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General Principles of Law and tax Procedure as a Source of Protection of the Taxpayer's Rights

Abstract: In the Polish tax law system, general principles of law and tax procedure play an extraordinary role in the taxpayer's rights protection structure. Their importance is difficult to overestimate in the context of frequent doubts related to the practical aspect of compliance with tax law provisions. This is because the principles constitute the axiological basis for the functioning of the law. Additionally, during the period of dynamic changes in regulations, the role of the principle of legal certainty or the principle of the citizens' trust in government becomes more important. This is because it is difficult to reconcile the principle of legal certainty with the situation when the legislator decides to terminate the interpretation without giving detailed grounds for doing so and referring only to the institution of tax avoidance. The practice involving suspending the limitation period by an authority in connection with instituting penal and fiscal proceedings, when it was instituted without grounds, is also unacceptable. Such attitude explicitly contradicts the principle of carrying out proceedings in a manner that creates trust in the authorities. Planned amendments aimed at organising the institution in question should be considered positive. At the same time, in order to ensure proper protection of the obligated party (including a taxpayer), it is highly desirable to formulate the principles that are not expressed in currently binding regulations, but which can otherwise be derived from the provisions of the Constitution of the Republic of Poland.

Keywords: general principles, taxpayer's rights, principle of legal certainty, principle of trust in government

1. Introduction

In the broadest meaning, principles of law are the principles of special importance for the particular system of law, that determine the law-making process and application of legal regulations. As the criteria for the assessment and self-assessment of actions of entities that are obliged to apply the principles or to which

the principles are addressed¹ they have an organising function. Their meaning in the tax law system is difficult to overestimate, because they reflect the nature of regulations in this particular field, emphasise the values protected by law, identify ideas that should not be breached when pursuing one's own goals. In essence they are the axiological and praxeological foundation of the field of law.² In order to balance the relationships between citizens and public authorities, assuming a subordinate role of public administration towards the society, as well as assuming the existence of a catalogue of recognised values, with respect to which a citizen is entitled to legal protection, the taxpayer should have certain rights or authorisations that would eliminate the excessive difference in actions of parties to a legal relationship or allow correcting defective or even oppressive actions of tax authorities.³ General principles of law and tax procedure, understood as binding recommendations, the implementation of which would result in certain axiological outcomes, without any doubts play an important role in this respect.

In the context of the role of general principles in the process of protection of the taxpayer's rights, it is worthwhile to note the practical aspect of the issue in question, i.e. certain situations, when the importance and application of the principles discussed may cause justified doubts. Discussing this topic requires presentation of the general principles of law and principles of tax procedure. After presenting the international background of the institutions discussed, an attempt is made to assess the practical functioning of the principle of legal certainty and the principle of trust in government against the background of planned amendments related to the no-harm principle arising from the application of an individual ruling. Then the practice involving tax authorities instituting penal and fiscal proceedings in order to avoid a liability becoming limited by lapse of time is presented.

2. Notion of General Principles of Law and Principles of Tax Procedure

When discussing the issue of impact of the functioning of general principles of law on the taxpayer's rights, it should be emphasised that it is possible to differentiate tax law principles and principles of tax procedure.⁴ General tax law principles are the principles pertaining not only to the procedure. In this respect, the doctrine refers to: the principle of statutory tax control, the principle of legalism, the principle of

1 B. Brzezinski, W. Nykiel, *Zasady ogólne prawa podatkowego*, (in:) *Prawo podatkowe. Teoria. Instytucje. Funkcjonowanie*, Toruń 2009, p. 136.

2 B. Brzeziński, *Zasady ogólne prawa podatkowego*, "Toruński Rocznik Podatkowy" 2015, no. 4.

3 B. Brzeziński, *Koncepcja praw podatnika i ich ochrony jako przedmiot badań naukowych*, "KPP" 2005, no. 1, p. 9-10.

4 See: B. Brzeziński, W. Nykiel, *Zasady ogólne prawa podatkowego*, "Przegląd Podatkowy" 2002, no. 3.

equality (non-discrimination), the principle of trust, the principle of immediate tax matter resolution, the principle of non-retroactivity, the principle of respect for international and EU law, the principles of pragmatism and proportionality, the principle of applying provisions repealed to events that took place during the period when these provisions were binding, the principle of resolving doubts in favour of the taxpayer, the principle of judicial protection of the taxpayer's rights,⁵ the principle of limited use of analogy, the principle of application of previously binding provisions with respect to cases instituted during the period when such provisions were binding, and the principle of permanency of the taxpayer's rights to benefit from tax reliefs and exemptions.⁶

The principles of tax procedure arise primarily from provisions of the Tax Ordinance.⁷ The doctrine emphasises that assigning the meaning of a general principle to a standard of conduct has major consequences.⁸ Hence, these are common principles for all procedure stages, and they include guidelines pertaining to the application of all tax procedure provisions.⁹ They are clarified by other provisions of the Tax Ordinance¹⁰ that supplement general principles with detailed normative content.¹¹ Additionally, general principles include interpretation guidelines for remaining provisions of the Tax Ordinance. Other provisions pertaining to tax procedure should be interpreted in accordance with directives arising from general principles. In this way, in addition to an undoubted normative aspect, the general principles of tax procedure serve a further function related to setting the direction of the interpretation of procedural provisions.

It is worthwhile to note that in the New Ordinance bill prepared by the Tax Law Codification Committee,¹² the principles of tax procedure are part of the catalogue of general tax law principles subject to the separate chapter 2 in section 1 of the bill.¹³ In addition to principles binding until now, some other principles have been introduced having great importance in the tax procedure. In the bill, a need for organising this

5 More information in: A. Mudrecki, *Rzetelny proces podatkowy*, Warszawa 2015.

6 See: B. Brzeziński, *Zasady ogólne ...*, *op. cit.*

7 See: judgement of the Supreme Administrative Court in Katowice of 11 September 2000, I SA/Ka 559/99, LEX no. 44729.

8 B. Adamiak, J. Borkowski, R. Mastalski, J. Zubrzycki, *Ordynacja podatkowa. Komentarz 2015*, Wrocław 2015, p. 605.

9 A. Gomułowicz, D. Mączyński, *Podatki i prawo podatkowe*, LEX 2016.

10 Act of 29 August 1997 – Tax Ordinance (consolidated text: Journal of Laws of 2018, item 800, as amended); hereinafter referred to as the “Tax Ordinance.”

11 See: judgement of the Supreme Administrative Court of 16 November 2006, II FSK 1419/05, Lex no. 263875.

12 Hereinafter referred to as KKOP.

13 The justification available on the website, at: <http://www.mf.gov.pl/ministerstwo-finansow/dzialalnosc/ciala-kolegialne/komisja-kodyfikacyjna-ogolnego-prawa-podatkowego/prace-komisji> (access: 2.12.2018).

area has been noticed. At the same time, in order to ensure proper protection of the obligated party (including a taxpayer), it has been considered proper to formulate the principles that are not expressed in currently binding regulations, but which can otherwise be derived from provisions of the Constitution of the Republic of Poland. New principles include *inter alia* the principle of cooperation between the taxpayer and tax authorities, the principle of conciliatory resolution of matters, requirement to balance the taxpayer's interest and public interest, the principle of pragmatism and the principle of proportionality.

3. International Background

Using a catalogue of tax law principles in general tax law provisions of particular countries is not a standard in European tax law. This is because there are legal systems lacking normative tax law principles directly included in tax ordinance or having normative tax law principles scattered across various procedural regulations (e.g. in Germany and Austria). In these instances, tax law principles can be derived from particular tax law provisions. However, at the same time, it is possible to notice general tax law structures, the typical aspect of which is that the legislator reflects therein the main principles in this field of law demonstrating features of legal norms (e.g. in Spain, the Czech Republic, Serbia, Bulgaria, Hungary). In these situations, tax law principles are disclosed directly in the legal act pertaining to general tax law.¹⁴

The "right to certainty" ("taxpayers must be able to be certain as to the tax consequences of their actions"¹⁵) is also identified in taxpayers' rights charters adopted in many countries and in non-binding documents of international organisations.¹⁶ Special attention should be paid to the OECD report entitled "Taxpayers' rights and obligations: a survey of the legal situation in OECD countries" approved by the OECD Council on 27 April 1990, and the addendum thereto of 2003, entitled "Taxpayers' Rights and Obligations – Practice Note".¹⁷ Taxpayers' rights described in these documents include the "right to certainty" stipulating *inter alia* that taxpayers should be able to anticipate the consequences of their ordinary personal and business affairs. Achieving this goal is often difficult because modern tax systems are complex and evolving.

14 See: D. Strzelec, O potrzebie badań prawno porównawczych w obszarze procedury podatkowej, "Przegląd Podatkowy" 2015, no. 8.

15 A. Mariański, Rozstrzygnięcie wątpliwości na korzyść podatnika. Zasada prawa podatkowego, Warszawa 2011, p. 30.

16 See: H. Filipczuk, Postulat pewności prawa w wykładni operatywnej prawa podatkowego, LEX 2013.

17 Available on the website, at: <http://www.oecd.org/dataoecd/24/52/17851176.pdf> (access: 2.12.2018).

The duty to apply administrative law (and thus tax law) in a manner ensuring legal certainty can also be noticed in the soft-law human rights protection system of the Council of Europe. In particular, the “principle of legal certainty” is listed among general principles in Recommendation CM/Rec (2007) 7 of the Committee of Ministers of 20 July 2007 – Right to good administration.

4. Principle of Legal Certainty vs. Amendments to Provisions on Individual Rulings

The Constitution is the main source of general principles applicable to the legal order as a whole. This is because Article 2 of the Constitution stipulates that the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. This rule is a source of a universal principle of particular importance for tax law – the principle of legal certainty. As indicated in the doctrine – legal certainty is a feature ensuring that the taxpayer, to whom a legal norm applies, is able to anticipate the consequences of both the taxpayer’s own and other entities’ actions,¹⁸ determined by the particular norm. Consequently, a central category for legal certainty is predictability achieved primarily by openness, specificity, clarity¹⁹ and stability of law (understood as “consistency, stability, continuity”²⁰ or “legal peace”²¹) with respect to law-making and application.²² The principle of legal certainty provides a basis for criticism of the practice involving excessively dynamic amendments to tax acts.

Individual tax law rulings are a tool ensuring significant extension of the scope of protection of rights and economic freedoms of the taxpayer. They are one of the most important safeguards for the protection of legal rights of taxpayers. Every year, tax authorities issue around thirty thousand interpretations, half of which are favourable to taxpayers. Consequently, attempts to change the very essence of interpretations, i.e. to deprive them of their protective function, are all the more surprising.

At present, in accordance with provisions of the Tax Ordinance, two types of protection are available – narrow and wide protection. In the case of narrow protection, in Article 14k of the Tax Ordinance, the legislator stipulates that proceedings in cases involving fiscal offences or fiscal petty offences shall not be initiated and proceedings initiated in such cases shall be discontinued and no default

18 H. Filipczyk, *Postulat pewności prawa ...*, *op. cit.*

19 See: S. Wronkowska, *Postulat jasności prawa i niektóre metody jego realizacji*, “Państwo i Prawo” 1976, p. 10.

20 Z. Tobor, *Teoretyczne problemy legalności*, Katowice 1998, p. 68.

21 T. Spyra, *Granice wykładni prawa. Znaczenie językowe tekstu prawnego jako granica wykładni*, Warszawa 2006, p. 195.

22 H. Filipczyk, *Postulat pewności prawa...*, *op. cit.*

interest shall accrue. At the same time, Article 14m of the Tax Ordinance introduces exemption from the duty to pay tax to the extent resulting from the event being the subject matter of ruling if:

- the obligation was not performed properly due to application of a ruling which was changed or which was not taken into account in resolution of a tax case; and
- the tax effects connected with the event to which the factual state of affairs being the subject matter to which the ruling corresponds occurred after publication of the public ruling or after service of the individual ruling.

The aforementioned “no-harm principle” is in fact the essence of the whole individual ruling institution. However, a major change is planned in this respect.

In accordance with the bill on amendments to the Act on personal income tax, Act on corporate income tax, Act – Tax Ordinance and some other acts,²³ individual rulings issued with respect to tax law provisions specified in Article 14b § 2a point 2 letters a-d²⁴ of the act being amended, in wording based on this act, shall expire by virtue of law as of the day on which this provision comes into force. The day of expiration of the aforementioned individual rulings shall be the day on which their expiration was declared, within the meaning of the provisions of Articles 14k-14n of the Act.²⁵ Pursuant to the new wording of Article 119a of the Tax Ordinance, to which the aforementioned provision applies, an action shall not result in achieving a tax benefit if achieving this benefit, in the particular circumstances contrary to the object and goal of the tax act or a provision thereof, was the main objective or one of the main objectives of the action, and the mode of action was artificial (tax avoidance). It is worthwhile to note that the practice of authorities shows that the authority refers to the law-avoidance clause in the context of the transaction, i.e. restructuring, contribution in kind, employee incentive programmes, trademark transfer²⁶.

The analysis of the aforementioned provision does not answer the key question of – where the taxpayer can obtain the information whether the interpretation still applies and provides protection or whether the interpretation has expired. This is

23 Act of 23 October 2018 on amendments to the Act on personal income tax, Act on corporate income tax, Act – Tax Ordinance and some other acts (Journal of Laws of 2018, *item* 2193).

24 Aimed at combating tax avoidance, referring to the law abuse, carrying out actual business activities or taking up activities in an artificial way and without economic justification, such as: a) provisions included in chapter 1 section IIIA [Combating tax avoidance]; b) provisions included in Article 4a point 29, Article 12 sections 13 and 14, Article 22c, Article 24a section 3 point 3 letter b last bullet point, Article 24a sections 16-18a of the Act of 15 February 1992 on corporate income tax, and Article 24 sections 19 and 20, Article 30f section 3 point 3 letter b last bullet point, Article 30f sections 18-20a of the Act of 26 July 1991 on personal income tax.

25 Article 29 of the amending act.

26 P. Wojtasik, Skarbówka nie zgodzi się na unikanie podatku, *Rzeczpospolita* daily 2018, of 5 September 2018.

because there is no option to submit an inquiry, issue a decision or even send an e-mail with information. Therefore, most likely the taxpayer will find out that there is no additional protection at the time of inspection or proceedings. At this point, every taxpayer faces the need for in-depth analysis whether the tax saving practice followed until now, approved in the form of the interpretation by the authorities, is not tax avoidance. In this way, the taxpayer loses one of the main pillars of its activities – stability.

When the institution introduced by legal regulations causes such doubts, it is difficult to notice the implementation of the principle of legal certainty. This is because in this situation a certain practice had been approved by the tax authority and then, without changing the material provisions on the basis of which it was issued, this practice is considered invalid.

The provisions of Article 121 of the Tax Ordinance, introducing the principle that proceedings should be conducted in a way that inspires trust in the tax authorities, are considered a non-textual reference to the ethical order, and in particular to the value of legal certainty.²⁷ Consequently, how should the situation be assessed – firstly taking into account uncertainty as to whether the interpretation still functions in the legal order or has already expired, and secondly how should this be verified?

Breach of the fundamental principle of the protection of acquired rights should also be taken into account. Moreover, it is difficult to positively assess changes in the context of principles arising from so-called Constitution for Business²⁸ – e.g. the principle that an entrepreneur may undertake any actions except those forbidden by legal regulations, presumption of the entrepreneur's integrity, the principle of following the principle of trust, while assuming that the entrepreneur acts lawfully and honestly, and while respecting good customs, the principle of resolution of any doubts in favour of the taxpayer, the principle of trust development, the principle of impartiality, and the principle of equal treatment.

5. Instituting Penal and Fiscal Proceedings in Order to Avoid a Tax Liability Becoming Limited by Lapse of Time in the Context of the Principle of Carrying out the Proceedings in a Manner Creating Trust

The constitutional goal of the introduction of the institution involving a tax liability becoming limited by lapse of time is determining the impact of the time factor on existing financial obligations of entities.²⁹ In this sense, the institution

27 H. Filipczuk, *Postulat pewności...*, *op. cit.*

28 Act of 6 March 2018 – Entrepreneurs' Law (consolidated text: Journal of Laws of 2018, item 646, as amended).

29 A. Krzywoń, *Przedawnienie zobowiązania podatkowego – analiza konstytucyjna*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2013, no. 2, p. 21-33.

involving a tax limitation becoming limited by lapse of time supports significant values of the Constitution, related primarily to the principle of legal security and the principle of trading certainty.³⁰ Consequently, lapse of time – in accordance with the postulate of legal certainty and stabilisation of social relationship – can be a sufficient argument to exclude the possibility of effective enforcement of a claim.³¹ Taking into account the role of the limitation period in exercising the taxpayer's rights, it should be concluded that any grounds pertaining to potential suspension or stoppage of the period of limitation must be assessed very carefully.

Statutory grounds for suspension of the limitation period include suspension related to instituting proceedings in cases involving fiscal offences or fiscal petty offences. In accordance with Article 70 § 6 point 1 of the Tax Ordinance, the limitation period for a tax liability shall not start and one that has started should be suspended as of the day of instituting proceedings in cases involving fiscal offences or fiscal petty offences, of which the taxpayer was notified, if the suspected fiscal offence or fiscal petty offence is related to non-settlement of this liability.

Consequently, in accordance with the aforementioned provision, the legislator has not implemented the condition that the act subject to penal and fiscal proceedings has to be the same, taking into account the entity and subject matter, with the act subject to the tax proceedings.³² The provision refers only to the relationship without explaining the type of relationship.

In accordance with the position presented in judicial decisions: "If in the legal norm analysed the legislator failed to clarify the relationship, this means that instituting any proceedings pertaining to such tax payer's action (omission) that impacted the tax liability becoming limited by lapse of time can be considered as meeting the grounds for suspension."³³ In this context, it should be noted that proving that the particular offences / petty offences influenced the amount of tax is not necessary to suspend the limitation period. This is because it is sufficient to prove that the tax liability subject to limitation resulted from a prohibited act, defined in the Penal and Tax Code.

30 *Ibidem.*

31 See: judgement of the Constitutional Tribunal of 1 September 2006, SK 14/2005, LexPolonica no. 415890, OTK ZU-A-2006, no. 8, item 97. See also: comparison of the effects of the passage of time against the background of civil law and tax law made by A. Izdebska, Uływ czasu jako przyczyna sprawcza zakończenia stosunku prawnopodatkowego, "Acta Universitatis Wratislaviensis, Przegląd Prawa i Administracji", v. XLVIII, p. 145-156.

32 See: T. Dudek, Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego ze względu na tok postępowania karnoskarbowego – artykuł dyskusyjny, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2014, no. 1, p. 58.

33 See: judgement of the Supreme Administrative Court of 28 September 2011, II FSK 171/11, LEX no. 1068680.

It is worthwhile to emphasise that in accordance with the Constitution the period of limitation of a tax liability will be suspended only if the authority notifies the taxpayer of the suspension before the expiry of the limitation period, i.e. when the taxpayer becomes aware that its liability would not be limited upon the expiry of the statutory period. Notification of the suspension of the limitation period is not notification of instituting penal and fiscal proceedings. Linking the effect in form of the extension of the tax liability term with the conviction that the taxpayer is able to link the cause and effect is a departure from the constitutional rule of law and leads to the loss of a sense of legal certainty.³⁴

In accordance with Article 70c of the Tax Ordinance in force since 2013, the tax authority competent for the tax liability, non-settlement of which is related to a suspected fiscal offence or fiscal petty offence, shall notify the taxpayer that the tax liability limitation period has not started or has been suspended in the case referred to in Article 70 § 6 point 1 upon the expiry of the limitation period referred to in Article 70 § 1 at the latest and of the start or continuation of the limitation period after the expiry of the suspension period. In the established legal status, in addition to the necessary notification (information) about the proceedings instituted with respect to the fiscal offence (petty offence), the legislator has also introduced a direct notification to the taxpayer about legal consequences of this event, involving the suspension of the limitation period. At this point, it should be emphasised that only notifying the taxpayer in an accurate and certain way of the suspension of the limitation period should be considered the proper implementation of the provisions of Article 70c of the Tax Ordinance. It is impossible to approve the situation, where the taxpayer is expected to show knowledge of the law to such an extent that the taxpayer is able to link the notification of instituting the penal and fiscal proceedings with the extension of the term of the taxpayer's tax liability.

As emphasised in the resolution of the seven judges of the Supreme Administrative Court, a notification to the taxpayer made based on Article 70c of the Tax Ordinance that the limitation period of the taxpayer's liability for the specified settlement period was suspended on the basis of Article 70 § 6 point 1, is sufficient to conclude that the limitation period for such a liability was suspended based on Article 70 § 6 point 1 of the aforementioned Act.³⁵

In accordance with binding provisions, in order to suspend the limitation period of a tax liability, it is sufficient to institute the penal and fiscal proceedings and notify the taxpayer thereof. The legislator does not mention that the liability

34 E. Bobrus-Nowińska, Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego na skutek wszczęcia postępowania karnoskarbowego, "Procedury Administracyjne i Podatkowe" 2018, no. 3.

35 Resolution of the 7 judges of the Supreme Administrative Court of 18 June 2018, I FPS 1/18, Lex 2503900.

period is extended only if the proceedings are justified, and does not indicate the consequences of discontinuing the penal and fiscal proceedings after a few months of the suspension of the limitation period due to lack of grounds. However, the effect is achieved – the authority gains time to resolve the case. As the statistics³⁶ show – 72% of penal and fiscal proceedings instituted in the last year of the limitation period are instituted in the last quarter and even on last day, e.g. on 31 December. About 39% of proceedings instituted in such a way end with bringing an indictment to the court.³⁷

The General Tax Law Codification Committee plans to make certain amendments to the Tax Ordinance in the aspect in question.³⁸ As emphasised in the justification to the New Ordinance, elimination of the unrelated ground resulting currently in the suspension of the tax liability limitation period as a result of instituting penal and fiscal proceedings is an important element of the concept of limitation by lapse of time presented in the bill.³⁹

6. Conclusions

The assessment of the functioning of principles of law and tax procedure in practice leads to the following conclusions. Firstly, the role of general principles in tax law is of the utmost importance. This is because in instances where the provision is imperfect and causes doubts, the principles indicate the direction of interpretation of the provisions and, as emphasized in the doctrine, they constitute procedural guarantees in a condensed form.⁴⁰ Secondly, in practice it is possible to find examples when ideas resulting from the principles are not fully implemented. As indicated above, it is impossible to reconcile the situation where the legislator decides to terminate the interpretation without providing detailed information on interpretations terminated, with the principle of legal certainty and the principle of trust in government. Equally, it is impossible to accept the situation where the authorities use institutions established in legal regulations but without grounds for doing so and only in order to avoid negative consequences for the authorities, frequently resulting from their own inactivity. The examples quoted refer to situations, where identifying the provision of substantive law which was violated is

36 See: J. Waško, Wszczywanie postępowań karnych skarbowych w trakcie postępowań kontrolnych – analiza praktyki wybranych urzędów kontroli skarbowej, “Przegląd Podatkowy” 2017, no. 2, p. 44-49. The author analysed statistical data of four fiscal control offices in the years 2008-2014.

37 *Ibidem*.

38 See: L. Etel, M. Popławski, Kierunki reformy przedawnienia w prawie podatkowym, “Przegląd Podatkowy” 2015, no. 11, p. 11.

39 Here it is worthwhile to emphasise that the Committee’s postulate is not an isolated one – see: H. Dzwonkowski, Ordynacja podatkowa. Komentarz, Legalis 2016.

40 D. Strzelec, Gwarancje procesowe wynikające z zasady czynnego udziału strony w postępowaniu. Komentarz praktyczny, LEX.

impossible, but the aforementioned attitude poses a threat to the citizen's sense of security, sense of legal certainty, sense of trust in the state, and therefore the basic values arising from general principles. At the same time, potential amendments to acts in this respect, aimed at strengthening the protection of taxpayers' rights and rights guaranteed by the Constitution, should be considered positive.

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