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DISCRETIONARY NATURE OF THE TAX AUTHORITY'S DECISION IN THE MATTER OF TAX WRITE-OFF'S*

1. Research methodology

Legal sciences use the typical methods found in the social sciences and humanities, i.e.: the study of documents (legal acts and judgments of administrative courts), comparative methods (expert opinions, legal opinions, analyses resulting from linguistic, grammatical and historical interpretation) and case studies (kays). The results of cognitive research are new theorems or theories that improve the quality of tax law, especially on the interpretation of the concept of public interest and economic and social interest of the taxpayer in the context of theoretical principles of taxation. Induction was used as the main research method. It consists in drawing general conclusions or establishing regularities on the basis of analysis of empirically established phenomena and processes. It is a type of inference based on details about the general properties of a phenomenon or object. The use of this method requires the assumption that only facts can form the basis of scientific inference. These facts are real existing situations (economic and legal). Inductive methods include various types of legal acts, analyses, expert opinions and scientific documents used in social research. The article uses a dogmatic-legal method, through a linguistic and logical analysis of discretionary reliefs and the concept of economic and social interest of the taxpayer, taking into account the public interest

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(fiscal and non-fiscal). The legal-comparative method of tax law concepts and terms was also applied.

2. The concept of tax preferences

In the literature, tax allowances and tax exemptions are mentioned as elements of tax technique. However, the analysis of the function, structure and the very nature of allowances and exemptions allows us to see that they are forms of reduction of individual elements of tax technique, or the tax amount itself, and thus are a dependent element of the other components of the tax [Nykiel 2003, 99-100]. In the tax law there are both tax exemptions and tax reliefs (including reliefs from tax payment). In the normative aspect the relieves are defined in the tax law as: exemptions, deductions, reductions and decreases, resulting in reduction of the tax base or tax amount. The normative approach emphasizes the effect, to which the application of a particular relief is supposed to lead. The lack of effect indicates the ineffectiveness of a given form of preference [Wołowiec 2016a, 18-19].

Tax reliefs and exemptions differ both in their construction and in the purposes imposed on them. Tax exemptions are defined as exclusions from the subjective scope in a given tax of a certain category of entities or the subject of a given tax of a certain category of factual or legal situations [Wołowiec 2016b, 6]. In the first case we are dealing with exemptions of subjective character, in the second with exemptions of objective character. There may also be subject-object exemptions. Within the framework of tax exemptions (in the content of tax laws), we can distinguish non-taxation, which clearly differs in purpose and construction from the category of exemptions. Exemption means that the aim of the legislator is to eliminate the taxation of certain objects of taxation, falling within the scope of the tax. This is a legal state, in which a certain category of objects or entities is subject to taxation, but has been exempted from it. Neither the tax in question is levied on the exempted object, nor will any "other tax" be paid, because the object will not be subject to the provisions of the law on that "other tax." Non-taxability means that certain situations are not subject to a given tax, but this does not exclude the possibility of subjecting these legal situations to this "other tax." [Nykiel 2002, 29; Wołowiec and Żywicka 2017, 115-17]. Tax reliefs mean either

the exclusion from the tax base or the non-deduction of certain amounts from it, or the reduction of the tax itself. Reduction of tax as a result of reliefs consists of: reduction of the tax base, reduction of tax rates (including application of 0% rate), reduction of the amount of tax (tax deduction) [Morawski 2003, 15].

From the legislative point of view, the definition of tax reliefs in Article 3.6 of the Act of 29 August 1997 – the Tax Code[1] raises significant reservations in terms of compliance with Article 217 of the Constitution of the Republic of Poland.[2] Tax reliefs may be established only in a statute, not in the provisions of tax law, which also include provisions of executive acts to tax laws. In terms of substance, the differences between tax reliefs and tax exemptions are also significant [Wołowiec 2017, 39-41; Dzwonkowski 2020, 54-55].

A tax exemption may mean a total or partial release of the taxpayer from tax, i.e. a limitation of the subjective or objective scope of taxation, while a tax credit primarily results in a reduction of the tax amount. Emphasizing the differences between the listed in Article 3, para. 6 elements of tax construction has not only scientific value, but also legislative value [Dzwonkowski 2020, 15; Etel 2020, 14; Mariański 2019, 67]. Some of the tax reductions and exemptions must be regulated in the Tax Act, while another part (e.g. subject matter exemptions) may also be specified in implementing acts to the Tax Code. Article 3(6) rightly treats tax relieves in a broad manner, covering all deductions or reductions the application of which results in a reduction of the tax base, and thus also the amount of the tax itself. Tax allowances and tax exemptions have the same purposes and functions. However, this does not change the fact that they are separate elements of tax construction and therefore they should not be equated [Zubrzycki 2017, 13-18; Kosikowski 2011, 5-12; Dauter 2020, 94-96].

3. Discretionary reliefs specified in the Tax Code

In addition to reliefs that are elements of the tax construction, there are reliefs in tax systems that are not elements of the construction

[1] Journal of Laws of 2021, item 1540 [hereinafter: the Tax Code].

[2] Journal of Laws of 1997, No. 78, item 483.

of any taxes. They are referred to as reliefs from tax payment. This type of reliefs can be divided into facilitations in payment that do not reduce the amount of tax paid (payment in instalments, deferral of the deadline for payment in the form of a decision of the tax authority or transfer of property and property rights in exchange for tax arrears) and reductions in the amount of tax paid and exemptions from tax payment (remission in whole or in part of the overdue tax in the form of a decision of the tax authority or abandonment of tax collection in the form of a regulation of the Minister of Finance) [Wołowiec 2016b, 9-10]. The regulation on reliefs in repayment of tax liabilities is regulated in detail in Chapter 7a of the Tax Code. Based on Article 67a, para. 1 of the Tax Code, the tax authority may, at the request of the taxpayer: 1) defer the date of payment of the tax or spread the payment of the tax into instalments; 2) defer or spread into instalments the payment of tax arrears together with default interest or interest on tax advances not paid on time; 3) remit in whole or in part the tax arrears, interest for late payment or prolongation fee.

It is argued in the literature that deferment of payment deadline and division of tax liability into instalments should be included in the scope of the term "relief in payment of tax liability," remission cannot be treated as such category directly. In the case of a write-off we are in fact dealing with a tax exemption (when a tax liability is written off in its entirety), unless a partial write-off is involved, in which case we can speak of a relief in respect of the unremitted part of the tax liability.

Tax preferences are a de facto substitute for budgetary expenditures and under certain conditions they are an alternative to direct transfers from the state or municipal budget. As a form of expenditure (tax expenditures) made "through the back door," tax preferences are difficult to reconcile with the basic principles of budgeting. In fact, they are financed through the tax system, but unlike budget expenditures, they are not subject to such careful analysis and control [Idem 2016c, 22-23; Wołowiec and Bogacki 2012, 139-41]. In Poland, there is no generally accepted definition of tax preference in the above presented approach. The Tax Code defines the concept of tax relief as exemptions, deductions, reductions or reductions provided for in the provisions of tax law, the application of which results in a reduction of the tax base or the amount of tax. This definition does not fully

reflect the essence and specificity of tax preferences, especially in the context of relations to theoretical tax principles [Wołowiec 2020, 59-60].

In the context of the above findings, it should be stated that the key to understanding the concept of relief is how the doctrine understands it, as well as what about the specific reliefs can be determined on the basis of a specific tax law. The literature draws attention to the fact that the notions of relief and exemption cannot be treated as synonymous, because it can and should be recognized that reliefs and exemptions are most often two different institutions of tax law [Etel 2008, 67-76; Etel and Dowgier 2013, 13-16]. There is a lot of controversy in the literature on this issue. On the one hand, it is pointed out that the identification of the concepts of "relief" and "tax exemption" is unjustified, and that there is no relation of common features between the semantic scopes of these concepts; on the other hand, it is pointed out that the legislative procedure used in the Tax Code, consisting in treating reliefs in a broad way, was accurate and intentional, because both reliefs and exemptions have, in the final analysis, the same functions. However, a completely uncritical view of this solution is opposed to the fact that we are dealing with two different structures. Therefore, their identification can be regarded as a theoretical error and in this light the glossary of the Tax Code does not work, it can be regarded only as a source of nominal chaos. However, it is emphasized in the studies that Article 3 of the Tax Code, i.e. the "glossary" is a glossary of this particular, specific law and transferring directly the entries contained therein to the entire system of tax law is in no way justified by the content of the Tax Code [Wołowiec 2019, 26-27].

4. Concept of taxpayer's interest and public interest

Article 67a, para. 1(3) of the Tax Code provides that the tax authority, at the request of the taxpayer and in cases justified by an important interest of the taxpayer or the public interest, may write off, in whole or in part, tax arrears, interest on arrears or prolongation fee [Mariański 2019, 34; Orłowski 2013, 81-83]. The institution of remission is an exceptional institution, the application of which should be justified by special and extraordinary circumstances. This is because it is not possible to make this institution a commonly used means of releasing from payment of a debt.

Redemption is nothing but an ineffective way of extinguishing obligations of different legal nature, consisting in the final abandonment by the creditor of the collection of public debts after the payment deadline [Etel and Dowgier 2013, 13-14; Etel 2008, 12-14]. The analysis should begin with the legal interpretation of the principle of universality of taxation. According to Article 84 of the Constitution, everyone is obliged to bear public burdens and benefits, including taxes, specified in the Tax Code. Bearing public burdens and benefits, including in particular taxes, is a universal (and not only civic) obligation regulated at the constitutional level, while the obligation to bear a tax applies to everyone to whom the obligation to pay the tax is addressed, according to the regulations of the given tax law [Orłowski 2013, 81-84]. The universality of taxation is sometimes understood in such a way that taxes should occur at their economic source and burden all entities that earn income or have property, which consequently implies that all entities, in which the phenomena constituting the object of taxation occur, should be burdened without exception. The principle of universality of taxation is applied both to the entire tax system and to individual taxes. In the light of Article 217 of the Constitution, the legislator may impose taxes, other public levies, define the entities, the subject of taxation and tax rates, as well as the principles for granting reliefs and remissions and categories of entities exempt from taxes, while respecting the principle of equality of citizens before the law (Article 32, clause 1 of the Constitution) and social justice (Article 2 of the Constitution). In the same judgment the Tribunal indicated that in legal doctrine the tax justice as a factor limiting the tax authority is treated as a set of objectified social and economic factors determining the scope and amount of the tax obligation. This justice is understood as the so-called capacity to provide benefits, taking into account the economic efficiency of the taxpayer (economic efficiency). The Constitutional Tribunal also pointed out that the legislator, guided by the principle of tax justice, should construct the tax system in such a way that it fulfills specific functions of the state. This justice should ensure universality and equality of taxation for all citizens. It must take into account the income capacity of the citizens, which makes the amount of tax burden dependent on the taxpayer's ability to bear the tax burden [Wołowiec 2010, 311-13].

The manifestation of the indicated justice is also equality, which means the proper distribution of the tax burden, in proportion to the taxpayer's ability to pay. On the other hand, when analyzing the principle of equality of taxation, the Constitutional Tribunal indicated that it consists in the fact that all entities in the same economic situation (in terms of assets, types of sources of income and their size) should be taxed equally. The obligation imposed by Article 84 of the Constitution allows for a justified differentiation of subjects, if it is connected with the principle of social justice in terms of distributive justice, based on the principle of proportionality, according to which what is just is what is proportional [Bogacki and Wołowiec 2012, 139-41]. The principle of equality as shaping the tribute obligation means the proper distribution of the tax burden in accordance with the principle of ability to pay. The distribution of the tax burden should be made in accordance with the individual capacity, taking into account the economic, financial and social factors of the subject, so as to lead to relative equality of taxation [Skrzypek-Ahmed and Wołowiec 2016, 131-33]. The burden of taxation should be set at a level to bear the burden. Equality of taxation must take into account tax capacity, and therefore the ability to bear the tax. It must also not abstract from income. In addition to economic conditions, the uniformity of taxation is related to the equality of lawmaking.[3] The principle of taxpayer capacity means limiting the circle of taxpayers for a given tax and taking into account individual tax capacity (usually measured by income or wealth). It therefore excludes taxes on the entire community of equal size, while ensuring that people with the same level of tax capacity should pay the same amount of taxes. Deciding whether it is the proportional, progressive or regressive rate that constitutes a fair solution remains an individual issue [Skrzypek-Ahmed and Wołowiec 2019, 251-58; Skrzypek-Ahmed, Wołowiec 2021, 226].[4]

It should be remembered that the existence of an important interest of the taxpayer is not determined by his subjective conviction, but by objective criteria, such as a threat to human life and health, inability to earn

[3] Judgment of the Constitutional Tribunal of 12 April 2011, ref. no. SK 62/08, Journal of Laws No. 87, item 492; judgment of the Constitutional Tribunal of 18 October 2011, ref. no. SK 2/10, Journal of Laws No. 240, item 1439.

[4] Judgment of the Constitutional Tribunal of 12 April 2011, ref. no. SK 62/08, Journal of Laws No. 87, item 492.

money to support himself and his family, sudden economic downturn of a wide range, fortuitous events, independent of the taxpayer, adversely changing the economic situation to such an extent that the payment of tax or tax arrears will threaten his existence. The application of relief, in the opinion of the tax authority, is not supported by business failures in agricultural activity, since this activity is a market activity, based on economic risk and competition. The wording "may" used by the legislator in Article 67a, para. 1.3 of the Tax Code indicates that the authority ruling on the remission of tax arrears when considering such a case and issuing a decision exercises administrative discretion. This means that even if the prerequisites set forth in this provision are found, the authority may, but is not required to grant the request. The decision-making freedom under Article 67a, para. 1.3 of the Code of Civil Procedure[5] means that even if the statutory prerequisites are met, this does not oblige the tax authority to apply remission in every case. The indicated administrative discretion is limited by selection directives, i.e. public interest and important interest of the taxpayer. The terms "public interest" and "important interest of the taxpayer" are vague concepts.

In the assessment of the existence of an "important interest of the taxpayer" and "public interest" the objective criteria, consistent with the generally applicable hierarchy of importance, are decisive. The condition of "important interest of the taxpayer" requires not only a determination of the financial situation of the taxpayer, but also an assessment of the economic consequences that will occur as a result of fulfilment of the obligation for him and his family. Tax authorities should assume that the premise of "public interest" requires respect for values common to the entire society. Thus, each time the tax authority determines the existence of the "public interest" premise, it is necessary to weigh the values on two levels: one level is constituted by the principle, which is the timely payment of taxes in full, the other – by the exception to the principle, which consists in the application of individual tax relief. The authority in a given case must determine which is more advantageous from the point of view of the public interest (recovery of the debt or application of the relief). The point is that

[5] Act of 23 April 1964 – Civil Code, Journal of Laws No. 16, item 93.

as a result of the enforcement of tax arrears, the state should not incur costs that are higher than in the case of failure to exercise this right.[6]

5. Tax procedure and the discretionary nature of a tax decision

In the practice of tax proceedings, doubts arise, on the one hand, from the discretionary nature of the tax decision in this respect and, on the other hand, from the undefined nature of the notions of "important interest of the taxpayer" and "public interest" in the context of the content of general clauses contained in the Tax Code.

First, there is no doubt that tax relief is an extraordinary remedy. The write-off of a tax arrear means that the creditor completely relinquishes its tax claim. A party always has a possibility to apply to the tax authority for a relief in the form of postponement of tax payment or spreading the tax payment into instalments. The principle is to pay taxes, and remission of tax arrears may be applied only exceptionally, because at the moment of applying the relief the tax authority resigns from the income due to it. It should also be borne in mind that the write-off of tax arrears is not an institution of social welfare, but is aimed solely at mitigating the effects of the tax burden on persons who are suddenly and unforeseeably unable to meet their tax obligations [Skrzypek-Ahmed and Wołowiec 2021, 225-26].

Second, when analysing the provisions of the Tax Code in terms of their stability and flexibility, it should be noted that the effects of legislated law depend on several factors. The basic one is the choice of lawmaking techniques that ensure the flexibility of legal regulations, among which there are also general clauses. Then, the proper placement of general clauses in a given normative act should be pointed out. On the other hand, their effectiveness is largely determined by the content of the general clauses, setting a greater or lesser degree of freedom of interpretation. The provisions of the Tax Code contain relatively few phrases and normative expressions in which general clauses can be found [Ziembiński 1973, 21; Borszowski 2014, 266-67]. For the most part, the legislator uses conceptually similar

[6] Judgment of the Supreme Administrative Court of 15 July 2016, ref. no. II FSK 1685/14, Legalis no. 1511191.

general clauses, which refer the interpreter to the assessment of the important interest of the taxpayer and the public interest. The phrase "important interest of the taxpayer" has been formulated in the provisions of Article 22, para. 1 and para. 2, Article 48, para. 1 and para. 2, Article 67a, para. 1, and Articles 253 and 253a of the Tax Code. The same provisions also refer to the assessment of the public interest. However, both normative phrases, different in their content, leave the tax authorities to define on their own the notion of important interest of the taxpayer and the public interest.

Thirdly, the notions of "important interest of the taxpayer" and "public interest" used in the Tax Code do not have a fixed scope. Therefore, the tax authorities, in the course of examination of particular cases, are obliged to fill these notions with proper content according to their own discretion. In this way, the general clauses result in a more flexible application of the legal provisions of the Tax Code. At the same time, the analysis of the provisions of Article 22, para. 1 and para. 2, Article 48, para. 1 and para. 2, Article 67a, para. 1 as well as Articles 253 and 253a of the Tax Code leads to a conviction that the general clauses actually induce the tax authorities to choose the legal consequences specified in these provisions.

The authorities applying tax law provisions containing general clauses are therefore free to choose one of the possible consequences. Thus, the Minister of Finance may, pursuant to Article 22, para. 1(1) of the Tax Code, either waive collection of tax by issuing a relevant regulation, or refuse to waive collection to certain groups of taxpayers. A similar result can be encountered when a competent tax authority, on the basis of Article 253, para. 4 of the Tax Code, issues a decision to repeal or amend an existing final decision if it considers that there is an important interest of the taxpayer, or refuses to do so on the basis of the same legal provision [Hanusz and Krukowska-Siembida 2016, 182-85]. Thus, the general clauses contained in the provisions of the Tax Code refer to two extra-legal assessments: the important interest of the taxpayer and the public interest. It follows that the assessment criteria, which should be followed by the tax authority, were expressed by general concepts in an indefinite way. Such formulation of legal provisions may therefore create a sense of insecurity. This is because general clauses referring to extra-legal assessments may

make taxpayers dependent on any arbitrary application of the law by tax authorities [Choduń 2013, 121-23].

Fourthly, it is necessary to accept the view that the general interpretative directive for the application of the above provision should remain the recognition of the uniqueness of the institution of remission of tax arrears as an ineffective form of extinguishing tax liabilities and as a derogation from the principle of general taxation. Tax revenues are earmarked for the realization of various social goals, so accordingly to this circumstance, the waiver of their collection must be dictated by the occurrence of particularly important and justified, also from the point of view of objective criteria, reasons, which are generally defined in the law as an important interest of the taxpayer or the public interest. It should also not be forgotten that the decision issued pursuant to Article 67a, para. 1(3) of the Tax Code is discretionary in nature. However, the discretionary nature of the decision does not mean that it should be completely arbitrary. The authority taking a decision negative for the taxpayer, even of discretionary nature, is obliged to indicate and justify the reasons which guided it, which is consistent with the requirements of the legal state.[7]

Fifthly, each time the refusal to accept a request for relief – if the conditions for its granting are met – requires balancing these conditions with generally accepted social principles: justice, equality or the obligation to bear the costs of the functioning of the community by its members. Balancing means, in fact, indicating which of the aforementioned principles may take precedence over an important interest of the taxpayer or the public interest, i.e. which of the aforementioned principles are "more important" in axiological terms. Thus, a negative decision, made in the framework of administrative discretion, should be convincingly, exhaustively and clearly justified, both as to the facts and the provisions of law, so that there is no doubt that all the circumstances of the case have been deeply considered and evaluated, and the final decision is their logical consequence.

Sixthly, the institution of writing off tax arrears cannot be made out to be a generally applicable measure leading to exemption from tax debt

[7] Judgment of the Supreme Administrative Court of 27 February 2013, ref. no. II FSK 2013/11, Legalis no. 664204.

in a situation where the Tax Code provides for other possibilities of mitigating the conditions for performing a tax obligation, e.g. spreading the tax arrears into instalments. However, the assessment of the condition of "important interest of the taxpayer" in the application of the tax relief cannot be limited only to extraordinary situations or fortuitous events making it impossible to settle the tax arrears, because this notion functions in a much broader sense, taking into account not only extraordinary situations, but also the normal economic situation of the taxpayer, the amount of his income and expenses, etc.

Therefore, in the tax proceedings initiated by the taxpayer's application for the granting of relief from payment of tax liabilities, particular emphasis should be placed on the analysis of the economic situation of the taxpayer. The write-off of tax arrears should be a form of assistance provided by the public sector to the taxpayer so that the application of the principle (tax enforcement) does not lead to undesirable consequences from both a social and an individual point of view, relating to the taxpayer and his relatives and dependants. The point is therefore that the State, as a result of the enforcement of tax arrears, should not incur greater costs than if it had not exercised this right. Consequently, the determination by the tax authorities of the existence of the "public interest" premise involves the necessity to weigh the relationship on two levels: one level is constituted by the principle of timely and full payment of taxes and the other by the exception to the principle, consisting in the application of an individual tax credit. In a given case, the authority should determine which is more beneficial from the point of view of the public interest – collection of the amount due or application of the relief.

Seventhly, the tax authority should properly investigate the case in order to determine whether there is an "important interest of the taxpayer" or "public interest." Therefore, the tax authority is obliged to thoroughly explain the facts of the case (Article 122 of the Code of Civil Procedure), and in particular to exhaustively collect evidence (Article 187, para. 1 of the Code of Civil Procedure) and to comprehensively and thoroughly consider all of the evidence (Article 191 of the Code of Civil Procedure). Only after the facts of the case have been properly established, may the court make a correct assessment of the prerequisites for the application of Article 67a of the Code of Civil Procedure, assessing the contested

decision in this respect. The prerequisite of "public interest" should be analysed multi-facetedly, in a wider scope than it was done in the appealed decision; it cannot be identified only with the fiscal interest of the commune (more broadly: public interest). The public interest should also take into account potential expenditures, e.g. in the area of social assistance, which may be incurred by the public sector if the relief is not granted. It appears that in the circumstances of this case, the authority did not examine whether as a result of pursuing the tax arrears from the complainant, the state will not in effect incur greater costs than if it had not exercised this right.

Conclusion

In the course of tax proceedings the issue of granting relief in the form of remission of tax arrears must be considered in the light of the reasons why the arrears arose. It is in the proceedings for granting the tax relief that the authority should take into account whether the arising of the liability was not a result of a deliberate action of the applicant aimed for example at avoiding taxation. The circumstances in which the arrears covered by the application for remission arose should be carefully examined when assessing the public interest motive and in this case they may prove in favour of the applicant, as the arrears did not result from deliberate action of the taxpayer aimed at avoiding taxation.

The issue of reviewing the legality of discretionary decisions of local government tax authorities indicates that the tax authorities usually refuse to grant relief in repayment of tax liabilities. Such cases are brought before the administrative courts. However, due to the specific nature of discretionary decisions, control of their legality is limited. It comes down to an assessment of whether the authorities properly conducted the evidence procedure, and then whether the limits of administrative discretion were not exceeded. According to the position taken in the judicature, the court does not decide whether the authority should have remitted the arrears, but rather examines whether the tax authority issued the decision in compliance with the rules of procedure. Therefore, the court does not review the decision itself, but the correctness of the evidence and conclusions drawn as to whether a given factual state meets the undefined

notions of "important interest of the taxpayer" or "public interest" as used in Article 67a of the Tax Code.

By the way, it seems that the judicial review should therefore not refer to the criteria of expediency or equity. Considering the above, it should be stated that the manner of administrative court control of discretionary decisions is different than in the case of bound acts, as it does not include the examination of the substantive legitimacy of the decision. In practice, this leads to situations in which taxpayers, despite favourable decisions of administrative courts, still receive decisions refusing to grant relief in repayment of tax liabilities. Usually, upon re-examination of the cases, the tax authorities only correct formal defects noted by the administrative courts and then refer to the possibility of issuing a negative decision for the party, even if the prerequisite of an important interest of the taxpayer or the public interest was established. As a consequence, the institution of granting relief in repayment of tax liabilities is perceived in terms of an ostensible institution. This is because there is no actual possibility of realization of the rights specified by the legislator. In the literature on the subject, it is argued that any exclusions in the scope of control of discretionary decisions hinder the realization of subjective right to a court, which in turn reduces the protection of a citizen against unilateral administrative acts, which are issued by an administrative body. Thus, it is proposed to redefine the institution of administrative discretion, so that in a democratic state of law it functions as a kind of choice of a decision from among several legally equivalent solutions allowed by the legislator, and not as a free action within the framework of laws [Jędrzejczak 2012, 4-7].

An "important interest" is a vague and undefined concept, referred to as a so-called general clause, referring to extra-legal assessments. It does not have one strict, easily graspable meaning. The Tax Code (or any other tax act) does not define this concept. Consequently, there is no exhaustively specified catalogue of circumstances, events or reasons (not to mention some predetermined hierarchy of them), which should be followed by the tax authorities while adjudicating cases on the basis of Article 67a of the Tax Code. In the context of tax arrears remission "important interest of the taxpayer" is usually defined in the jurisprudence and tax law studies as a situation in which as a result of tax collection the existence of the taxpayer may be threatened, as well as a situation in which the tax

collection would significantly lower the standard of living of the person applying for relief and/or his closest dependents. In general, the assessment of whether there is a compelling interest of the taxpayer in a given situation usually takes into account issues of the taxpayer's health and life, as well as the taxpayer's ability to provide for himself and his family. However, this is not an exhaustive or closed list. In practice, qualifying someone's specific, real-world situation as one in which there is an important taxpayer interest will first be at the discretion of the tax authority reviewing the request.

As with the "compelling interest of the taxpayer" rationale, "compelling public interest" is a general clause and everyone may understand the term a little differently. Undoubtedly, some guidance which suggest that this phrase should be viewed from the perspective of, among other things, principles of ethics, justice, or the public's trust in the state. The public interest is not only the interest of the entire society (this term has a broader meaning than the than the term "social interest"), it is also the protection of the values on which the state is built.

REFERENCES

Bogacki, Sylwester, and Tomasz Wołowiec. 2012. "Harmonization of personal income taxation: is it possible and if so, does it make economic sense?" *International Journal of Legal Studies* 1(9):139-52. https://doi.org10.5604/01.3001.0015.0432

Bogacki, Sylwester, and Tomasz Wołowiec. 2020. "Opodatkowanie dochodów osobistych a zasada sprawiedliwości opodatkowania." *Biuletyn Stowarzyszenia Absolwentów i Przyjaciół Wydziału Prawa Katolickiego Uniwersytetu Lubelskiego* 15, no. 1:7-32. https://doi.org/10.32084/sawp.2020.15.1-1

Borszowski, Paweł. 2014. "Elastyczność a zwrot szacunkowy „ważny interes podatnika" w konstrukcji umorzenia zaległości podatkowych." In *Instytucje prawnofinansowe w warunkach kryzysu gospodarczego*, edited by Wiesława Miemiec, and Katarzyna Sawicka, 265-91. Warszawa: Wolters Kluwer.

Choduń, Agnieszka. 2013. "Klauzule generalne i zwroty niedookreślone – wybrane zagadnienia teoretyczne." In *Klauzule generalne i zwroty niedookreślone w prawie podatkowym i administracyjnym. Wybrane zagadnienia teoretyczne i orzecznicze*, edited by Agnieszka Choduń, Andrzej Gomułowicz, and Andrzej Skoczylas, 120-28. Warszawa: Wolters Kluwer.

Dauter, Bogusław. 2020. "Art. 6 Podatek." In *Ordynacja podatkowa. Komentarz*, edited by Stefan Babiarz, 94-96. Warszawa: PWN.

Dzwonkowski, Henryk. 2020. *Ordynacja podatkowa. Komentarz*. Warszawa: Wydawnictwo C.H. Beck.

Etel, Leonard, and Rafał Dowgier. 2013. *Podatki i opłaty lokalne – czas na zmiany*. Białystok: Temida 2.

Etel, Leonard. 2008. *Prawo podatkowe*. Warszawa: Difin.

Etel, Leonard. 2020. *Ordynacja podatkowa. Komentarz*. Warszawa: PWN.

Hanusz, Antoni, and Paulina Krukowska-Siembida. 2016. "Ważny interes podatnika i interes publiczny w klauzulach generalnych Ordynacji podatkowej." *Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, Sectio G* 63, no. 2:182-89. https:// doi.org10.17951/g.2016.63.2.181

Jędrzejczak, Maria. 2012. "Koncepcje ograniczające swobodę organu w ramach uznania administracyjnego." *Przegląd Prawniczy, Ekonomiczny i Społeczny* 3:4-16. http://hdl.handle.net/10593/5775

Kosikowski, Cezary. 2011. "Przepisy Ogólne." In *Ordynacja podatkowa, komentarz*, edited by Cezary Kosikowski, Leonard Etel, Rafał Dowgier, et al., 4th ed., 5-12. Warszawa: Wolters Kluwer business.

Mariański, Adam. 2019. *Ordynacja podatkowa. Poradnik dla praktyków*. Warszawa: Wydawnictwo C.H. Beck.

Morawski, Wojciech. 2003. *Ulgi i zwolnienia w prawie podatkowym*. Gdańsk: ODDK.

Nykiel, Włodzimierz. 2002. *Ulgi i zwolnienia w konstrukcji prawnej podatku*. Warszawa: Dom Wydawniczy ABC.

Nykiel, Włodzimierz. 2003. "Ulgi i zwolnienia podatkowe – podstawowe cechy." In *Kierunki reformy polskiego systemu podatkowego*, edited by Alicja Pomorska, 96-103. Lublin: UMCS.

Orłowski, Janusz. 2013. "Konstytucyjna zasada powszechności opodatkowania – wybrane zagadnienia." *Studia Prawnoustrojowe* 22:81-100.

Skrzypek-Ahmed, Sylwia, and Tomasz Wołowiec. 2016. "Justice of taxation as a factor of social security." In *Współczesne uwarunkowania bezpieczeństwa Rzeczypospolitej Polskiej. Wymiar polityczno-prawny i społeczny*, edited by Marek Gąska, and Mariusz Paździor, 130-36. Lublin: Innovatio Press, Wyższa Szkoła Ekonomii i Innowacji w Lublinie.

Skrzypek-Ahmed, Sylwia, and Tomasz Wołowiec. 2019. *Praktyczne i zarządcze problemy opodatkowania nieruchomości w Polsce*. Lublin: Innovatio Press Wyższa Szkoła Ekonomii i Innowacji w Lublinie.

Skrzypek-Ahmed, Sylwia, and Tomasz Wołowiec. 2021. "The concept of real estate taxation based on the ad valorem principle." *International Journal of Legal Studies* 1(9):225-49. https://doi.org10.5604/01.3001.0015.0437

Wołowiec, Tomasz, and Agnieszka Żywicka. 2017. "Umorzenie należności podatkowej – interes publiczny versus interes fiskalny." In *Podatki i opłaty w samorządzie terytorialnym. Aspekty prawne i finansowe – wybrane zagadnienia*, edited by Piotr Chojnacki, Sławomir Fundowicz, Piotr Możyłowski, et al., 115-25. Radom: Instytut Naukowo-Wydawniczy „Spatium".

Wołowiec, Tomasz. 2010. "Zasada sprawiedliwości w opodatkowaniu." In *Organizacje komercyjne i niekomercyjne wobec wzmożonej konkurencji oraz wzrastających wymagań konsumentów*, edited by Adam Nalepa, and Anna Ujwary-Gil, 311-23. Nowy Sącz: Wyższa Szkoła Biznesu – National-Louis University.

Wołowiec, Tomasz. 2016a. "Umorzenie zaległości podatkowej uzasadnione ważnym interesem podatnika lub interesem publicznym." *Przegląd Podatków Lokalnych i Finansów Samorządowych* 11:17-21.

Wołowiec, Tomasz. 2016b. "Zwolnienia podatkowe a ulgi w uchwałach podatkowych – różnicowanie podmiotowe podatników." *Przegląd Podatków Lokalnych i Finansów Samorządowych* 10:6-10.

Wołowiec, Tomasz. 2016c. "Zwolnienia podatkowe a ulgi w uchwałach podatkowych – kontrowersje prawne." *Prawo Finansów Publicznych* 10:21-25.

Wołowiec, Tomasz. 2017. "Umorzenie zaległości podatkowej a pojęcie „ważnego interesu" versus różnicowanie podmiotowe podatników." *Biuletyn Stowarzyszenia Gmin Uzdrowiskowych RP* 4:37-53.

Wołowiec, Tomasz. 2019. "Zwolnienia i ulgi podatkowe w uchwałach podatkowych gmin w kontekście kontroli prokuratorskiej i sądowej." *Procedury Administracyjne i Podatkowe* 1:25-31.

Wołowiec, Tomasz. 2020. "Ulgi i zwolnienia w podatku od nieruchomości w kontekście celów polityki podatkowej gminy." *Finanse Komunalne* 1:58-72.

Ziembiński, Zygmunt. 1973. *Teoria prawa*. Warszawa–Poznań: PWN.

Zubrzycki, Janusz. 2017. "Komentarz do art. 1-15." In *Ordynacja podatkowa. Komentarz*, edited by Barbara Adamiak, 13-18. Warszawa: Wolters Kluwer.

Discretionary Nature of the Tax Authority's Decision in the Matter of Tax Write-offs

Abstract

The fulfillment of the obligation to pay taxes is secured by the coercive measures available to the state (local government), both those of financial, administrative and even criminal nature. Their application (or threat of application) is

to cause compliance with the requirements of paying public levies, including taxes. At the same time, however, the actual possibility of realization of the obligation to pay public levies depends on the financial (economic) situation of the taxpayer. In many situations the taxpayer – without a threat to his existence or a significant deterioration of his financial situation or that of his relatives – will not be able to pay the tax. Also, the principle of universality of taxation does not have an absolute character and priority over other constitutional principles, including the principle of a democratic state of law or the principle of equality. Making the tax payable by coercive means may sometimes come into conflict with other values protected by the Constitution of the Republic of Poland and laws. The remission of tax arrears is an instrument used to resolve such conflicts between values and to support those taxpayers who for various reasons (usually financial) are unable to pay the tax. It is worth paying special attention to Article 217 of the Constitution of the Republic of Poland, which in its content directly points to the institution of remission. This determines the constitutional value of the institution of remission. It may be applied only to tax arrears, i.e. after the deadline for payment of tax has passed, which results from the assumption that as long as the deadline for payment has not passed, any interference and releasing the taxpayer from his constitutional obligations would be premature, since by the time the deadline passes, changes may have occurred in the taxpayer's situation which will enable him to pay the obligation. The wording "may" used in Article 67a, para. 1, point 3 of the Tax Code indicates that the authority adjudicating the case for remission of tax arrears exercises administrative discretion when considering the case and making a ruling. The freedom to make decisions under means that even if statutory prerequisites are met, this does not oblige the tax authority to apply remission in every case.

Keywords: tax preferences, tax allowances and exemptions, remission of tax debt, public interest, interest of the taxpayer

Uznaniowość decyzji organu podatkowego w przedmiocie umorzenia zaległości podatkowej

Abstrakt

Realizacja obowiązku zapłaty podatków zabezpieczona jest środkami przymusu, jakimi dysponuje Państwo (samorząd), zarówno tymi o charakterze finansowym, administracyjnym jak i wręcz karnym. Ich zastosowanie (lub groźba zastosowania) spowodować ma przestrzeganie wymogów uiszczania danin publicznych, w tym podatków. Jednocześnie jednak faktyczna możliwość realizacji obowiązku ponoszenia danin publicznych uzależniona jest od sytuacji finansowej (ekonomicznej) podatnika. W wielu sytuacjach podatnik – bez zagrożenia dla egzystencji

lub istotnego pogorszenia sytuacji majątkowej swojej lub najbliższych – nie będzie w stanie zapłacić podatku. Zasada powszechności opodatkowania nie ma także charakteru bezwzględnego i pierwszeństwa nad innymi zasadami konstytucyjnymi, w tym zasady demokratycznego państwa prawnego czy zasady równości. Doprowadzenie do realizacji zapłaty podatku przy wykorzystaniu środków przymusu może czasami stać w opozycji z innymi wartościami chronionymi przez Konstytucję Rzeczypospolitej Polskiej i ustawy. Instrumentem służącym do rozwiązywania takich konfliktów między wartościami oraz wspierania tych podatników, którzy z różnych powodów (zazwyczaj finansowych) nie są w stanie zapłacić podatku jest właśnie umorzenie zaległości podatkowej. Warto w tym miejscu zwrócić szczególną uwagę na art. 217 Konstytucji Rzeczypospolitej Polskiej, który w swej treści wprost wskazuje na instytucję umorzenia. Przesądza to o konstytucyjnej wartości instytucji, jaką jest umorzenie. Może być ono zastosowane tylko w stosunku do zaległości podatkowych, czyli już po upływie terminu do zapłaty podatku, co wynika z założenia, że dopóki termin zapłaty nie minie, wszelka ingerencja i zwalnianie podatnika z obowiązków konstytucyjnych byłoby przedwczesne, jako że do czasu upływu terminu w sytuacji podatnika mogą zajść takie zmiany, które umożliwią mu jego zapłatę zobowiązania. Użyte w art. 67a § 1 pkt 3 *Ordynacji podatkowej* sformułowanie „może" wskazuje, że organ orzekający w przedmiocie umorzenia zaległości podatkowych przy rozpatrywaniu takiej sprawy i wydawaniu rozstrzygnięcia korzysta ze swobody uznania administracyjnego. Wolność decyzyjna w zakresie rozstrzygnięcia na gruncie art. 67a § 1 pkt 3 *Ordynacji podatkowej* sprawia, że nawet wystąpienie ustawowych przesłanek nie obliguje organu podatkowego do zastosowania instytucji umorzenia w każdym przypadku.

Słowa kluczowe: prefernecje podatkowe, ulgi i zwolnienia podatkowe, umorzenie należności podatkowej, inters publiczny, interes podatnika

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