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ADMINISTRATIVE VERSUS PENAL SANCTIONS IN POLISH TAX LAW – THE DUAL SYSTEM OR TWO SYSTEMS?

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Abstract: *the paper discusses the duality of the legal methods of counteraction of tax evasion and tax fraud in Poland: administrative sanctions are rooted in tax law whereas penal sanctions are rooted in criminal law. The question is raised whether it is possible to name the present position a system or not. The authors express a view that the present reality is very far from coherence and synergy.*
Key words: *fiscal criminal law, Polish tax law, tax evasion, tax fraud, administrative sanctions.*

Аннотация: *административные санкции в сравнении со штрафными санкциями в польском налоговом праве – двойная система или две системы? Рассматривается двойственность правовых методов противодействия налоговому мошенничеству в Польше: содержатся ли административные санкции в налоговом праве или в уголовном? Поставлен вопрос, можно ли назвать приближенным к реальности положением системы или нет. Авторы выражают мнение, что сегодняшняя реальность очень далека от согласованности и синергии.*
Ключевые слова: *финансовое уголовное право, польское налоговое право, уклонение от уплаты налогов, налоговое мошенничество, административные санкции.*

Unlike the situation in some other legal systems (e.g. Germany), two distinctly different methods of counteraction of tax evasion co-exist in Polish legal system. The first of them is based on criminal law method and imposes criminal sanctions. The other one is based on the application of the administrative sanctions typical for tax law. Criminal penalties (penal sanctions) are imposed solely by criminal courts. Administrative tax penalties are imposed by tax authorities.

It is unclear whether such double types of liability are complementary or conflicting.

The core issue is the concurrence of both regimes of responsibility. Surprisingly, Polish law did not develop any rules of conflict solution and the very problem is often ignored by the courts[1]. The approach dominates that both kinds of liability are placed on the entirely different niveau. If so, the non bis is idem rule never actualises itself, due to the lack of idem. On the other hand, from the point of view of the natural person subjected at same time to both

[1] D. Szumiło-Kulczycka: Prawo administracyjno-karne, Zakamycze 2004, p. 188-192, M.Wincenciak, Sankcje w prawie administracyjnym i procedura ich wymierzania, Warszawa 2008, p. 231–236, P. Nowak, Zbieg sankcji penalnej z sankcją administracyjną – de lege lata i postulaty de lege ferenda, e-Czaspismo Prawa Karnego i Nauk Penalnych 3/2012.

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parallel liabilities, the penalties are perceived as applied for the same activity, same decision or same omission. It is a serious shortcoming of the system. It is serious enough to put in doubt the existence of the system itself. Instead, one can ask a question if the present situation is the two conflicting systems model.

The liability

The ratio of the criminal liability for tax fraud is basically the same as in general criminal law, i.e. predominantly preventive (both in respect of general and individual prevention) and repressive[2].

In case of tax offences, the prerequisites and elements are determined in the general part of Fiscal Criminal Code[3] (FCC) as well as in particular types of the offences. According to FCC, the fiscal criminal liability may be imposed for human conduct matching all the elements of the fiscal offence. These elements are generally the same as in general criminal law, i.e. the active or passive conduct has to match the type of crime as determined in a specific part, has to be illegal (bezprawny), and has to have a level of social danger which is more than negligible (społecznieszkodliwy w stopniuwyższymniżnikomy)[4] and faulty (zawiniony)[5].

Criminal liability may be attributed not only in case of commission of the crime but also in case of attempt (much narrower, however, than in general Criminal Code). Not only the direct perpetrator is liable, but also the aides and abettors. According to the specific clause in art. 9 § 3 FCC, the person acting on behalf of the other natural or legal person may also be held responsible as an emanation of the represented person[6].

The prohibited acts in FCC are divided into fiscal offences (przestępstwaskarbowe) and fiscal contraventions (wykroczeniaskarbowe). Almost all the fiscal contraventions are the sub-types of the fiscal offences, delimited either by the quantitative criterion (the value not exceeding 5 minimum monthly wages) or by the criterion of «less serious case» (wypadekmniejszejwagi).

[2] See art. 12 Fiscal Criminal Code and art.53 Criminal Code.

[3] Kodeks karny skarbowy of 1999. Traditionally a separate regulation of fiscal criminal law exists in Polish legal system. It contains an autonomous general part, a specific part (covering the tax, customs and excise, foreign currency trading and gambling offences) as well as procedural and enforcement regulations. For unclear reasons, some criminal behaviours indirectly related to tax assessment may also be found outside the fiscal criminal law – in Bookkeeping Act of 1994 (*ustawa o rachunkowości*).

[4] It means that some conducts, even if they «technically» constitute the offence, are not offences because of the lack of «*social relevance*». The same effect is achieved in other systems by the concept of negligible fault, by extensive exceptions from the mandatory prosecution (e.g. Germany) or procedural opportunism (e.g. Anglo-American common law system as well as some Continental systems).

[5] Bogdan, G., Nita, A., Raglewski, J., Światłowski, A. *Kodeks karny skarbowy. Komentarz*, Gdańsk, Wydawnictwo «Arche», 2007.

[6] For example: if the individual offence may be committed by the «taxpayer» and the taxpayer in a particular case is a company (not the individual person), the individual person in charge of particular duty is held liable as an agent of the company.

The definition of criminal liability in Polish legal system matches the Engel criteria, as laid down by the European Court of Human Rights[7]. Also, according to the Polish Constitutional Tribunal (TrybynałKonstytucyjny), the very nature of the liability is important, rather than the name used[8]. In the constitutional meaning (i.e. for the purpose of the application of the constitutional freedoms and guarantees, like presumption of innocence or right to defence) the scope of the criminal liability is construed broader (so called «repressive liability» or «criminal liability sensu largo»). It covers the liability related to crimes (przestępstwa), contraventions (wykroczenia), prohibited acts of legal persons (collective entities), juvenile delinquent acts and even – to some limited extent – the disciplinary delicts. On the other hand, the criminal liability sensustricto is limited to the liability for crimes (przestępstwa) and for the fiscal offences (przestępstwaskarbowe).

In case of administrative penalties, the prerequisites are determined in tax law acts. However, the legal base for proceedings is the Polish Tax Ordinance[9]. Such elements as a level of social danger more than negligible or faulty are absent here.

Administrative penalties in the Polish tax law are not legally defined in any legal act. In the theory of Polish tax law they are described as the reaction or the anticipation of reaction from the state on conflicting behaviour with the norm, being effective negative after-effects for violating this norm[10]. In a narrow meaning, the administrative penalties are only the measures described in tax law. The legal solutions provided in fiscal criminal law or in penitentiary law do not belong to this category. This is because the declared function of administrative penalties is prevention only. The measures cannot be considered administrative penalties, because their aim is only restitution – the restoration of the status to that before the infringement of law.

The sanctions

Relevant tax criminal acts are to be found in Fiscal Criminal Code Chapter 6. Most of them are punished with a fine, some most serious with imprisonment, either suspended (rarely) or not suspended, usually accompanied with a fine. Other important accessorial measure is a forfeiture.

Art. 54 is tax evasion. The offence is committed if the taxpayer evades the taxation by nondisclosure to the competent organ the taxation object or the taxable base and the tax is exposed to diminution. The penalty is a fine up to

[7] *Engel,* EGMR-E No. 23 of 5.12.2008; p: 178, para. 82

[8] Among the others: the judgement of the Constitutional Tribunal of 19 February 2008 (P 48/06) OTK ZU No 4A/2008, pos.1, the judgement of the Constitutional Tribunal of 3 November 2004, (K 18/03), OTK ZU, No 10A/2004, pos. 103.

[9] Polish Tax Ordinance *(Ordynacjapodatkowa)* of 29 August 1997 (The Journal of Laws from 2015, pos. 613).

[10] Majka, P. *Sankcje w prawie podatkowym*, In B. Brzeziński (ed.), Prawo podatkowe. Teoria, instytucje, funkcjonowanie, Toruń, TNOIK, 2009, p. 96, H. Nowicki in R. Hauser, Z. Niewiadomski, A. Wróbel (ed.),System prawa administracyjnego, Tom 7. Prawo administracyjne materialne, Warszawa 2012, p. 630–636, M. Stahl, *Sankcje administracyjne – problemy węzłowe*, in, M. Stahl, R. Lewicka, M. Lewicki (eds), Sankcje administracyjne, Warszawa 2011, pp. 21–25.

720 day units or imprisonment for up to 5 years (both are maximum penalties provided for in FCC).

Art. 56 is tax fraud. The crime is committed by the taxpayer if he or she files a tax return containing misleading or false information and in this way exposes the tax on diminution. The penalty is the same as in case of tax evasion.

A specific type of tax fraud is to be found in art. 76 and art. 77 FCC. The first of them is committed if the fraud leads to improper return of the tax already paid. In practice it happens mostly in VAT cases (sc. carousel fraud, among others). The penalty limits are the same as in art. 54 and 56 FCC. The second may be committed by the tax collector who delays the payment of the tax already collected from the taxpayer. The upper limit of the penalty is 3 years of imprisonment.

All of these articles contain the basic type of offence in § 1 and less serious type of offence in § 2, characterised by the tax amount not exceeding «small value», which is defined as 200 minimum wages (i.e. ca 84 000 Euros). It means that almost all «individual» (non-corporate) perpetrators fall into this milder qualification, not threatened with imprisonment, but a fine only.

The proper tax assessment is also indirectly protected by art. 60 and 61 FCC. The first of the offences is committed if the perpetrator does not keep the commercial records (books) he/she is obliged to, does not keep them in declared place or does not inform about letting the bookkeeping to the tax advisor. The other one is committed if the record contains inaccurate information. In case of art. 60 FCC the obvious reason of criminalisation is prevention from the «hidden» tax fraud, committed by concealing the information or making it unavailable to the controlling agencies. Both are punished with a moderate fine.

All of these fiscal offences have corresponding fiscal contraventions. Tax evasion, fraud and delay are the fiscal contravention if the amount of the tax evaded, endangered or delayed is lower than 5 minimal wages (ca. 2100 Euro). In case of the offences connected with the improper bookkeeping, the contravention is in «lesser case» (the criteria are specified in the general part) or if the record is kept formally improperly but it does not contain false information.

Various examples of administrative penalties in Polish tax law may be pointed out. These are higher (sanctional) tax rates or an additional tax obligation. A separate kind of administrative penalties is penalties for Breach of Order the aim of which is assurance of the correct course of the tax proceedings. According to art. 262 § 1 of the Polish Tax Ordinance a party, a party's representative, witness or expert who, despite being correctly summoned by a tax authority, failed without a just cause to appear in person, even though he was obliged to do so, or refused without any reason to provide explanations, make a testimony, express an opinion, present the object of inspection or participate in other actions, or left the place of an action without permission of the tax authority, before the action was completed, may be punished with a penalty for breach of order of up to PLN 2,800.

An example of an administrative penalty which consists of higher than normal tax rate could be the Polish Inheritance and Gift Tax Act. According to this Act, the level of the tax rates depends on sc. «taxation group». It is determined according to the degree of closeness (kinship, relation) between a donor and a

beneficiary, a decedent and a heir etc. The regular level of tax rates for members of the first tax group is according to the tax base 3 %, 5 % and 7 %. For members of the second group it is 7 %, 9 % and 12 % respectively. Next, if someone belongs to the third group, the regular level of tax rates is 12 %, 16 % and 20 %. The special level of a tax rate which is kind of surcharge has its application when the taxpayer tried to evade the inheritance and gift tax, did not declare the tax base and claimed the gift only in the presence of a tax authority or fiscal inspection authority in the course of an audit, tax proceedings, fiscal control, or control activities, and the tax due on that acquisition has not been paid. Such a level of the tax rate is always 20% and the degree of closeness between a donor and a beneficiary or between a decedent and a heir is irrelevant[11].

A similar regulation exists in Polish personal income tax. According to art. 20 section 3 of the Polish Personal Income Tax Act (PIT)[12] the amount of revenue not justified by the revealed sources or arising from the sources not revealed shall be determined on the basis of expenses incurred by a taxpayer in a tax year and the value of property gathered in a given year if the expenses and the assets cannot be covered by the assets gathered before incurring the expenses or gathering the property arising from the revenue previously taxed or exempt from taxation. In this case the tax rate is as much as 75 % of income[13]. It is much higher than «normal» tax rates which are part of the progressive tax bracket with two rates (18 % and 32 %). It must also be pointed out that the 75 % taxation of «concealed incomes» makes the use of the tax reliefs impossible. It is also impossible to reach for the common taxation of spouses and a common taxation of taxpayers who are single parents.

Art. 20 section 3 of the Polish Personal Income Tax Act forms very general premises for taxation of concealed incomes. Due to this, the Constitutional Tribunal in its judgement of 29 July 2014 recognized this regulation as too vague in democratic state of law. In consequence, a legal definition of «concealed income» should be specified till 6 February 2016[14]. The Polish Legislature has subsequently formed a new, more precise definition of the «concealed incomes». It is included in the new constructed art. 25 b of the Polish Personal Income Tax Act which comes in force on 1 January 2016. However from the same date the level of the higher, 75 % tax rate will be pointed in art. 25e of the same legal act[15].

[11] Art. 15 sect. 4 of the Polish Inheritance and Gift Tax Act (ustawa o podatkuodspadkówidarowizn) of 29 July 1983 (The Journal of Laws from 2009, No. 93, pos. 768 – with changes). Similar regulation exists in Art. 7 sect. 5 of the Polish Tax on Civil Law Transactions (ustawa o podatkuodczynnościcywilnoprawnych) of 9 September 2000 (The Journal of Laws from 2010, No. 101, pos. 649 – with changes).

[12] The Polish Personal Income Tax Act (ustawa o podatkudochodowymodosóbfizycznych) of 26 July 1991 (The Journal of Laws from 2012, pos. 361 – with changes).

[13] Art. 30 sect. 1 point 7 of the Polish Personal Income Tax Act.

[14] Sentence of the Constitutional Tribunal of 29 July 2014 (P 49/13), The Journal of Laws from 2014, pos. 1052.

[15] Art. 1 point 5 of the Act about change in the Polish Personal Income Tax Act (ustawa o zmianieustawy o podatkudochodowymodosóbfizycznychorazustawy – Ordynacjapodatkowa) of 16 January 2015 (The Journal of Laws from 2015, pos. 251).

As it was mentioned, an example of the administrative penalties in the Polish tax law is also an additional tax obligation in VAT[16]. It had a wider use in the past (it was a consequence of a wrong self–assessment – a lower tax due or higher input tax), but these days it is connected only with a duty to keep the record of turnover and amounts of the output tax with the use of cash registers. According to art. 111 section 2 of the Polish VAT Act, if it is found that a taxable person violates this obligation, the authority shall determine for the period since which the record of turnover and amounts of the output tax with the use of cash registers has been kept an additional tax liability in the amount of 30 % of the tax charged upon the acquisition of goods and services.

This additional tax liability is not determined in case of natural persons who, in respect of the same act, bear liability for a fiscal contravention offence or fiscal offence[17]. It is a consequence of two judgements of the Constitutional Tribunal. The Tribunal considered the question of administrative sanctions in the context of the principle of proportionality. The reaction of the state (sanction) for infringement of right in a democratic state of law should not be obviously inappropriate or irrational or incommensurate[18]. In its judgements of 29 April 1998 (K 17/97)[19] and of 4 September 2007 (P 43/06)[20] the Constitutional Tribunal made it clear that the accumulation of two sanctions – administrative additional tax liability in VAT and penal sanction against the same natural person violates the principle of proportionality and cannot have its place in the democratic state of law. As it can be understood, the Constitutional Tribunal recognised a repressive function of additional tax liability and according to the non bis in idem principle excluded the application of this administrative sanction to the same natural person together with a penal sanction.

The Constitutional Tribunal expressed a different opinion in respect of the personal income tax calculated with the 75 % tax rate. In its judgement CT did not find any «ne bis in idem» infringement, because it did not recognise an element of repression in this higher tax rate. In the opinion of this court, the income tax amount calculated with this 75 % tax rate cannot be considered obviously inappropriate or irrational or incommensurate complained. It is because of the function of this rate[21]. The CT says that this legal construction is not a sanction (repression). The higher amount of rates compensates the lack of the delay interests (late interests). They are to be paid only when the 75 % income tax was not paid within 14 days after handing out of the decision creating this obligation. Therefore, the higher tax rate is not a repression but compensation to the state for all this period when the taxpayer tried to evade the tax and did not pay an income tax.

[16] The Polish Value Added Tax Act (ustawa o podatkuodtowarówiusług) of 11 March 2004 (The Journal of Laws from 2011, No. 177, pos. 1054 – with changes).

[17] Art. 111 sect. 2 of the Polish Value Added Tax Act.

[18] Judgement of the Constitutional Tribunal of 15 January 2007 (P 19/06), OTK ZU, No 1/A/2007, pos. 2.

[19] OTK ZU, No 3/1998, pos. 30.

[20] OTK ZU, No 8/A/2007, pos. 95.

[21] Judgement of the Constitutional Tribunal of 12 April 2011 (P 90/08), The Journal of Laws from 2011, No. 87, pos. 493.

A special regulation in the Polish personal income tax Act and in the Polish Corporate Income Tax Act concerns a higher tax rate connected with taxation of transactions made with connected subjects and the payment is made directly or indirectly to the entity that has its place of residence, registered office or management board within the territory or in the country that implements harmful tax competition. According to art. 30d section 1 of the Polish Personal Income Tax Act and art. 19 section 4 of the Polish Corporate Income Tax (CIT)[22] if the competent tax authority or tax inspection authority determines the taxpayer's income in the amount higher than (or the loss lower than) declared by the taxpayer in connection with conducting transactions between connected subjects and the payment of liabilities arising from the said transactions is made directly or indirectly to the entity that has its place of residence, registered office or management board within the territory or in the country that implements harmful tax competition and the taxpayer fails to furnish to those authorities the required tax documents – the difference between the income declared by the taxpayer and the income determined by the said authorities shall be charged at 50 % rate.

However, the regulation included in art. 108 section 1 of the Polish VAT Act is not considered an administrative sanction. According to this article, if anybody issues an invoice in which it shows the amount of the tax, it shall pay that amount. The CT expressed the view that the abovementioned art. 108 section 1 of the Polish VAT Act is not a regulation which determines a sanction understood as a negative consequence of the infringement of legal norms, which is an ailment for the subject who violates the legal norm. This is because issuing the VAT invoice with the shown amount of the tax (resulting with a necessity to pay the tax declared in this document), is not a breach of a legal norm[23].

The procedure

The procedure and execution is based on Criminal Procedure Code and on the Enforcement of Penalties Code (which is a separate code in Poland, together with Criminal Code and Criminal Procedure Code) respectively. Some differences and some own legal institutions are to be found in the FCC. The perpetrator has the position of the suspect within the preparatory procedure and the defendant within the court procedures (main hearing), with no differences versus a general criminal procedure.

Both in general and in fiscal criminal law the criminal penalties are imposed by the court only. Before 1999 they could be applied (except for imprisonment) by the administrative authorities. After 1999 the imposition of the penalties for all the criminal misconducts is the domain of the courts (with the exception of the small fines in contravention and fiscal contravention cases in the fine ticket procedure). Therefore all the penalties for the fiscal offences

[22] The Polish Corporate Income Tax Act (ustawa o podatkudochodowymodosóbprawnych) of 15 February 1992 (The Journal of Laws from 2014, pos. 851 – with changes).

[23] Judgement of the Constitutional Tribunal of 21 April 2015 (P 40/13), The Journal of Laws 2015, pos. 601.

and part of the penalties for the fiscal contraventions are imposed by the court. Only some small part of fines in case of the fiscal contraventions is applied by the tax or customs administration in the fine ticket procedure.

Administrative penalties are imposed by tax authorities only.

According to art. 113 FCC, the CPC applies in case of fiscal offences (and fiscal contraventions). The subsequent articles of FCC (art. 114–177) contain the catalogue of the differences. The preparatory procedure is conducted mostly by the fiscal authorities. The competent court is the District Court (SądRejonowy – the lowest level of the Ordinary Courts) and the appeals are dealt with by the Provincial Court (SądOkręgowy – second level of the system). The whole procedure is based on exactly the same principles as with general criminal cases (objective truth, presumption of innocence, right to defence, immediacy, free valuation of the evidence, legality and others). The Administrative Courts play no role in determining the criminal liability for fiscal crimes. However, in case of the concurrent proceedings, the criminal court may stay its procedures if the final decision depends on solution of some questions dealt with by the control authority, tax authority or the administrative court (art. 114a FCC).

Administrative penalties are imposed in proceedings regulated in the Tax Ordinance. These are the same proceedings which apply in determination of tax liabilities. They have nothing in common with the criminal proceedings and the principles of application of the administrative penalties are different.

The tax can be appealed against to the higher tax authority. Some orders issued in the course of proceedings may also be contested. The legal measure against tax decisions is an appeal (odwołanie), the legal measure against the orders is a complaint (zażalenie). In addition, the final decision or final order which was earlier an object of appeal or complaint can be challenged with the complaint to the Province Administrative Court (WojewódzkiSądAdministracyjny)[24]. Next, the judgements of the Province Administrative Court can be an object of an extraordinary appeal (kasacja) to the Superior Administrative Court (NaczelnySądAdministracyjny) in Warsaw.

Both additional liability and tax liability determined by higher tax rates come under the administrative and (then) judicial control. The penalties for breach of order are controlled on complaint and subsequently they are subjected to the judicial control[25]. It is also possible that the person punished for the breach of order gives up bringing a complaint and fulfils his procedural duty. The tax authority that imposed a penalty for breach of order may, at the request of the punished person filed within seven days from the day of delivery of an order imposing a penalty for breach of order, recognise the failure to appear or comply with other duties as justified and set aside the order imposing the penalty[26].

[24] Currently sixteen Province Administrative Courts *(WojewódzkichSądówAdministracyjnych)* exist – one court in each province *(województwo)* of the Republic of Poland.

[25] Art. 262 § 5 of the Polish Tax Ordinance (TO).

[26] Art. 262 § 5 TO.

The complaints shall be lodged to a Province Administrative Court within 30 days from the day of service of the decision on the complainant[27]. It shall be lodged through the authority whose action or failure to act has been challenged[28]. The cassation appeal shall be lodged with the Province Administrative Court which has issued the challenged judgement or order, within thirty days from the day of service on the party of the copy of the decision with the reasons given[29].

As it was mentioned, it is possible to lodge an appeal and a complaint within tax proceedings. The conditions are the same for all the taxpayers or other tax debtors. The participation of the Ombudsman, a prosecutor and a social organisation is also possible. A complaint and a cassation appeal is available both to the taxpayer and to the tax authority, but a cassation appeal has to be prepared on behalf of a taxpayer by the professional lawyer (advocate, legal advisor, tax advisor).

In case of criminal conviction, the appeal (apelacja) is available under the same conditions as in a general criminal procedure. Some particularly important decisions during the proceedings (provisional detention, search, seizure, stay of the proceedings and others) may also be subject to complaint (zażalenie).

The fine ticket (applicable in small contravention cases) always requires the acceptance of the perpetrator. If the perpetrator objects to such procedure, the case is transferred to the court and dealt with according to ordinary procedure (with a penal order in most cases).

According to art. 239b § 1–2 of the Polish Tax Ordinance a non-final decision may be in some cases declared to be immediately enforceable. No such possibility exists in criminal cases.

The influence of the taxpayer on the sanctioning process

Numerous instruments enable the defendants' influence on sanctioning process. The criminal sentence does not exempt from the payment of the due public revenue (art. 15 § 1 FCC). Neither the public revenue is deductible from the fine nor the fine from the public revenue to be paid. However, the presence and importance of various consensual instruments encouraging the cooperation of the defendant with the authorities and offering him various advantages in return for the cooperation is the landmark of the fiscal criminal procedure. These instruments are:

– Active repentance after the commission of the crime and a correction of the tax refund (art. 16 and 16a PCC) as well as active repentance in case of criminal collaboration and in case of attempt.

– Voluntary subordination to penalty (more than a half of the cases are dealt with this way).

– Application of the mitigated penalty without the hearing (art. 156 FCC).

– Application of the mitigated penalty on the request of the defendant (art. 161 FCC and art. 387 CPC).

– Penal order procedure.

[27] Art. 53 § 1 of the act of 30 August 2002 Law on proceedings before administrative courts, The Journal of Laws from 2002, No 153, pos. 1270 – with changes.

[28] Art. 54 § 1 of the act on proceedings before administrative courts.

[29] Art. 177 § 1 of the act on proceedings before administrative courts.

No such instruments exist in a tax procedure. It is also impossible to negotiate the scope of sanctions regulated in the particular Polish tax law acts. This is because the tax authorities after tracing the irregularities are obliged to apply the legal regulated sanction in the dimension prescribed in a tax act. Due to this, there is not space for settlements regarding administrative penalties.

The statistical data

According to the provisions of the general part of the FCC, the fine for the tax offences is imposed in daily units (the same, as in Criminal Code). The number of day units is 10-720, the day unit may vary between ca. 15 Euro and ca 6000 Euros. Like in other legal systems, the court shall determine the amount of the daily unit taking into consideration personal and financial circumstances of the defendant. Imprisonment may normally be between 5 days and 5 years (except for extraordinary aggravation of the penalty and the aggregate penalties). The fiscal contraventions are punishable with fines only. The fine may not exceed 10 minimum monthly wages (ca. 4200 Euros). In case of fine ticket, the fine may not exceed 2 minimum monthly wages (ca. 840 Euros).

In case of the offences connected with the tax assessment, the limits of the penalties as specified in the specific part of FCC are:

<table>
<tr><th></th><th>Fine</th><th>Imprisonment</th></tr>
<tr><td>Art. 54 § 1</td><td rowspan="4">up to 720 day units</td><td rowspan="3">up to 5 years</td></tr>
<tr><td>Art. 56 § 1</td></tr>
<tr><td>Art. 76 § 1</td></tr>
<tr><td>Art. 77 § 1</td><td>up to 3 years</td></tr>
<tr><td>Art. 54 § 2</td><td rowspan="4">up to 720 day units</td><td rowspan="6">none</td></tr>
<tr><td>Art. 56 § 2</td></tr>
<tr><td>Art. 76 § 2</td></tr>
<tr><td>Art. 77 § 2</td></tr>
<tr><td>Art. 60 § 1, 2 and 3</td><td rowspan="2">up to 240 day units</td></tr>
<tr><td>Art. 61 § 1</td></tr>
</table>

It should be remarked that out of 93 persons sent to prison for the fiscal offences in 2014, more than 75 % were convicted for the crimes connected with the tax assessment, almost all of them for (aggravated) tax evasion and fraud. In more general terms, imprisonment is clearly an ultima ratio, vast majority of the cases (and virtually all the smaller cases) end with economic sanctions only.

Unfortunately the comprehensive data on administrative measures is not available.

According to the statistics published by the Inspector General of Fiscal Control[30], in 2014 the number of control proceedings was 10 105. In 5 127 cases the ground for the institution of the criminal investigation was found. 2030 cases ended with a voluntary submission to punishment and the amount

[30] URL: http://www.mf.gov.pl/kontrola-skarbowa

In 2014 the number of convicted persons and the applied criminal penalties was as follows:

	persons convicted	fine	imprisonment-suspended	imprisonment-nonsuspended
Art. 54 § 1 and 2	1630	1477	110	36
Art. 56 § 1 and 2	1143	1020	90	30
Art. 60 § 1, 2 and 3	132	128	0	0
Art. 61 § 1	88	86	3	0
Art. 76 § 1 and 2	118	100	13	5
Art. 77 § 1 and 2	1329	1321	7	1
total	4440	4132	223	72
all the fiscal offences	8539	8049	380	93
% among the all fiscal offences	52,00	51,34	58,68	77,41

Source: Ministry of Justice official statistics. URL: http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/

of fines was PLN 3,3 million. In addition to this, the inspectors issued 39 665 fine tickets. The amount of the fines imposed in this way was PLN 9,4 million.

The amount of the tax evasions discovered by the inspectors was PLN 10 602,3 million. The taxpayers voluntarily corrected the tax returns and paid PLN 410,7 million (much more than in preceding years). The rest of the amount was subject to the tax decisions. In addition to this, the control procedures prevented the unduly return of VAT to the amount of PLN 227,1 million (much more than in preceding years).

The total number of controls was 6 426. In 3 558 cases the decision was issued, in 1569 the voluntary correction was made. It means that 80 % of the controls ended with the decision or with the voluntary correction.

In respect of particular taxes, more than 85 % findings were related to VAT[31], 4,36 % to CIT, 4,15 % to excise and less than 3,87 % to PIT.

In small cases the taxpayers were encouraged to file a correction of the tax return and voluntarily pay the outstanding tax (with the delay interest) or to accept and pay a fine ticket. If this is not possible, the procedure of the voluntary subordination to penalty is employed in numerous cases. The indictments are filed in the most serious offences only. The most important penalty is a fine, sometimes accompanied with the forfeiture. The unsuspended imprisonment is used very rarely, in aggravated cases (recidivism, very serious tax evasion and fraud, organised crime).

Like in other areas of law (e.g. environment protection law), an interesting phenomenon may be pointed out. Criminal liability and administrative liability have their own, distinct grounds. On the other hand, however, from the point of view of the «final user» – the perpetrator of the tax irregularity, the problem is not purely theoretical. It is fully possible (and it happens in numerous cases) to be penalised separately with the administrative sanction and the criminal sanction.

[31] The most important problem was the growing number of the documents of fictional operations (for the purpose of the VAT refund) – the so called «carousel fraud».

In case of parallel ways of liability and repression, the criminal penalties are not necessarily the harshest, but the guarantees in the criminal law are obviously stronger than in the area of administrative law. This encourages the Legislature to create new and extend the existing forms of administrative liability in order to divert and avoid all the restrictions present in criminal law. High level and high quality of criminal-law safeguards may paradoxically lead to the weakening of the practical position of the particular person, subject to various simplified forms of administrative repression, either parallel or instead of the criminal liability.

As it was mentioned above, the fiscal criminal liability is based on fault. There is no difference between general criminal law and fiscal criminal law in this respect: no strict liability exists in Polish criminal law. The level of social danger of the particular criminal behaviour is taken into consideration All the offences discussed here require the intentional conduct (umyślność). The administrative penalties require neither any fault nor intent.

The lack of balance is clearly visible. The defendant in fiscal criminal case enjoys all the guarantees and safeguards. The judgements may be subject to complete appellate review, both in the aspect of the liability itself and of the sanction. On the other hand, the administrative liability is objective in its nature, no fault requirement is present, no justification and excuse in available to the tax-payer. The decisions are subject to the judicial review, but the review is limited to the formal legality of the decision and the substantive issues are left outside the scope of judicial control.

We may call it a system under the condition of the complementary nature of both types of sanction. An alternative solution would be a subsidiary nature of the criminal sanctions: the criminal liability seen as an ultima ratio in the most serious cases. In most general terms, the administrative surcharges should be treated as the primary and the criminal law measures as the subsidiary[32].

Unfortunately, neither of these solution is chosen. The principle of legality (art. 10 Criminal Procedure Code applied here) makes the prosecution in all the cases of the fiscal law infringements (both fiscal offences and fiscal contraventions) mandatory. The duality seems to be a wrong solution and it needs rethinking.

[32] Other possible solutions may be found in: P. Nowak, op.cit., p. 13–20.

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