



Uniwersytet  
ŁÓDZKI



WYDZIAŁ PRAWA  
I ADMINISTRACJI

Małgorzata Kurzac

*Legal consequences of non-disclosure an object of taxation on the basis of  
Polish tax law and fiscal penal law*

Summary

A Ph. D. dissertation prepared  
in the Financial Law Department  
under the supervision of Prof. H. Dzwonkowski

Łódź 2016

The main aim of the study was to examine legal consequences of not revealing an object of taxation, on the basis of Polish tax law and fiscal penal law. The study analyzes the issue of duality of the legal methods of counteraction of tax evasion and tax fraud in Poland, namely administrative sanctions (rooted in tax law) and penal sanctions (rooted in criminal law).

In Polish legal system co-occur two different methods of counteraction of tax evasion and tax fraud. The first one is based on the tax law method (administrative sanctions), and the second – on the criminal law method (imposing penal sanctions). Administrative sanctions are imposed by tax authorities, whereas criminal sanctions are imposed by criminal courts. This dualism of the legal liability is still highly disputable. The question is whether these two types of liability are complementary or conflicting.

Fiscal penal law is an autonomic part of penal law, with its own terminology and institutions. This specific branch of law is intended to protect a fiscal system of a state. Fiscal penal law aims to guarantee that the inflow of funds into the State Treasury budget is not disturbed by actions which are illegal under Polish law. The prerequisites of the fiscal penal liability are determined in the general part of Fiscal Penal Code. According to Fiscal Penal Code, the fiscal liability may be imposed for the conduct matching all the elements of the fiscal offence/misdemeanour. The perpetrator's conduct has to match the type of crime (determined in Fiscal Penal Code), has to be illegal, has to have more than negligible level of social danger and need to be faulty.

In Polish tax law, administrative penalties are not defined in any legal act. In the doctrine of tax law, administrative penalties are described as the reaction of the state on the behaviour which stays in contradiction with the norms of tax law. *Sensu stricto*, administrative penalties are described in tax law, and consequently the legal solutions provided in fiscal criminal law do not belong to this category. The main function of administrative penalties is restitution, not repression. Various examples of administrative penalties in Polish tax law may be indicated f.e. higher tax rates or an additional tax obligation.

The dissertation has interdisciplinary character and consists of an introduction, four chapters and a conclusion.

The first chapter of the dissertation presents reflections on the essence of tax avoidance, tax evasion and tax fraud in Polish tax system. All these practices can be viewed as forms of tax noncompliance as they describe passive or active conducts that intend to reduce one's tax burden.

The main part of the first chapter covers the differences between these phenomena. Analysis led to form the differencing criteria. Tax evasion which is the kind of tax fraud is strictly connected with penal law, that is based on the special rules of responsibility. The penal responsibility has subjective and individual character. In case of tax evasion a taxpayer does not report the subject of taxation (f.e. income) to the tax authorities in order to eliminate their tax liability. Tax avoidance is based on the abuse of tax law by means of making the artificial constructions ("tax gaps"). These constructions have no economic meaning and their only aim is reducing the taxation burden.

Tax evasion is always illegal and immoral whereas tax avoidance is not illegal but means the abuse of tax legislation in order to draw benefits contrary to its aims. Both above-mentioned phenomena are incompatible with the principles upon which Polish tax system is founded. They stay in contradiction with the axiology of tax law, mainly the rules of equality and universality in taxation.

In the conclusion of the first chapter, the issue of the nature of tax obligations has been considered through the prism of ethical discourse. In this part has been concluded that the tax obligations are not ethically neutral.

The second chapter of the dissertation presents reflections on the rules of fiscal penal liability and the third part examines the elements of the tax evasion and tax fraud offence (and misdemeanour) set forth in Polish Fiscal Penal Code (Art. 54 i Art. 56).

Under Article 1 of Polish Fiscal Penal Code, penal liability shall be incurred only by a person who commits an act prohibited under penalty by a law in force at the time of its commission. Moreover, to convict an individual of a fiscal penal crime, it is necessary to demonstrate that the accused has committed an act that fulfils all the features of a crime, not

just one or several. Therefore, not paying a tax in the correct amount is not necessarily sufficient to lead to liability for a fiscal penal crime. In order to prove liability, all elements of the act as determined in the Code must have been committed.

Certain conduct is a crime if declared as such by the relevant and applicable law. Art. 54 is tax evasion. Under Art. 54 of the Fiscal Penal Code, a taxpayer who by evading tax obligations does not reveal to a competent authority an object of taxation or tax base or does not file a declaration, which may result in tax reduction, shall be subject to the penalty (...).

Analysis of Art. 54 led to form the proposals for legislative improvements. *De lege ferenda* the conjunction “or” used in the phrase “an object of taxation or tax base” should be replaced by the conjunction “and” or alternately removed from this regulation. As tax base is an inherent part of an object of taxation, it is impossible to reveal an object of taxation without revealing tax base. Tax base is the assessed value of an object of taxation. Therefore, Art. 54 should sound as follows: a taxpayer who by evading tax obligations does not reveal to a competent authority an object of taxation (and tax base) or does not file a declaration, which may result in tax reduction, shall be subject to the penalty (...).

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 a fine up to 720 day units or imprisonment for up to 5 years. All the above-mentioned fiscal offences have corresponding fiscal misdemeanours. Tax evasion, fraud and delay are the fiscal misdemeanour if the amount of the tax evaded, endangered or delayed is lower than 5 minimal wages (ca. 2100 Euro).

Joint analysis of Art. 54 and Art. 56 led to form another proposal for legislative improvement. *De lege ferenda*, a taxpayer should be subject to the penalty only if they want to commit an offence and directly lead to that. Therefore, taxpayers should not be subject to the penalty if they do not reveal to a competent authority an object of taxation and tax base or do not file a declaration, as a consequence of applying interpretation of tax law resulting in tax reduction, which was later contested by the tax authority. Similarly, under Art. 56 a taxpayer shall be subject to the penalty only if they declare false data or conceal the truth or

do not fulfil an obligation to inform about the change of data included therein, to cause an illegal tax reduction.

The last chapter contains the proposals for introducing into the Polish tax system the new institutions that could help the taxpayers to fulfil their tax obligation accurately and avoid the risk of bearing fiscal penal liability.

The defendant may influence the sanctioning process thorough the consensual instruments encouraging the cooperation of the defendant with the authorities. To these consensual instruments belong: voluntary subordination to penalty; active repentance after the commission of the crime and a correction of the tax refund; application of the mitigated penalty without the hearing (or on the request of the defendant). Such instruments do not exist in a tax procedure. In tax law it is impossible to negotiate the scope of sanctions. Administrative penalties have objective character. Tax authorities are obliged to apply the legal sanctions in the dimension prescribed in tax law acts.

In order to achieve research aims the following have been analyzed: legal acts, case law of the Constitutional Tribunal of the Republic of Poland, Supreme Court, Supreme Administrative Court and Court of Justice of the European Union. A literature investigation, legal analysis and the assessment of the legal provisions have been applied within this study. On this basis, *de lege ferenda* proposals have been developed.

