

## PROCEEDINGS IN RELATION TO ABSENT PERSONS UNDER THE FISCAL PENAL CODE (SELECTED ISSUES)

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**Abstract.** The paper is devoted to the discussion of the situation of the accused in the proceedings in relation to the absent, which is regulated by the Fiscal Penal Code. The author discusses the conditions which make it possible to examine the case of a person accused of fiscal offences and fiscal petty offences. The prerequisites for conducting such special proceedings are: permanent residence abroad of the perpetrator of a fiscal offence or fiscal petty offence or a situation when it is not possible to determine the place of residence or stay of the accused perpetrator (Article 173(1) of the Fiscal Penal Code). Negative conditions for these proceedings are the following situations: when the guilt of the perpetrator or circumstances of a prohibited act give rise to doubts, or when a person accused of a fiscal offence hid after the filing of a bill of indictment with the court, and also when in the course of proceedings before the court his place of residence or place of stay in the country is established (Article 173(2) of the Fiscal Penal Code). The author discusses the procedural consequences that result from the possibility of conducting proceedings against an absent defendant in cases of fiscal offences or fiscal petty offences.

**Keywords:** criminal fiscal proceedings, criminal proceedings, proceedings against absent persons, accused of a fiscal offence or fiscal petty offence

### INTRODUCTION

The study discusses issues relating to the legal regulations that apply to the accused in the proceedings in relation to absent persons. It omits the rules relating to the entity bearing subsidiary responsibility.

#### 1. THE CHARACTERIZATION OF PROCEEDINGS IN RELATION TO ABSENT PERSONS UNDER THE FISCAL PENAL CODE

Pursuant to Article 117(1)(4) of the Fiscal Penal Code,<sup>1</sup> proceedings in relation to the absent are one of the proceedings in which it is possible to

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<sup>1</sup> Act of 10 September 1999, the Fiscal Penal Code, Journal of Laws of 2020, item 19 as amended [hereinafter: FPC].

adjudicate in cases of fiscal offences and fiscal petty offences. It is treated as a special procedure in relation to ordinary proceedings [Grzegorzczuk 2001, 407, 534; Światłowski 2008, 263], provided for by the Fiscal Penal Code. Article 113(1)(2) FPC provides that in proceedings in cases of fiscal offences and fiscal petty offences the provisions of the Code of Criminal Procedure<sup>2</sup> shall apply accordingly, apart from those which are excluded under special regulations contained in the Fiscal Penal Code. It should be pointed out that there is no consensus of views in the literature as to the legal nature of proceedings in cases of fiscal offences. In principle, the following positions can be distinguished on this issue. The first assumes that fiscal penal proceedings are separate from criminal proceedings [Światłowski 2008, 146, 157], a special mode, a special criminal procedure.<sup>3</sup> In the opposite view, the fiscal penal proceedings are a type of criminal proceedings in the broad sense [Wilk and Zagrodnik 2015, 253]. In the opinion of these authors, the subject matter of these proceedings is the distinguishing feature [ibid.]. Taking into account the specific subject matter was the basis for the formulation of the view that fiscal penal proceedings are neither criminal proceedings within the meaning of Article 1 CCP nor special proceedings or a separate mode of criminal trial, and this is so because the subject matter of such proceedings is the issue of legal liability for prohibited acts which are not offences in the sense adopted in the provisions of the Criminal Code and specific criminal statutes [Kmieciak 2009, 48–49; Idem 2004, 456]. According to R. Kmiecik, fiscal penal proceedings, similarly to disciplinary or petty offences proceedings, belong to a separate system of law on the borderline between the law regulating the administration of justice in criminal matters and broadly defined administrative law [Kmieciak 2004, 456] and is one of the quasi-criminal proceedings regulated in separate legal acts [Idem 2009, 48].<sup>4</sup> In addressing this issue, the view should be supported that the possibility of applying the provisions of the Code of Criminal Procedure in specific proceedings does not in itself determine that a given proceeding should be equated with criminal proceedings within the meaning of Article 1 CCP. The subject of the criminal trial is the issue of legal liability, especially the criminal liability of the accused for the alleged offence. Since it is not possible to equate an offence with a fiscal offence,<sup>5</sup> it is therefore reasonable to take the view that proceedings in cases

<sup>2</sup> Act of 19 April 1969, the Code of Criminal Procedure, Journal of Laws of 2021, item 534 as amended [hereinafter: CCP].

<sup>3</sup> See also Światłowski 2008, 156; Grzegorzczuk 2001, 392; Idem 2014, 886; Razowski 2017a, 1069; Wiliński 2020, 26, 28. P. Wiliński classifies fiscal penal proceedings as proceedings related to criminal proceedings [Wiliński 2020, 26].

<sup>4</sup> This view has been challenged in the literature, see: Błachnio–Parzych, Hudzik, and Pomykała 2006, 253; Światłowski 2008, 159.

<sup>5</sup> See the resolution of the Supreme Court - Criminal Chamber of 4 April 2005, ref. no. I KZP 7/05, Lex no. 146390. In the opinion of the Supreme Court, *de lege lata* the thesis that, under

of fiscal offences are neither a separate form of criminal proceedings nor specific criminal proceedings. The above statement does not mean that in the course of the proceedings provided for by the Fiscal Penal Code no decisions on criminal liability are made. The following arguments support this thesis. Firstly, Article 1(1) FPC provides that criminal liability is incurred for committing a fiscal offence [Łabuda 2017, 24]. It is worth noting at this point that the Fiscal Penal Code does not extend the concept of criminal liability onto committing a fiscal petty offence. Pursuant to Article 1(1) FPC, in this case the expression “liability for a fiscal petty offence” was used [ibid., 24–25]. Secondly, the interpretation of the concept of a criminal case within the meaning of Article 6(1) of the European Convention on Human Rights should be used. It is assumed that the regulations in force in a given country are relevant in resolving this issue [Nowicki 2009, 263]. At the same time, it is argued that they are not considered decisive. Whether we are dealing with a criminal case within the meaning of Article 6(1) of the European Convention on Human Rights is to be decided by the nature of the punishable act [ibid.; Nita-Światłowska 2019, 669]. It is pointed out that the punishment is primarily aimed at retribution and deterring similar acts of the perpetrator himself and others. Its application must be based on a general standard of a preventive and repressive nature.<sup>6</sup> A consequence of these assumptions is the thesis, according to which the proceedings in the case of a petty offence are also treated as a criminal case within the meaning of Article 6 of the European Convention on Human Rights [Hofmański and Wróbel 2010, 281–83; Dąbkiewicz 2014, 24–25]. Accepting these assumptions one should assume that proceedings in the case of a fiscal offence should be treated as a criminal case. The recognition of a case as a criminal one makes it necessary for proceedings in such cases to meet the requirements set out in Article 6 of the European Convention on Human Rights.

This understanding of the criminal case is also present in the case law of the Constitutional Tribunal. According to the rulings of the Constitutional Tribunal, constitutional guarantees related to repressive liability (Article 42(2)

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the Criminal Code, the concept of an offence does not include fiscal offences has been accepted by both the judges who supported the view expressed in the thesis of this resolution and the judges who submitted a separate opinion. See also: Wilk and Zagrodnik 2015, 10. On the relationship between fiscal and ordinary criminal law, see Błachnio-Parzych, Hudzik, and Pomykała 2006, 252 and the literature indicated there. As regards the autonomy of the Penal Code, see Konarska-Wrżosek 2010, 30–31.

<sup>6</sup> See the judgement *Bendenoum v. France* of 24 February 1994, ref. no. A 284, para. 47, in: Nowicki 1998, 134; Idem 2009, 263. See also Kruk and Nowikowski 2015, 200; Nita-Światłowska 2019, 669.

of the Constitution) apply not only to strictly criminal proceedings, but also to other proceedings referring to the issue of repressive liability.<sup>7</sup>

As an addition to the above thesis, it is worth quoting the view of the Supreme Court expressed in its judgment of 9 June 2005, according to which the principles of *nullum crimen sine lege*, *nulla poena sine lege* and the presumption of innocence provided for in Article 42 of the Constitution of the Republic of Poland concern not only criminal liability in the strict sense of the word, but also apply to other forms of criminal liability associated with the imposition of penalties on an individual.<sup>8</sup>

For these reasons, it can be argued that the constitutional principles of guarantee nature and the regulations contained in Article 6 of the European Convention on Human Rights cover various areas of repressive law, which include proceedings in cases of fiscal offences and petty fiscal offences.

## 2. THE CONDITIONS WHICH MAKE IT POSSIBLE TO EXAMINE THE CASE OF A PERSON ACCUSED OF FISCAL OFFENCES AND FISCAL PETTY OFFENCES AND NEGATIVE CONDITIONS FOR THESE PROCEEDINGS

Pursuant to Article 173(1) FPC, proceedings may be conducted against a perpetrator of a fiscal offence permanently residing abroad or if his place of residence or stay in the country cannot be determined, during his absence. The possibility of conducting proceedings in relation to an absent defendant is a permanent normative solution in Polish fiscal penal law [Razowski 2014, 60; Tuznik 2011, 61]. Such a regulation was provided for in the fiscal penal acts: of 2 August 1926 (Article 228),<sup>9</sup> of 18 March 1932 (Article 227),<sup>10</sup> of 13 April 1960 (Articles 230–234),<sup>11</sup> of 26 October 1971 (Articles 271–273)<sup>12</sup> and in the Decrees – Fiscal Criminal Law: of 3 November 1936 (Articles 337–342)<sup>13</sup> and of 11 April 1947 (Articles 288–293).<sup>14</sup>

The legal possibility of conducting proceedings in cases of fiscal offences against a defendant permanently residing abroad or when his place of residence

<sup>7</sup> Thus: judgement of the Constitutional Court of 19 February 2008, ref. no. P 48/06, OTK–A 2008, no. 1, item 4; judgment of the Constitutional Court of 3 November 2004, ref. no. K 18/03, OTK–A 2004, no. 10, item 103. On the concept of repressive behaviour, see Mamak 2016, 3–6.

<sup>8</sup> See judgement of the Supreme Court of 9 June 2005, ref. no. V KK 41/05, OSNKW 2005, no. 9, item 83. This view is approved by Dąbkiewicz 2014, 25.

<sup>9</sup> Journal of Laws No. 105, item 608 as amended.

<sup>10</sup> Journal of Laws No. 34, item 355 as amended.

<sup>11</sup> Journal of Laws No. 21, item 123 as amended.

<sup>12</sup> Journal of Laws, No. 28, item 260 as amended.

<sup>13</sup> Journal of Laws, No. 84, item 581 as amended.

<sup>14</sup> Journal of Laws, No. 32 as amended.

or stay in the country cannot be determined is a different regulation from the legal solutions adopted in the currently binding Code of Criminal Procedure in the case of the occurrence of the above mentioned circumstances, which are connected with the suspension of proceedings [Tużnik 2011, 63–64]. Pursuant to Article 22(1) CCP a long-term obstacle preventing the conducting of proceedings, consisting, among others, in the inability to capture the accused, justifies the suspension of proceedings. It is assumed that the expression “the accused cannot be captured” refers both to the perpetrator’s hiding and his long-term absence in the country in circumstances in which there are no prospects of his imminent return, and extradition proceedings either have not been initiated or are protracted [Gostyński 1998a, 121; Idem 1998b, 231]. Therefore, it is justified to state that Article 173(1) FPC constitutes a *lex specialis* in relation to Article 22 CCP [Światłowski 2008, 176]. The conditions justifying the suspension of proceedings are not the same as those justifying the conducting of proceedings in relation to the absent.<sup>15</sup>

It should be pointed out that there are legal regulations in force referring to the criminal process which allow proceedings to be conducted in spite of the absence of the accused. In the context of these considerations, it is worth mentioning that the 1969 Code of Criminal Procedure provided for proceedings in relation to the absent. Pursuant to Article 415 CCP of 1969,<sup>16</sup> against a person accused of committing an offence specified in Article 122 of the former Penal Code,<sup>17</sup> (treason of the homeland), Article 123 f.P.C. (conspiracy against the State), Article 124 f.P.C. (espionage) and Article 130 f.P.C. (diplomatic treason), Article 304(3) f.P.C. (desertion), Article 1(1) of the decree of 31 August 1944 on the punishment of fascist-Hitlerian criminals guilty of murder and abuse of civilians and prisoners of war and of traitors of the Polish Nation<sup>18</sup> [Prusak 2015, 77] could take place during that person’s absence. Article 417 CCP of 1969 provided that in the case when the convicted person was apprehended or personally appeared before the court, a copy of the final judgment should have been delivered to him. At the request of the accused, submitted within 14 days from the date of delivering him the judgement, the court whose judgment became final was to set the date of the hearing, and the judgment issued at that instance expired when the accused appeared at the hearing. The defendant’s request was considered to be an objection.<sup>19</sup> Although pursuant

<sup>15</sup> According to G. Skowronek one can talk of apparent convergence in this case [Skowronek 2020].

<sup>16</sup> Act of 19 April 1969, the Code of Criminal Procedure, Journal of Laws No. 13, item 96 as amended.

<sup>17</sup> Act of 19 April 1969, the Penal Code, Journal of Laws No. 13, item 94 as amended indicated [hereinafter: f.P.C. or former Penal Code].

<sup>18</sup> Journal of Laws of 1946, No. 69, item 377 as amended.

<sup>19</sup> See Cieślak 1984, 379; Grajewski 1993, 551; Wrona 1997, 112. According to S. Waltoś, this request was described either as “de facto objection” [Waltoś 1971, 206, 210, 211] or as an

to Article 3(1) of the Statute introducing the Code of Criminal Procedure of 6 June 1997,<sup>20</sup> the Code of Criminal Procedure of 19 April 1969 was repealed, and thus also the articles on proceedings with respect to absent persons (Articles 415–417), but under Article 12a of the Introductory Provisions<sup>21</sup> in a case which ended with a final conviction, issued in the proceedings with respect to the absent persons provided for by the Code of Criminal Procedure of 1969, a copy of that conviction is delivered to the convicted person if the convicted person is apprehended or if he or she appears before the court. At the request of the convicted person, submitted in writing within 14 days of delivering of the judgment, the court whose judgment has become final shall immediately convene a hearing and the judgment delivered at that instance shall cease to have effect as soon as the convicted person appears at the hearing. This provision therefore allows a person convicted before 1 September 1998, in proceedings against the absent, to have the final judgment cancelled. The discussed measure of appeal can be classified as an objection.

In addition, it should be pointed out that there were other regulations under criminal procedural law and fiscal criminal law that allowed proceedings to be conducted despite the defendant's failure to appear. In this context, it should be pointed out that until the entry into force of the amendment of 27 September 2013, i.e. 1 July 2015, both the criminal proceedings regulated by the Code of Criminal Procedure and the Fiscal Penal Code provided for simplified proceedings, which allowed for the possibility of issuing a judgment in absentia in the case of the defendant's failure to appear at the trial.<sup>22</sup> Pursuant to Article 479(1) CCP in connection with Article 113(1) FPC, if a defendant, who had received the summons, did not appear at the main hearing, then the court could conduct the proceedings without his participation, and if his defence counsel did not appear, the court could issue a judgment in absentia [Kala 2005, 46]. In addition, prior hearing of the defendant was a condition for allowing the judgment to be issued in absentia (Article 479(2) CCP). This regulation was applicable in penal fiscal proceedings as well (Article 479(2) CCP in connection with Article 113(1) FPC).

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objection [Idem 1973, 68–69].

<sup>20</sup> Journal of Laws No. 89, item 556.

<sup>21</sup> Article 12a was added by the Act of 10 January 2003 amending the act – the Code of Criminal Procedure, the statute – Provisions introducing the Code of Criminal Procedure, the act on the Crown Witness and the act on the Protection of Classified Information, Journal of Laws No. 17, item 155.

<sup>22</sup> In the fiscal penal law the simplified procedure was provided for in the fiscal penal laws of 1926, 1932, 1960, 1971, 1999. Fiscal penal law, regulated by the decrees of 1936 and 1947, although they did not provide for a simplified procedure, they referred to the regulations contained in the Code of Criminal Procedure, and provided for the possibility of a simplified procedure. See more Tużnik 2013, 54–55.

In addition, when comparing the regulations contained in the proceedings against the absent from the Fiscal Penal Code with the regulations provided for in the Code of Criminal Procedure, the following may be observed. As a result of the amendment of Article 374 CCP by the Act of 27 September 2013,<sup>23</sup> the rule that the presence of the accused at the trial is mandatory was broken. A different regulation was adopted, according to which the compulsory participation of the accused at the trial is an exception to the rule according to which the accused is entitled to participate in the trial [Ponikowski and Zagrodnik 2020, 1002]. Pursuant to Article 113(1) FPC, these regulations apply in criminal fiscal proceedings.

Pursuant to Article 173(1) FPC, proceedings may be conducted against a perpetrator of a fiscal offence or a fiscal petty offence permanently residing abroad or if his place of residence or stay in the country cannot be determined, during his absence. This provision shall not apply if: the guilt of the perpetrator or the circumstances of the offence raise some doubts and, in addition, the accused of the fiscal offence concealed himself when the indictment was brought before the court, and also when his place of residence or stay in the country was discovered in the course of proceedings before the court.

The following comments can be made in relation to this regulation.

Firstly, the use by the legislator of the term “perpetrator of a fiscal offence” is questionable. Pursuant to Article 42(3) of the Constitution and Article 113(1) FPC in conjunction with Article 5(1) CCP, the principle of the presumption of innocence applies in these proceedings, and therefore the term “defendant” should be the correct expression. In the context of these remarks, it is worth recalling that previously applicable laws used the term “accused” in articles referring to the proceedings in relation to the absent.<sup>24</sup>

It should be noted, however, that the current Fiscal Penal Code does not make a distinction between the accused and the blamed person within the meaning of the Code of Petty Offences Procedure. Pursuant to Article 120(1) and (2) FPC the accused is the passive party both in proceedings in cases of fiscal offences and the passive party in proceedings in cases of fiscal petty offences.

Secondly, one of the prerequisites for the possibility of conducting proceedings in relation to absent persons is the permanent presence of the accused abroad. It is assumed that this circumstance occurs when the accused is a foreigner or a Polish citizen permanently residing abroad [Prusak 1994, 387; Błaszczuk 2016, 305]. Moreover, the thesis that permanent residence is also taking place when a Polish citizen has left the country’s borders and is staying abroad without specifying his stay or does not show any intention of

<sup>23</sup> Journal of Laws item 1247.

<sup>24</sup> See: Article 222(1) in connection with Article 271 and 272 of the Fiscal Penal Act of 1971; Article 230 of the Fiscal Penal Act of 1960.



returning should be accepted [ibid.]. It is assumed in the literature that the condition of “permanent residence” is also met when the accused, the blamed person, is temporarily staying abroad, but for a long time and without specifying the probable moment of return.<sup>25</sup> These circumstances should be established in criminal fiscal proceedings. If it is impossible to establish that the accused’s stay is not permanent within the meaning of Article 173(1) FPC, and at the same time the absence is of a long-term character, then fiscal penal proceedings should be suspended pursuant to Article 22 CCP in connection with Article 113(1) FPC, while undertaking certain search activities. In this case, it will be the issuance of e.g. a European arrest warrant [Błaszczuk 2016, 305], a letter of intent (Article 281 CCP in connection with Article 113(1) FPC) [Tużnik 2013, 302].

Another positive condition for the proceedings in relation to absent persons is the inability to determine the defendant’s place of residence or stay. Also in this case, determination of this circumstance should be preceded by appropriate search activities such as ordinary search (Article 278 CCP in connection with Article 113(1) FPC), an arrest warrant (Article 279 CCP in connection with Article 113(1) FPC) [Błaszczuk 2016, 305; Wilk and Zagrodnik 2015, 705].

It should be stated that if the accused cannot be apprehended and it is necessary to suspend the proceedings and there are no grounds for conducting the proceedings in relation to absent persons, while the evidence gathered indicates that in the case of a conviction the forfeiture would be ordered, the court may order the forfeiture of objects (see Article 43a FPC).

Thirdly, Article 173(2) provides for negative conditions for conducting proceedings in relation to the absent. One of them occurs when the guilt of the perpetrator or the circumstances of committing a prohibited act give rise to some doubts, which should be understood as uncertainty or the occurrence of justified doubts as to the existence of the constituent elements of a fiscal offence or fiscal petty offence.<sup>26</sup> It has been indicated that such a situation occurs when the evidence gathered in the preparatory proceedings does not allow for a full and unambiguous assessment of the committed fiscal offence or fiscal petty offence and of its perpetrator and thus prevents the truth from being reached in these proceedings [Razowski 2017b, 1403].

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<sup>25</sup> See Razowski 2017b, 1402–403; Skwarczyński 2012, 49 (and the literature indicated there); Skwarczyński 2002, 114. Temporary stay abroad is when the accused has gone away for business, tourism or family purposes [Błaszczuk 2016, 305].

<sup>26</sup> See the comments of Razowski 2017b, 1403 on the correctness of the formulation of this premise. The Supreme Court stated in its judgment of 1 October 2005, ref. no. II KK 124/15, that proceedings against the absent can only take place if there is a substantive conviction that a fiscal offence or fiscal petty offence has actually occurred.



The second negative condition for the conducting of proceedings in relation to the absent occurs when the accused of a fiscal offence has concealed himself when a bill of indictment has been filed with the court as well as when his place of residence or stay in the country has been established in the course of proceedings before the court. In the literature, there has been a divergence of opinions concerning the subjective scope of the regulation indicated in Article 173(2)(2) FPC. According to the first position, the phrase “accused of a fiscal offence” contained in Article 173(2)(2) FPC only applies to the accused who has been charged with a fiscal offence [Skwarczyński 2012, 48; Tużnik 2011, 65; Wilk and Zagrodnik 2015, 706]. This negative condition for the prosecution of the absent person would not apply to a person accused of a fiscal petty offence [Skwarczyński 2012, 48; Tużnik 2011, 65]. The consequence of this distinction would therefore be to state that the concealment of a defendant charged with a fiscal petty offence after the indictment has been brought before a court would not constitute an obstacle to conducting proceedings against the absent in relation to that person. According to a different opinion, when interpreting Article 173(2)(2) FPC, a literal interpretation of the term “accused of a fiscal offence” should not be adopted, but the scope of that formulation should include both the accused of a fiscal offence and the perpetrator of a fiscal petty offence [Razowski 2017b, 1405]. In R. Razowski’s opinion, adopting a literal interpretation would mean that discovering the offender’s place of residence or stay after the filing of the indictment would not be an obstacle to the conduct of proceedings against the absent in relation to that person, which is considered to be contrary to the principles of that special procedure [ibid.].

In addressing this issue, it should be pointed out that the legislator has not differentiated between the “accused” and the “blamed” in the meaning given to these concepts by the Code of Criminal Procedure and the Code of Petty Offences Procedure. For these reasons, to use only the term “accused” without further specification may mean both the accused in fiscal offence proceedings and the accused in fiscal petty offences proceedings. It should be noted that in the original version of Article 173(2)(2) FPC, the lawmaker used the concept of the accused without further specification of the categories of cases to which the accused was a party. Therefore, taking into account the content of Article 120(1) and (2) FPC, the view was justified that the regulation contained in Article 173(2)(2) FPC concerned both the accused in cases of fiscal offences as well as the blamed person in cases of fiscal petty offences. Pursuant to Article 1(132) of the Statute of 28 July 2005 amending the act – Fiscal Penal Code and certain other acts,<sup>27</sup> Article 173(2)(2) FPC was amended in such a way that the wording was used: “accused of a fiscal offence.” Therefore,

<sup>27</sup> Journal of Laws of 2005, No 178, item 1479.

when comparing the current wording of this provision with the regulation previously in force, it seems justified to conclude that the negative condition for conducting proceedings in relation to the absent persons, contained in Article 173(2)(2) FPC, applies only to a defendant in cases of a fiscal offence.

### 3. THE PROCEDURAL CONSEQUENCES THAT RESULT FROM THE POSSIBILITY OF CONDUCTING PROCEEDINGS AGAINST AN ABSENT DEFENDANT IN CASES OF FISCAL OFFENCES OR FISCAL PETTY OFFENCES

The issuance of a decision on the application of the proceedings to the absent, pursuant to Article 175 FPC, entails the necessity to appoint a defence counsel *ex officio* – in preparatory and court proceedings, both in the first and second instance (Article 176(1) FPC).<sup>28</sup>

It can be inferred from the essence of the proceedings in relation to the absent that the provisions which require the presence of the accused cannot be applied in these proceedings (Article 174 FPC). Proceedings in relation to the absent are conducted in accordance with the provisions on ordinary proceedings with deviations resulting from the specificity of such special proceedings. Pursuant to this regulation, in preparatory proceedings, the complex act of presenting charges (Article 313 CCP, in conjunction with Article 113(1) FPC) is limited only to preparing a decision on presenting charges. Evidence such as questioning the suspect (accused), confrontation, presentation with the participation of the accused is not carried out. The fact of the absence of the accused (suspect) does not release the authorities conducting preparatory proceedings from the obligation to inform the defence counsel of the final date of being apprised with the materials of the preparatory proceedings and to inform about the right to a prior examination of the files within a time limit appropriate to the gravity or complexity of the case (Article 321(1) CCP, Article 325h in connection with Article 113(1) FPC). Similar solutions related to the absence of the accused are found at the stage of court proceedings. In this context, it is worth paying special attention to the activities in which it is necessary to cooperate with the accused or the essence of which is his expression of consent to actions taken by other participants in the proceedings.

The first such situation occurs in the case of the institution of conviction at a sitting without a trial (Article 335 CCP in connection with Article 343 CCP). The lack of the presence of the accused prevents the conclusion of an appropriate agreement between the accused and the prosecutor. Similarly, the regulation indicated in Article 338a CCP cannot be applied in connection with Article 343a CCP due to the absence of the accused, who is entitled to submit

<sup>28</sup> See Grzegorzcyk 2001, 539; Razowski 2005, 261–62; Idem 2017c, 1407.

an appropriate motion. Also the absence of the accused makes it inadmissible to apply Article 387 CCP, which provides for voluntary submission to criminal liability.

In criminal proceedings, the consent of the accused is required when a public prosecutor withdraws the indictment after the commencement of court proceedings (Article 14(2) CCP), during the proceedings referring to an incidental process (Article 398 CCP), when a defence counsel withdraws the appeal brought in favour of the accused (Article 431 CCP). Pursuant to Article 113(1) FPC these regulations apply in criminal fiscal proceedings. Due to the absence of the accused in the proceedings, the condition of making a relevant declaration of will by that participant in the proceedings cannot be fulfilled in relation to the absent persons. Since the consent of the accused is necessary to revoke a relevant action, the lack of possibility to obtain such consent makes the revocation of the action impossible [Nowikowski 2001, 148].

However, this thesis requires additional commentary in connection with the content of Article 176(1) FPC. Pursuant to this provision, if a relevant procedural authority issues a decision to examine a case in the proceedings in relation to the absent, it becomes necessary to appoint a defence counsel *ex officio*. The question arises, therefore, whether in proceedings in relation to the absent, the defence counsel in lieu of the absent may not express a statement containing consent to the withdrawal of the above actions? This question should be answered in the negative. In situations where the regulations indicate the accused's consent as one of the conditions for the effectiveness of the action, it must be assumed that this consent should be demonstrated by a clear and unquestionable statement by the accused himself [ibid., 135]. Accepting the opposite view, according to which the defence counsel could replace the accused in expressing his consent, would mean that the condition set out in Article 431 CCP, applicable in these specific proceedings, that the defence counsel must show the defendant's consent to the revocation of the appeal would in fact be pointless. Such an interpretation would make the requirement for the defence counsel to obtain the consent of the accused to the withdrawal of the appeal unnecessary – which would be an example of interpretation *per non est*. According to this rule, it is not acceptable to establish the meaning of a rule in which certain of its phrases are considered irrelevant and therefore superfluous.<sup>29</sup>

When presenting the specificity of the proceedings in relation to the absent in cases of fiscal offences and fiscal petty offences, it is necessary to indicate the regulations concerning the means of appeal. They are characterised by a particular double-track approach. For the public prosecutor, for the entity brought to the auxiliary responsibility, for the accused, for the defence

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<sup>29</sup> See Morawski 2002, 150–51 and the literature and case law indicated there.

counsel, pursuant to Article 113(1) FPC, a procedure for appealing against decisions is provided for, such as in ordinary proceedings in the Code of Criminal Procedure.<sup>30</sup> A different regulation applies to an accused, against whom a final judgment has been passed in the proceedings in relation to the absent.

Pursuant to Article 177 FPC, if the convicted person makes himself available to the court or if the convicted person is arrested, a copy of the final judgment is delivered to him. At the request of the convicted person, submitted in writing within 14 days from the date of delivering the judgment, the court whose judgment has become final and binding shall immediately appoint a hearing, and the judgment issued in this instance shall cease to be valid upon the presence of the convicted person at the hearing. This extraordinary measure of appeal is considered to be an objection.<sup>31</sup> It is accepted in the literature that the specific features of objections are: adversarial nature, cassationality, lack of devolutive effect.<sup>32</sup> Furthermore, according to some authors, objections are characterized by suspensiveness [Nowikowski 2019, 475].

The Fiscal Penal Code does not directly regulate the issue of withdrawal of the objection indicated in Article 177 FPC. The withdrawal of an action performed by a party becomes possible if a certain time elapses between the performance of the action and its effect [Idem 2001, 175]. This delay in the effects of the action makes it possible to declare the withdrawal of the appeal so that the effects of the action can be prevented.<sup>33</sup> We are dealing with such a situation in the regulation provided for in Article 177 FPC. The mere lodging of an objection by the accused indicated in this provision does not automatically result in setting aside the judgment under appeal. The cassation effect, connected with this objection, arises when the accused (sentenced) appears for the trial. A certain period of time therefore elapses between the lodging of an appeal and the cassation effect connected with the loss of legal force of the judgment under appeal, which makes it possible to make an effective statement of revocation of that objection.<sup>34</sup>

<sup>30</sup> See Skorupka 2010, 440.

<sup>31</sup> See Grzegorzczak 2001, 539; Razowski 2017d, 1415; Nowikowski 2001, 177; Skowronek 2020 (commentary to Article 177, thesis 2). The request referred to in Article 177 FPC is also referred to as a quasi-objection [Tużnik 2013, 309; Idem 2011, 68; Wilk and Zagrodnik 2015, 708]. This is also the view of the Supreme Court in the justification of the judgment of 1 October 2025, ref. no. II KK 124/15, Lex no. 1918813.

<sup>32</sup> See more on this issue: Nowikowski 2019, 474 and the literature indicated there.

<sup>33</sup> Nowikowski 2001, 175 and the literature indicated there.

<sup>34</sup> See Nowikowski 2001, 177; Razowski 2017d, 1416; Tużnik 2013, 310; Idem 2011, 69. That thesis was not approved by Gostyński 2000, 317–18. According to the Author, the lack of a regulation in Article 177 FPC, which would provide for the withdrawal of this motion, is to indicate that such a possibility is excluded. In the opinion of Z. Gostynski, since under Article 177 FPC, the appearance of the accused at the trial results in the loss of legal force of the judgment, then the possible statement of the accused at the trial about the withdrawal of the motion does not cause any legal effects.

The prohibition of *reformationis in peius* is not connected with the lodging of this objection, as it is not a remedy.<sup>35</sup> However, the view expressed in the literature and jurisprudence of the Supreme Court should be accepted, that in the case of a retrial of the case at an appeal hearing, appointed as a result of the lodging of the motion referred to in Article 177 FPC by the defendant and as a result of loss *ex lege*, at the moment of the appearance of the convicted person at that hearing, of the power of the judgment of the court of second instance issued in absentia – the court *ad quem* is bound by the prohibition of *reformationis in peius* only when it has previously ruled on the appeal lodged only in favour of the accused.<sup>36</sup>

In the context of these observations, it may be examined whether the granting of the right to the accused to lodge an appeal against a final judgment in the course of the proceedings against the absent is linked to the admissibility of the defence counsel's lodging of the same means of appeal. This issue has been considered in the literature and case-law in connection with the lodging of an objection in the context of order proceedings and has given rise to diverging views [Hofmański, Sadzik, and Zgryzek 2012, 98]. With regard to the issue under consideration, two different solutions can be adopted. According to the first view, it should be possible for a defence counsel to lodge an objection, as this right arises from the procedural role of the defence counsel in criminal proceedings.<sup>37</sup> According to the opposite view, the lack of the prohibition of *reformationis in peius* when lodging an objection provided for in Article 177 FPC speaks against granting the defence counsel the right to lodge this appeal.<sup>38</sup> Pursuant to Article 86(1) CCP the defence counsel may take procedural steps only for the benefit of the accused, and in the event of filing such an objection, it cannot be ruled out that the defendant's procedural situation will deteriorate. When addressing this issue, it should be noted that the possibility of revoking an objection indicated in Article 177 FPC makes it possible, even after lodging this appeal, to deprive it of its effectiveness, which may be in favour of granting a defence counsel the right to file this objection.

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<sup>35</sup> See Razowski 2017d, 1416; Skwarczyński 2012, 59; Wilk and Zagrodnik 2015, 709. With regard to objections, this is the dominant position in literature see Nowikowski 2019, 475–76 and the literature indicated there. It should be noted, however, that, according to some authors, the ban on *reformationis in peius* should be combined with the raising of objections see Nowikowski 2019, 476 and the literature indicated there.

<sup>36</sup> Thus: Baniak 2001, 228; Grzegorzczak 2001, 177; Razowski 2017d, 1416; Skowronek 2020 (commentary on Article 177, thesis 3); Tużnik 2011, 69; Wilk and Zagrodnik 2015, 709. Thus also: the Supreme Court in its judgment of 1 October 2015, ref. no. II KK 124/15, Lex no. 1918813.

<sup>37</sup> Thus: the resolution of the Supreme Court of 15 April 1986, ref. no. VI KZP 8/86 [Hofmański, Sadzik, and Zgryzek 2012, 98; Grzegorzczak 1987, 144–47].

<sup>38</sup> Thus in reference to order proceedings: Zgryzek 1987, 141–42.

One should approve the thesis that if a person accused of committing a fiscal offence or a fiscal petty offence has appeared before the court in person or has been arrested after the announcement of the judgment, but prior to its becoming final and binding, he does not have the right to lodge the objection indicated in Article 177 FPC [Razowski 2014, 63–66; *Idem* 2017d, 1412–415]. Therefore, if the above mentioned circumstance related to the appearance of the defendant occurs before the lapse of the time limit for submitting a motion to draw up grounds for the judgment (Article 422(1) CCP in connection with Article 113(1) FPC), the defendant may independently initiate the appeal against the judgment, submitting a motion to draw up grounds for the judgment and then lodging an appeal [*Idem* 2014, 64].

### CONCLUSION

Three comments can be made in conclusion.

1) The conducting of proceedings in relation to an absent accused person makes certain procedural rules affecting the situation of the accused significantly restricted. This includes the principle of the accused person's right of defence in a material sense, the adversarial principle, the equality of parties.<sup>39</sup> Proceedings shaped that way are aimed at protecting the financial interest of the State Treasury, local government units or any other entitled entity in a situation where the accused does not intend to participate in proceedings pending against him/her in a case of a fiscal offence or a fiscal petty offence. The above mentioned deviations from the above-mentioned procedural principles may be minimised by introducing an obligatory defence, giving the accused the possibility to try his case with his participation in the event of submitting the motion provided for in Article 177 FPC. It should be added that the Constitutional Tribunal in its judgment of 9 July 2002, P 4/01 did not find the provisions in question incompatible with Article 42(2), Article 45(1) of the Constitution and Article 6(1) and (3)(a–d) of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14(1) and (3)(a)(b)(d)(e) of the International Covenant on Civil and Political Rights.<sup>40</sup>

2) The case law of the European Court of Human Rights allows, in the context of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, for the trial to be conducted in absentia, provided that the authorities have acted with due diligence to inform the accused of the trial.

<sup>39</sup> See in more detail on this issue: Kosonoga 2002, 93–101; Tużnik 2013, 312.

<sup>40</sup> OTK ZU–A 2002, no. 4, item 52. See also the grounds for the judgment of the Supreme Court of 1 October 2015, ref. no. II KK 124/15, Lex no. 1918813. See also the endorsing remarks by Światłowski 2008, 177–79.



This notification must reach the accused person within a reasonable time.<sup>41</sup> It is complemented by the statement that if it has not been established that the accused waived his right to be present at the trial and to defend himself in person or that he intended to evade the administration of justice, then he must have the possibility to have the case reviewed by the court that previously judged him.<sup>42</sup> Such a guarantee in the proceedings in relation to the absent is the possibility to lodge an objection indicated in Article 177 FPC.

3) Pursuant to Article 19(4) FPC, in proceedings with respect to the absent, a ruling on a penalty, penal measure or other measure may be limited to forfeiture of objects. At the same time, it should be reminded that if it is impossible to establish that the defendant's stay abroad is not permanent within the meaning of Article 173(1) FPC, and at the same time this absence is of a long-term character and the defendant cannot be apprehended, fiscal penal proceedings should be suspended pursuant to Article 22 CCP. This decision allows the court to decide on the forfeiture of objects pursuant to Article 43a FPC. In fact, it is a new way of adjudicating the forfeiture in spite of not conducting proceedings in relation to the absent person, and therefore without observing the guarantee solutions provided for in those proceedings.

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<sup>41</sup> Nowicki 2009, 288 and the case-law indicated there.

<sup>42</sup> Ibid.

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