

CUSTOMS AND FISCAL CONTROL AND TAX CONTROL

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Abstract. In Polish tax law, in addition to tax control and inspection activities, there is also customs and fiscal control, which covers not only tax law like the first two procedures, but also, among others, customs law, organizing and conducting gambling games or counteracting money laundering. The competences in the scope of customs and fiscal control are much broader than tax control and it could successfully remain the only typical control procedure in the Polish tax system. At the same time, instead of tax control, the head of the tax office should have broader competences within the inspection activities procedure.

Keywords: taxes; National Revenue Administration; fiscal control; customs control.

INTRODUCTION

Polish tax law provides for several legal possibilities of verifying the correctness of declaring and paying taxes in Poland. One of the oldest institutions is the tax control currently regulated by the Tax Ordinance Act of 29 August 1997,¹ the purpose of which is to verify whether the controlled persons fulfill their obligations resulting from the provisions of tax law. The concept of tax law provisions has been defined in Article 3(2) T.O., which means, among others, the provisions of tax acts, as well as the provisions of executory regulations issued on the basis of these acts. This means a very broad understanding of the obligations that the controlled persons are obliged to comply with. In addition, the administrative court indicated that undertaking a tax control is aimed at preventing the initiation of unnecessary tax proceedings, in a situation where the obliged persons properly fulfil their obligations, and also serves to collect evidence that can be used in jurisdictional proceedings, in the event that such obligations are not respected.² Tax controls are conducted by first-instance tax authorities, which

¹ Act of 29 August 1997, the Tax Ordinance, Journal of Laws of 2023, item 2383 [hereinafter: T.O.].

² Judgment of the Supreme Administrative Court of 1 September 2023, ref. no. I FSK 1023/22, CBOSA.

means that, for example, local government authorities to the extent that they are first-instance tax authorities (or have the powers of tax authorities) are authorized to conduct tax controls within the scope of taxes and fees within their jurisdiction. For example, when it is necessary to verify the fulfillment of tax obligations, tax controls may be conducted not only in the scope of property tax, but also in the scope of the fee for municipal waste management [Firkowski 2018]. The National Revenue Administration Act of 16 November 2016 specifies that the performance of tax controls and inspection activities is the responsibility of the head of the tax office.³

Another control procedure with a wealth of powers is the customs and fiscal control regulated by the KAS Act, where pursuant to Article 33(1)(1), this procedure is one of the basic tasks of the head of the customs and fiscal office. In practice, however, it is largely a compilation of solutions typical for fiscal control and customs control. The name of this procedure refers to this. The concept of customs and fiscal control has not been legally defined, one of the main objectives of the control will be to verify the degree of compliance with tax law provisions by analyzing the reliability of the tax bases declared by the controlled entities and the correctness of their calculation and payment of taxes constituting state budget revenue [Bielecki 2018, 142]. Customs and fiscal control is aimed at detecting and combating irregularities on a large scale.⁴

The first problem related to the fact that in the Polish tax law system we have as many as three verification procedures in the scope of correctness of paying taxes is the potential competition of activities between the locally competent head of the tax office and the head of the customs and tax office. In the scope of taxes, before the KAS Act came into force, i.e. before 01.03.2017,⁵ we had in Poland as many as three bodies that could control the taxpayer, i.e. the head of the customs office⁶ (e.g. in the scope of excise tax) and the head of the tax office (including income taxes or goods and services tax), both in the tax control procedure. In addition, tax control in the scope of local taxes and fees may also be conducted by the borough leader, the city mayor or the city president. The director of the tax office⁷

³ See Article 28 of the National Revenue Administration Act of 16 November 2016 (Journal of Laws of 2023, item 615) [hereinafter: KAS Act].

⁴ See p. 25 of the justification for the draft act on the National Revenue Administration; <https://www.bing.com/ck/a?!&&p=62f582973db910fd8a1b766ea3f249d2ef48e4c3da699500c20a56f827e44000JmItdHM9MTczNjY0MDAwMA&ptn=3&ver=2&hsh=4&fclid=0deafeb9-5ab5-698f-1862-eac15b9d6887&psq=uzasadnienie+do+ustawy+o+KAS&u=a1aHR0cHM6Ly93d3cuc2x1emJhY3l3aWxuYS5pbmZvLnBsL2ltYWdlcy9zdG9yaWVzL2RvX3BvYnJhbmlhL3V6YXNhZEtBUzE3MDIucGRm&ntb=1> [accessed: 18.03.2025].

⁵ Act of 16 November 2016, the Provisions introducing the Act on the National Revenue Administration, Journal of Laws item 1948.

⁶ Act of 19 March 2004, the Customs Law, Journal of Laws No. 68, item 622 as amended.

⁷ Act of 28 September 1991 on fiscal control, Journal of Laws No. 100, item 442 as amended.

had much broader competences, because the basic objective of tax controls was to protect the interests and property rights of the State Treasury and to ensure the effectiveness of the performance of tax liabilities and other receivables constituting the income of the state budget. The doctrine rightly noted that the main objective, i.e. protection of the interests and property rights of the State Treasury, is a largely unspecified objective, and in practice, the tax control performs the vast majority of its tasks by conducting control proceedings in the scope of controlling the reliability of the declared tax bases and the correctness of calculating and paying taxes constituting the income of the state budget [Melezini and Zalewski 2015, 35]. In conclusion, it should be stated that before 1 March 2017, a taxpayer could be subject to control by as many as four different, independent control bodies.

In the light of the currently applicable regulations, at least in the area of state taxes, there are only two bodies of the National Revenue Administration authorized to carry out control activities, i.e. the head of the tax office and the head of the customs and tax office. Firstly, it is very good that these are only the KAS bodies that may report directly to the director of the tax administration chamber in a given province, and indirectly to the Head of the KAS. However, even this fact does not eliminate competitive activities in the field of tax law in the scope in which the head of the tax office may undertake tax control. To illustrate the situation, it should be pointed out that in Poland there are 400 tax offices, where the task of tax control must be performed in each of them.⁸ Such competition may appear already at the stage of analysis of materials necessary for undertaking control activities, because such preparation is necessary for their proper conduct. An appropriate tax analysis may be prepared simultaneously by both the head of the tax office competent for the taxpayer and the head of the customs and tax office, who engage employees and their time in these activities. Since both bodies are located in the structure of the National Revenue Administration, any duplication of control activities by them is secured by IT mechanisms.

2. CHARACTERISTICS OF TAX CONTROL

A tax control is always undertaken *ex officio*, and the head of the tax office undertakes it only in relation to taxpayers who have their registered office or place of residence within their territorial jurisdiction. This means that only the tax authority (fiscal control) makes decisions on undertaking

⁸ Regulation of the Minister of Development and Finance of 17 December 2021 on the territorial scope of activity and seats of directors of tax administration chambers, heads of tax offices and heads of customs and tax offices and the seat of the director of the national tax information, Journal of Laws of 2022, item 361.

control.⁹ The second limitation, apart from the territorial jurisdiction of the tax authority, is the aforementioned purpose of the control, i.e. checking only and exclusively whether the controlled party fulfils the obligations resulting from the provisions of tax law. The tax authority is obliged to notify the controlled party of the tax control, but the legislator has provided exceptions to this rule contained in the regulation of Article 282c T.O., which contains a closed list of cases when the controllers may immediately commence the control, surprising the taxpayer, without prior delivery of a notice [Mariański 2023]. The basic rights of the controller, pursuant to Article 286 T.O., include, among others: entry onto property and buildings, requiring the presentation of property subject to control and carrying out its inspection, requesting access to files, books and all types of documents related to the subject of the control, examining witnesses or consulting experts. As emphasized in court decisions, the scope of powers of the inspector listed in this provision, indicated for example in the regulation of Article 286 T.O. is not exhaustive.¹⁰

In addition, attention should be paid to the limitation of the duration of the tax control, which should be completed without undue delay, but the statutory limitations on the duration of the control are included in the Act of 6 March 2018 on entrepreneurs.¹¹ According to Article 55 of this Act, the duration of all controls at the entrepreneur in one calendar year cannot exceed in relation to: 1) micro-entrepreneurs – 12 business days (the time limit for controlling a micro-entrepreneur may not exceed 12 consecutive working days);¹² 2) small entrepreneurs – 18 working days; 3) medium-sized entrepreneurs – 24 working days; 4) other entrepreneurs – 48 working days.

It should also be noted that the above-mentioned time limitation applies not only to the tax control as such, but also to any other possible controls conducted by other bodies, inspections, etc. However, the case law to date has held that exceeding the control time cannot be *ex lege* identified with a breach of the control regulations that had a significant impact on the outcome of the case, and therefore in the administrative court proceedings the party must derive the effects of the breach in the form of a significant impact on the outcome of the case.¹³ Time limitations are not applied if, among other things, conducting the control is necessary to prevent a fiscal

⁹ Judgment of the Regional Administrative Court in Kraków of 5 November 2014, ref. no. I SA/Kr 1157/14, CBOSA.

¹⁰ Judgment of the Supreme Administrative Court of 10 March 2015, ref. no. I FSK 41/14, CBOSA.

¹¹ Act of 6 March 2018 on entrepreneurs, Journal of Laws of 2024, item 236 [hereinafter: Entrepreneurs Act].

¹² Judgment of the Supreme Administrative Court of 19 February 2020, ref. no. I FSK 2243/19, CBOSA.

¹³ Judgment of the Supreme Administrative Court of 21 July 2016, ref. no. II FSK 1953/14, CBOSA.

crime or fiscal misdemeanour and the control concerns the justification for making a refund of the goods and services tax before making this refund.

According to Article 47 of the aforementioned Entrepreneurs Act, controls are planned and conducted after prior analysis of the probability of violating the law in the course of conducting business activity. The analysis includes identification of the subjective and objective areas in which the risk of violating the regulations is the highest.

Another verification procedure, namely inspection activities, has much more limited possibilities. As uniformly emphasized by administrative case law, verification of invoices as part of inspection activities has a different nature compared to tax proceedings or controls. Inspection activities are, in principle, limited in nature. It should be noted that as part of inspection activities, the body does not have the right to conduct much evidence, e.g. to examine witnesses.¹⁴ The literature clearly indicates that the nature of inspection activities does not allow for conducting evidence proceedings in a broader scope - going beyond the indicated purposes [Marianiński 2012, 12].

2. CHARACTERISTICS OF CUSTOMS AND TAX CONTROL

The legislator has provided much broader possibilities for verifying the correctness of settlements in the scope of public law levies for customs and tax control. Undoubtedly, one of the most important features of this procedure is the performance of control throughout the territory of the Republic of Poland (Article 61 of the KAS Act). Although there is a customs and tax office in each province, it has the possibility to initiate a customs and tax control in relation to a taxpayer with its registered office or place of residence also outside that province. The above regulation is consistent with the concept of functioning of such offices, as units specialized in combating the largest tax frauds in our country. In the scope of production, movement and consumption of excise goods or organization and conduct of gambling games, customs and tax control may be performed as a permanent control consisting in performing control activities in a continuous manner.¹⁵

A very important feature of customs and tax control is the mandatory consideration of the risk of irregularities and the determination and assessment of the measures necessary to limit it. According to the legislator, risk is the determination of the probability and effects of a violation of the law, e.g. in the area of taxes or customs law. The higher the probability

¹⁴ Judgment of the Provincial Administrative Court in Białystok of February 15, 2023, ref. no. I SA/Bk 37/23, CBOSA.

¹⁵ See regulation of the Minister of Finance, Funds and Regional Policy of 12 August 2021 on customs and tax control of certain excise goods, Journal of Laws item 1636.

of irregularities in the controlled entity, the higher the level of risk, which can still be corrected by the amount of the potential obligation to pay. After all, we can be certain of irregularities in a given case, but the amount that can be determined or specified will not justify the initiation of customs and tax control, because it will be at odds with its primary objective and the basic principles of economics of conducting proceedings [Bielecki 2018, 331]. In such a case, it may turn out that the application of the inspection activities procedure by the head of the tax office will be sufficient.

The powers that the legislator has endowed customs and tax control with are much broader than those resulting from the Tax Ordinance, for example, within the framework of customs and tax control, the body is authorized to: 1) impose official seals on devices, premises, means of transport; 2) conduct an experiment or recreate the possibility of playing a slot machine or other device. Customs and tax officers have the independent power to conduct an experiment, where the legislator does not introduce any additional formal requirements in the scope of their competences to check the operation of gaming devices and conduct appropriate experiments on them;¹⁶ 3) search premises, rooms and items using technical devices and customs dogs.

In addition, functionaries carrying out customs and tax control pursuant to Article 64(2) of the KAS Act are authorized to: search goods, search persons, inspect postal items, stop and inspect ships, and check the type of fuel used by taking samples.

An undoubted advantage from the point of view of a state authority is the fact that, pursuant to Article 65 of the Entrepreneurs Act, all regulations concerning limitations of control activities, such as the duration of a control at an entrepreneur's premises, do not apply to customs and tax controls.

A very important tool that the head of the customs and tax office has at his disposal, primarily in the scope of obtaining information necessary in the customs and tax control procedure, are the powers contained in Chapter 5 of the KAS Act, i.e. special powers of the bodies of the National Revenue Administration and functionaries of the customs and tax service. The activities regulated in Articles 114-120 and 128 of the KAS Act are defined by the legislator as operational and reconnaissance activities, which are to serve the secret obtaining of information and the secret recording of traces and evidence. Secrecy obviously concerns the lack of possibility of informing the persons against whom they are performed. The principle of openness of proceedings does not apply here, and within the framework of these activities the competent body of the National Revenue Administration may, among others, conduct operational control, record the image of events in public

¹⁶ Judgment of the Provincial Administrative Court in Olsztyn of 20 August 2020, ref. no. II SA/OI 62/20, CBOS.

places or secretly acquire or dispose of or take over objects. The powers to conduct operational and reconnaissance activities granted by law to the head of the customs and tax office are among the most characteristic tools for the implementation of the statutory tasks of this body.

At present, this legal form of action is justified to the extent that the activities of these law enforcement bodies are contained in two planes of action. The first is related to their information activities on threats to security and detection, as a sphere of disclosing and prosecuting crime, and the second is related to the statutory task of collecting information about it in a secret manner [Dana 2021, 49-67]. At the same time, on the basis of Article 122(1), if the data and materials collected as part of operational and reconnaissance activities contain, among others, information of significance for customs and fiscal control or tax proceedings, they are transferred to the locally competent KAS body. Therefore, information obtained as part of operational and reconnaissance activities may be legally used also for the purposes of customs and fiscal control.

Another undoubted advantage of customs and tax control is the transformation of a completed customs and tax control into tax proceedings, resulting from Article 83(1) of the KAS Act, which the legislator did not provide for a completed tax control. As rightly emphasized in court decisions, the transformation of customs and tax control into tax proceedings does not mean that tax proceedings are reduced to issuing a decision only, because the authority is obliged to apply the procedural rules resulting from them, including those related to collecting evidence. Evidence collected during a customs and tax control may constitute the basis for factual findings.¹⁷

In addition to control considerations, it should be noted that the most serious cases within the scope of the Fiscal Penal Code¹⁸ have also been transferred by the legislator to be conducted by the head of the customs and tax office. The list of cases remaining within the competence of this body is included in Article 133 of the Fiscal Penal Code, which specifies the material competence of this financial body of preparatory proceedings [Wilk 2020]. Moreover, in accordance with the provisions of Article 33a of the KAS Act, the head of the customs and tax office performing a customs and tax control is, among others, authorized to conduct preparatory proceedings in cases of fiscal crimes and fiscal misdemeanours disclosed in connection with this control. The examined powers of the head of the customs and tax office also extend to mandate proceedings or explanatory activities in cases of misdemeanours [Maruchin 2019].

¹⁷ Judgment of the Supreme Administrative Court of 28 February 2020, ref. no. I FSK 19/20, CBOSA.

¹⁸ Act of 10 September 1999, the Fiscal Penal Code, Journal of Laws of 2024, item 628.

From the comparison of the two control procedures, the customs and tax control definitely has broader powers and seems to be a complete tool for verifying the correctness of the application of, among others, tax law. It has a very wide range of interests, the body can use operational and reconnaissance activities, supporting itself with advanced analytics. In addition, the lack of territorial restrictions and the solution for transforming a completed customs and tax control into a tax procedure significantly optimize the activities of this KAS body.

Period	01.01.2023 to 30.11.2023	01.01.2024 to 30.11.2024
Number of completed tax controls	11687	8712
Number of completed customs and tax controls	6581	6368

Table 1. Number of tax and customs and fiscal controls in 2023 and 2024 [Stawicki 2024].

From the above summary, the following conclusions can be drawn that while the level of customs and tax controls remains stable, the number of tax controls is falling drastically and one can argue with the author of the commentary on this situation, who presented the above data on the reasons for such a decline, as this control procedure is undoubtedly in a deep downward trend.

Moreover, in the face of the development of analytics not only at the central level but also in individual customs and tax offices and tools tightening the tax system such as KSeF¹⁹ or JPK,²⁰ the thesis can be put forward that one control procedure is sufficient for verification activities, i.e. a customs and tax control may be sufficient. For the proper performance of tax settlements verification by the head of the tax office, the control procedure could be sufficient, however, after supplementing it with additional powers, i.e. the possibility of conducting inspections, according to the regulations contained in the tax control regulations.

All cases that require strictly control activities should remain within the jurisdiction of the customs and tax office in order to initiate the customs and tax control procedure. Of course, a very important issue in such

¹⁹ The National e-Invoice System (KSeF) enables the issuance and sharing of structured invoices. In the initial period, structured invoices will function in economic transactions as one of the permitted forms of documenting transactions, alongside paper invoices and electronic invoices currently used in economic transactions. Unfortunately, the planned introduction of this system has been postponed until 2026.

²⁰ JPK was introduced by the Act of 10 September 2015 amending the Tax Ordinance Act (Journal of Laws item 1649). Initially, there was no obligation to regularly submit VAT registers; this obligation was introduced by the Act of 13 May 2016 (Journal of Laws item 846) and was gradually introduced from 1 July 2016. Preparing JPK is not possible manually and requires equipping taxpayers' accounting systems with functions that allow for the creation of such a file. In some cases, it is also necessary to modify the principles of bookkeeping and the method of documenting commercial transactions.

decisions will be the issue of personnel resources necessary to perform additional work by customs and tax offices. The solution to this problem will be the proper allocation of competent staff from tax offices to customs and tax offices in proportion to the amount of work that the latter body would take over. It must be remembered that after the statutory strengthening of control activities, the appropriate, competent staff resources must remain in the tax offices in order to maintain the tightness of the tax system.

As a *de lege ferenda* proposal, statutory changes may be considered, in order to delete from the KAS Act the task of tax control by the head of the tax office, then the only control activities that the KAS would conduct would be customs and tax control, which is within the competence of the head of the customs and tax office. At the same time, the legislator should extend the powers of the head of the tax office contained in Section V T.O. to conduct inspections on the same principles as those applicable to tax control.

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