiscal offence). The lack of offender's awareness of punishability of the taken action results in inability to recognise the act as one fulfilling the hallmarks defined in the Penal Fiscal Code, and also threatening the offender with prosecution. The unawareness of punishability of the act (justified) occurs when the offender cannot be accused of negligence in defining the binding law. The taxpayer is obliged to follow the amendments to the law, particularly when it comes to business activity, occupation exercised or a certain function – these circumstances oblige the taxpayer to get familiar with the applicable law (Bojarski, Giezek and Sienkiewicz, 2004). One cannot refer to non-culpable unawareness of the state of the legal system if the established facts prove that the offender not only did not try to get familiar with the applicable law, although they could inform themselves at the representatives of the proper bodies, but also refused this option, and this function is carried out particularly by the protective tax ruling institution. An unjustified mistake in realisation of hallmarks of an offence by the Penal Fiscal Code does not overrule the guilt and the offender's act shall constitute a fiscal offence. When judging the degree of the offender's guilt, the court must take into consideration both culpability in terms of the offender's capability to wrongful act, recognising the unlawfulness of the act, the motivational situation and also the offender's attitude towards the committed act in terms of intent and its type, the way of acting, motives, awareness of the obligation to take reasonable precaution when needed.

The legislator introduced a possibility of the protection of the party or parties of the transaction against the application of the general clause by obtaining the abovementioned protective opinion which can be issued by the head of the National Revenue Administration. A negative protective opinion should result in the decision that the offender was aware that their behavior constitutes tax evasion and the tax effects of this behaviour are unacceptable for the state and it will aim at restoring the 'expected' state, applying also legal instruments.

IV. SELF-CALCULATION OF TAX

In Poland it is permissible to calculate the income tax by the taxpayer alone. The legislator has transferred the obligations of correct settlement to the taxpayer. The tax authority must therefore find any irregularity in the declared amount of tax liability. In tax law, the determination of the actual state is to serve the purpose of applying the substantive rules of tax law. The consequence of the issue, where the body applies the norm, is that it should determine the facts. 'A taxpayer self-calculating the tax, must first submit a declaration containing a statement of actual expenditure and revenue received. Secondly, the taxpayer must independently assess which of these expenses may be properly classified as deductible. On the one hand, the taxpayer is required to be reliable about facts that are legally significant from the point of view of a potential tax liability (..). The tax declaration in this respect is a statement of knowledge. However, on the other hand, the legislator requires the taxpayer, who make their own calculations, to be able to qualify the facts (expenses) in juridically correct manners. (...) The problem, therefore, is not the lack of truthfulness of the facts provided in the tax declaration, but the irregularity of their qualifications from the viewpoint of the assessment necessary for the correct taxation. Both elements of the taxpayer's obligation (as to the facts and correctness of their legal qualification) make up the concept of a correct (reliable tax assessment)'.

Pursuant to Article 21 § 3 (the Act on the Income Tax), it is for the tax authority to prove that the taxpayer has not complied with the (correct) obligation of self-calculation. The tax authority is responsible for proving the legitimacy of its allegation and, consequently, for rebuttal of the presumption that the tax return is correct. Tax proceedings are characterized by the principle of inquisitiveness, which means that the determination of the fact is to decide whether the substantive law standard can be applied at all. In the Polish regulations of tax proceedings, there is no legal norm which requires the assumption that objective truth corresponds to the actual state of affairs established by the tax authority, and the taxpayer has the right to rebut this presumption with a counter-claimant. What is more, there is a presumption of the veracity of the taxpayer's tax return, and thus the tax authority can only rebut this presumption by gathering the evidence (Mariański, 2018). Since it is the tax authority that applies the substantive tax law norm, it is also the authority that should determine the actual state, as it derives legal effects from established facts in the form of the possibility to determine a different amount of liability other than specified in the tax return - Article 21 § 2 and 3 (the Act on the Income Tax).

V. TAX FRAUD

'Tax fraud' is committed by anyone who, contrary to the tax act, is guilty of negligently fulfilling their duty to provide data in a way that allows proper tax calculation. The legislator, ordering the taxpayers to pay their own tax liabilities and reserving only control functions for the tax authorities, has to effectively secure the correctness and reliability of the tax law enforcement process. Violation of the penal code contained in Article 56 and 76 of the Penal Fiscal Code clearly indicates both the person to whom the prohibition is addressed, the features of the prohibited act as well as the type of penalty threatening the commission of such an act (Warylewski, 2003). Since all these elements are included in the criminal provision, one deals with so-called complete penal order. The unreliability of the declaration or statement that means its untruth, consists in giving by the taxpayer or payer data inconsistent with reality, e.g. showing costs related to the taxpayer's business activity as acquisition costs, even though the tax law does not include these costs as acquisition.

Intentionally unreliable classification of deductible expenses is necessary to commit 'tax fraud'. The concept of truth used in Article 56 and 76 of the Penal Fiscal Code refers not to the data disclosed by the taxpayer or the payer in the tax return but to their legal and tax qualification. The references to tax laws, that describe imposed and prohibited acts (relevant for tax purposes), and thus allow to determine what is true information, makes it possible decode the signs of 'tax fraud' in a manner that does not follow a standard which can be considered as acceptable.

The concept of fraud in penal fiscal law has a sovereign shape in relation to the concept functioning in the common criminal law which is the result of axiological, systemic and functional differences in the rules of penal fiscal law. The fraud is considered in addition to the act penalized in Article 56 of the Penal Fiscal Code (for clarification, it can be defined as a fraud in a tax return), also penalized acts in Article 76, 76a, 87, 92 of the Penal Tax Code. According to Article 56 of the Penal Fiscal Code, the offense is committed by a taxpayer, who by submitting a declaration or statement to the tax authority, other authorized body or payer, attests untruths or conceals the truth or fails to comply with the obligation to notify about the change in data covered by them, thereby exposing the tax to depletion. Due to the weight of the deed and the value of the tax advantage, the perpetrators of the tax evasion fulfil the characteristics of basic or privileged tax fraud in a tax declaration. This remark also applies to fraud under Article 76 of the Penal Fiscal Code - tax refund fraud, which consists in providing data that is inconsistent with the actual state or concealing the actual state of affairs and misleading the competent authority, exposing it to undue refund of public law debt. Both actions are punishable by a fine of up to 720 daily rates or imprisonment, or a combination of both. The privileged type (§ 2 of both provisions) takes place when the value of the public law liability threatened with depletion or depletion does not exceed two hundred times the minimum wage during the deed. The penalty imposed in these cases is a fine. Undoubtedly, tax avoidance in the event of determining the reasons for issuing a decision or stating the occurrence of such a statement, is a direct evidence of concealing the truth, i.e. the actual economic content, constituting the taxable legal state of the taxpayer's activities.

Within the meaning of Article 119e of the Labor Code, the tax benefit derived from tax avoidance is non-occurrence of tax

liability, postponement or reduction in the time when the tax liability arises, or the occurrence or overstatement of the tax loss. It is also the occurrence of an overpayment or the right to tax refund, or an increase in the amount of overpayment or tax refund. If one takes a closer look at the elements of the offenses - fraud in the tax declaration and fraud in the tax refund, the features of both are analogous to those contained in Article 119e of the definition of a tax advantage derived from tax avoidance activities. In practice, penalized tort in Article 56 of the Penal Fiscal Code, is usually committed by filing declarations or statement containing content that is inconsistent with reality and have an impact on tax loss, e.g. undervaluation, overcharging of tax deductible costs, making false tax deductions, hiding sources of income, etc. (Wilk, 2014). A characteristic feature of the party to the typified behaviour described in Article 56 of the Penal Fiscal Code is to mislead the tax authority by illegally presenting or concealing circumstances affecting the amount of tax. The taxpayer, who submits the declaration, attests untruths or conceals the truth, thus exposes the tax to depletion. Thus, an entity committing a tax fraud behaves correctly from the formal side - it participates in tax proceedings. The consequence of its material behavior, however, is at least that the tax is exposed to depletion (Zgoliński, 2018). It is true that the subject of enforcement activity will be here, each time, a declaration or a statement made by the taxpayer to the tax authority. It seems only to superficially negate the criminalization of tax avoidance, in which the declaration discloses the state consistent with the economic operations carried out. In fact, it is a falsification of the reality at a different level and in case of reclassification by the head of the National Revenue Administration of the activities in avoiding taxation, the purpose of the dishonest taxpayer's action and the result of its operation falls within the scope of the fraud.

The sanctioned standard included in Article 56 § 1 of the Penal Tax Code covers not only acts consisting in exposure to depletion of tax liability, but also in the conclusion of a *minori ad maius*, causing such depletion. The perpetrator's action in typified behaviour in the provision of Article 56 of the Penal Tax Code made by the taxpayer is the reflection of the principles of self-calculation and the self-assessment adopted in the tax law. The attestation of untruth should be understood as the information provided by the taxpayer that is inconsistent with the actual state, including tax consequences based on events that actually occurred, but could not be based on that (Zgoliński, 2018). The Constitutional Tribunal concluded that truth within the meaning of Article 56 of the Penal Tax Code is a normative concept, although not every tax unreliability will constitute a deliberate tax fraud. It is important that the taxpayer's intention is to effectively inform the authority about the content of the documents and on this basis to obtain certain tax consequences.

In Article 56 of the Penal Tax Code, which regulates tax fraud, the taxpayer submits a declaration or statement in which their attest untruth, conceal the truth or fail to notify about the change of data, therefore variable marks from Article 286 of the Penal Tax Code appear. There is no regulation of property, because the taxpayer simply does not pay the tax or pays it to a lesser extent. Regulation of property - reimbursement of overpayment by the State Treasury - may occur only in case of an offense under Article 76 of the Penal Tax Code. For the existence of offenses under Article 56 and Article 76 of the Penal Fiscal Code, an effect in the form of an undue tax benefit is not required – it is sufficient to expose a public law entity to the said effect. The public entity's exposure to the occurrence of the said effect is sufficient. The reason for the possibility of unjustified refund is incorrect assessment of the taxpayer's rights by the competent authority. It always results from an incomplete or incorrect assessment of the actual state of affairs which in turn is the reason for making the wrong decision. In case of fraud under provision of Article 76 of the Penal Fiscal Code, the enforcement activities of the offender consist exclusively in misleading and therefore on action. This mistake must relate to facts connected with the creation of the taxpayer's right to demand reimbursement of the surplus of this tax or the statement of overpayment of tax. The inclusion in the tax return of data, that is inconsistent with the actual state or conceal the relevant material circumstances in that tax declaration, is a sufficient behaviour for the implementation of the features defining executive actions (Kardas, Łabuda and Razowski, 2018). The perpetrator must be aware of the total absence of legal and factual basis for payment of specific tax. The only intention of its operation is to get rich at the expense of the State Treasury (Konarska-Wrzosek, Oczkowski and Skorupka, 2013) (a different view on this matter can be found in Wilk and Zagrodnik, 2007).

VI. QUID EST VERITAS? (JOHN, 18:38)

Penalized acts mentioned in the Criminal Code are of a blanket nature and refer to appropriate legal regulations defined in other specific legal acts, in particular in the so-called tax laws. Some doubts may arise in a situation in which the head of the National Revenue Administration determines the subject of taxation in tax proceedings aimed at determining whether tax avoidance took place. Attesting untruths, which is falsifying the real nature of undertaken tax-related behaviours, can include providing 'false data' affecting the size of tax liabilities and exposing the State Treasury to the depletion of tax revenues.

Rights and obligations of a taxpayer, related to a payment of due tax, and tax proceedings have been regulated in acts of a statutory rank, and one of them is the act on Personal Income Tax. The phrase 'to attest untruths' is semantically close to phrases: 'to testify untruth' (Article 233 § 1 of Criminal Code) or 'to certify untruth' (Article 271 § 1 of C. C.). The provisions of the Criminal Code, quoted above, do not rise doubts to interpretations of the discussed area. Article 56 § 2 of C.C. penalizes tax payers` unreliable performance in mandatory tax proceedings. This provision refers only to attesting untruth which means giving false data in terms of their compatibility with reality. The term 'attesting untruth' includes non-compliance in the scope of such a piece of information about data affecting tax dimensions, which results from the legal qualification of these data by tax law.

VII. CONCLUSIONS

Tax law provisions are developed in a universal way because tax avoidance is aimed at bringing an unauthorized tax benefits to running business professionals who can hire specialized services (accountants, specialists in tax law). The general anti-avoidance clause, introduced into the Polish tax system, is a departure from formal equality in taxation in favour of equal opportunities in the economic game. In the Polish legal system, the principle of independence of fiscal penal liability from liabilities for financial obligations applies. Financial obligations refer to a person achieving taxable income, running a business or showing other types of activity with which specific tribute obligations are necessary. The fact that a perpetrator has been punished for their unlawful act related to self-fulfilment or improper performances of certain obligations resulting from the broadly understood financial law, does not exempt them from the obligation to pay their public law liabilities if they have not been paid them yet (Article 15 § 1 C.C.). The adoption of this principle is logical and necessary as it provides real protection of budget revenues through the obligation to pay to injured public bodies, and makes committed tax penalties not profitable and not worth doing (Konarska-Wrzosek, 2018).

In the Polish legal system, sanctions for tax fraud, including tax avoidance, require proof of guilt and it should be thought as an intentional guilt. The guilt must be determined in the course of the application of the Criminal Code provisions by a court that should take into account circumstances of a particular fraud and the awareness of its committing by a taxpayer. It is not possible to agree with the statement that before issuing a decision based on the anti-tax clause (when potentially tax avoidance behaviour is taken) a taxpayer cannot have knowledge (or awareness) about the full set of acts that would constitute a tax offense, because an excessive 'kindness' would be the recognition that they have received a tax advantage equal to or exceeding 100,000 zlotys in a random and unconscious way.

Tax avoidance, or in any case, the 'optimization' of taxation is made in order to achieve a tax advantage with the awareness that it is performed at the expense of a public law entity. It is behaviour on the edge of risk, which is based on negating the correctness of self-calculations of tax by an authorized body, and the risk of taxpayers' 'journey' (who are intentionally making this peculiar tax Odyssey more attractive) must be borne by the taxpayers themselves, if they are not as cunning as Odysseus, they must face the music.

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