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STATUS OF PUBLIC PROSECUTOR IN CASES INVOLVING TAX OFFENCES

Article 113(1) of the Act of 10 September 1999 — Penal Fiscal Code² (hereinafter: k.k.s.) introduces the principle of an appropriate application of regulations of the Act of 6 June 1997 — Code of Criminal Procedure³ (hereinafter: k.p.k.) in proceedings involving tax offences if the provisions of the penal Penal Fiscal Code do not provide for specific exceptions (subsidiarity principle). These exceptions are described in the provisions up to Article 177 of k.k.s. Proper application of the provisions of the Code of Criminal Procedure means that proceedings are conducted on the basis of the provisions of criminal procedure, taking into account the changes resulting from the provisions of the second part (Title II) of the Penal Fiscal Code⁴. This means that in some cases, one concept may be substituted for another, or part of the provision may be changed due to differences in the Penal Fiscal Code. As a result, it is always necessary to analyse individually what form of ‘appropriate’ application is reflected in a given provision⁵.

Undoubtedly, one of the most interesting modifications relevant to criminal procedure regulations is the issue of obtaining the status of a public prosecutor and some of their powers during the trial. It should be stressed that the Penal Fiscal Code contains a number of provisions defining the legal status of a public prosecutor, but at the same time, some of the provisions of the Code of Criminal Procedure, by means of Article

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² Unified text, DzU, 2020, item 19; hereinafter: k.k.s.

³ Unified text, DzU, 2018, item 1987 as amended; hereinafter: k.p.k.

⁴ Siwik Z, “Odpowiednie” stosowanie przepisów kodeksu karnego w prawie karnym skarbowym (studium na tle systemu środków penalnych). *Przegląd Prawa i Administracji* 1987, No. XXIII, pp. 55 ff; Świetlicka M, “Odpowiednie” stosowanie kodeksu postępowania karnego w sprawach o przestępstwa skarbowe i wykroczenia skarbowe. *Prokuratura i Prawo*, 2006, No. 10, pp. 69 ff.

⁵ Łabuda G, Razowski T, Głosa do postanowienia Sądu Apelacyjnego we Wrocławiu z dnia 16 maja 2002 r., II AKo 245/02. *Prokuratura i Prawo*, 2003, No. 3, pp. 101 ff.

113(1) of k.k.s. are applicable to these proceedings, shaping the procedural position of this party to a case.

In addition to the important cognitive aspects relating to the status of a public prosecutor, the purpose of these considerations is to identify the group of entities that can fulfil this role. A regulation obliging the financial investigative authority or its representative to participate in the main and appeal hearings if that authority has brought indictment for a tax offence should also be evaluated. The question which the author seeks to answer is: Is it right that the system of two public prosecutors working side-by-side, *i.e.* a prosecutor and a financial investigative authority acting as a public prosecutor, is applicable to the Penal Fiscal Code? Undertaken in this article, the analysis of provisions relating to this exceptional legal solution will make it possible to assess the status of these parties and to clarify their role in court proceedings.

In criminal proceedings, the status of a public prosecutor in a court of law is defined in Article 45(1) of k.p.k., according to which, the prosecuting attorney plays the role of a public prosecutor in all courts of law. This provision expresses the principle of primacy of the prosecuting attorney as a public prosecutor. A party to the proceedings is any participant who acts on their own behalf, and who has a particular legal interest in a specific decision on the subject matter of the trial⁶. In the case of a public prosecutor, the concept of a party to the proceedings should be clarified by stating that it is a state authority which, on its own behalf but in the public interest, brings and substantiates an accusation of a tax offence, regardless of how serious it is. In addition, the doctrine recognises the public prosecutor as an 'active party', *i.e.* a party who demands that the issue of legal liability be resolved⁷.

According to Article 2 of the Act of 28 January 2016 — Law on the Prosecution Service⁸, the prosecuting attorney brings cases against defendants in court of law and upholds the rule of law. The duties set out in Article 2 shall be performed by the prosecuting attorney, *inter alia*, by exercising the function of a public prosecutor in courts. According to Article 64(1) of the Law on the Prosecution Service, a prosecuting attorney shall perform the functions of a public prosecutor in all courts. The basic responsibilities of a public prosecutor in court proceedings, which can be inferred from this provision, are preparing and bringing charges against offenders and substantiating them in court⁹. Another state authority may become a public prosecutor by virtue of specific provisions of an act defining their

⁶ Grzegorzczuk T, Tylman J, *Polskie postępowanie karne*. Warsaw, 2005, p. 509.

⁷ Waltoś S, Hofmański P, *Proces karny. Zarys systemu*. Warsaw, 2016, p. 180; Sawicki J, Skowronek G, *Prawo karne skarbowe. Zagadnienia materialnoprawne, procesowe i wykonawcze*. Warsaw, 2017, p. 322.

⁸ Ustawa z 28 stycznia 2016 r. — Prawo o prokuraturze (Unified text, DzU, 2019, item 740; hereinafter: law on the prosecution service).

⁹ Mistygacz M, *Usytuowanie i strój urzędowy prokuratora w postępowaniu sądowym*. *Prokuratura i Prawo*, 2014, No. 10, pp. 63 ff.

scope of activity¹⁰. Thus, non-prosecution bodies for pre-trial proceedings may file a bill of indictment, but only in cases transferred to their jurisdiction under Article 325d of k.p.k.¹¹ in connection with Article 331(2) of k.p.k. or specific acts¹².

In penal fiscal cases, Article 120(1) of k.k.s. defines a circle of parties to the proceedings regarding fiscal crimes, while § 2 of that article refers to parties to the proceedings concerning fiscal misdemeanours. In cases involving both fiscal crimes and misdemeanours, a public prosecutor acts as a party to the proceedings.

Article 121(1) of k.k.s. formulates a general rule that, apart from a prosecuting attorney, the role of a public prosecutor in court is played by the body that brings and substantiates an indictment. It is worth noting that the said Article properly corresponds to the definition of the analysed party as an active party. It signals that a prosecuting attorney is a very important, but not the only body entitled to act as a public prosecutor in fiscal criminal cases. At the same time, the provision does not specify when and which body may bring and substantiate an indictment. It is only the analysis of subsequent paragraphs of this regulation as well as subsequent articles that settles this issue more precisely.

Article 121(2) and (3) and Articles 155 and 157 of k.k.s. are complementary to Article 121(1) of k.k.s., which makes it possible to determine the bodies authorised to bring and substantiate a charge. According to Article 155(4) of k.k.s. if the financial investigative authorities conduct an investigation, they shall prepare a bill of indictment within 14 days, submit it to a competent court and substantiate it in that court. Under Article 53(37)(1–3) of k.k.s., the head of the tax office, the head of the revenue and customs office, and the head of the National Revenue Administration are financial investigative bodies, thus being competent to independently file and substantiate a bill of indictment in the cases referred to in Article 155 (4) of k.k.s., *i.e.* fiscal crimes, the investigation of which has not been supervised by a prosecuting attorney, and fiscal misdemeanours. These circumstances are clarified by Article 121(2) of k.k.s. in connection with

¹⁰ Code of Criminal Procedure, Article 45(2).

¹¹ Rozporządzenie ministra sprawiedliwości z 22 września 2015 r. w sprawie organów uprawnionych obok Policji do prowadzenia dochodzeń oraz organów uprawnionych do wnoszenia i popierania oskarżenia przed sądem pierwszej instancji w sprawach, w których prowadzono dochodzenie, jak również zakresu spraw zleconych tym organom (Unified text, DzU, 2018, item 522).

¹² Authorities which, according to specific acts, are entitled to file and substantiate a bill of indictment in a court of law are: forest rangers — according to ustawa z 28 września 1991 o lasach (Unified text, DzU, 2018, item 2129 as amended), members of the State Hunting Guard — according to ustawa z 13 października 1995 — Prawo łowieckie (Unified text, DzU, 2018, item 2033), the State Agency for the Prevention of Alcohol-related Problems and local government authorities — according to ustawa z 26 października 1982 o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi (Unified text, DzU, 2018, item 2137 as amended).

Article 133(1) of k.k.s., which defines the right of the financial investigative authority to draw up and file a bill of indictment, and to substantiate it in court. It also allows the authority to act in the course of the entire proceedings, not excluding activities after the judgements in fiscal offence cases become final and binding.

If a financial investigative authority has conducted an investigation¹³ into a fiscal crime which has been supervised by a prosecutor¹⁴ and there are conditions to bring an indictment with a motion for conviction without a trial¹⁵, the financial investigative authority prepares only the indictment which is sent together with the case files to the prosecutor to be approved. If the prosecutor approves the bill of indictment, he/ she files it to court acting as a public prosecutor¹⁶. Although in the latter case the indictment is filed by the prosecutor being at the same time a public prosecutor in court, the financial investigative authority who has conducted the pre-trial proceedings in the case also enjoy the rights of a public prosecutor. This results from Article 155(2) of k.k.s., according to which a prosecutor approves and brings the indictment, at the same time pointing out the financial investigative institution which has conducted the pre-trial proceedings and which enjoys the rights and powers of a public prosecutor. Moreover, in fiscal cases in which the bill of indictment has been filed by a prosecutor, a financial investigative authority may play the role of a public prosecutor along with the prosecuting attorney¹⁷, including during an appeal procedure¹⁸. If the bill has been supplemented with a motion for conviction without a trial, a financial investigative authority has the right to attend all the sittings described in Article 341(1), Article 343(5), and Article 354(2) of k.p.k., and the hearings if the case has been qualified for trial¹⁹.

In the aforementioned cases, there is a specific coexistence of a prosecutor and a financial investigative authority²⁰, which is a break from the general rule laid down in Article 121(1) of k.k.s., which gives a public prosecutor the right to bring and substantiate an indictment in a court.

Pursuant to Article 121(2) of k.k.s., in relation to Article 134(1)(1) and (2) of k.k.s., two other non-financial law enforcement agencies — the

¹³ K.k.s., Article 151a(1).

¹⁴ *Ibid.*, Article 151c(2).

¹⁵ *Ibid.*, Article 155(3).

¹⁶ *Ibid.*, Article 155(1).

¹⁷ *Ibid.*, Article 157(2).

¹⁸ *Ibid.*, Article 165.

¹⁹ *Ibid.*, Article 155(3).

²⁰ Świecki D, Cofnięcie aktu oskarżenia przez oskarżyciela publicznego w postępowaniu karnym skarbowym, [in:] Grzegorz T, Olszewski R (Eds), *Verba volant scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Konferencja naukowa w rocznicę śmierci Profesor Moniki Zbrojewskiej. Łódź, 8 grudnia 2016 r. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*. Warsaw, 2017, pp. 468–469; Kardas P, Łabuda G, Razowski T, *Kodeks karny skarbowy. Komentarz*. Warsaw, 2017, pp. 1094–1095.

Border Guard and the Police — are authorised in fiscal misdemeanour cases to draw up and file bills of indictment and to substantiate them in court, as well as to represent the government in court, including activities after the judgement becomes final. However, in terms of fiscal crime regulations, only a prosecutor is competent to file a bill of indictment when preparatory proceedings have been conducted by a non-financial investigative authority²¹. The Military Police are not authorised to bring and substantiate bills of indictment, since according to Article 121(3) of k.k.s., the only prosecutor for military cases can be a public prosecutor in fiscal crime and misdemeanour cases before a military garrison court or in fiscal crime cases before a military district court²².

The analysis of the legislation clearly shows that the Penal Fiscal Code gives the prosecutor a special role and competence when they act as a public prosecutor in comparison with other public prosecutors. The provisions of the Code state that, 'In addition to the prosecuting attorney, the public prosecutor in court is the authority that brings and supports the act of indictment'²³, therefore, it establishes the general principle that the prosecuting attorney is a public prosecutor in court in fiscal crime and fiscal misdemeanour cases, and this role does not depend on him/ her having brought and substantiated the indictment²⁴. Moreover, pursuant to Article 122(3) of k.k.s., a prosecutor may take over any case, and if he/ she does, the activities assigned to him/ her in accordance with the Code of Criminal Procedure may be performed only by the prosecutor (who, alternatively, may order the whole case, a part of it, or a specific activity to be performed by another authority), and thus the provisions of Article 122(1) and (2) of k.k.s. do not apply. These provisions assign certain powers, which in criminal proceedings are given to the prosecutor or the Attorney General, to the financial law enforcement agencies, or to institutions superior to them.

Prosecutor may take over a case by way of their office or at the request of the financial investigative authority. Taking over a case is one of the forms of supervision over investigation, but it also results in the prosecutor having sufficient evidence, and bringing and substantiating the indictment before the court²⁵.

Such a strong position of the prosecutor also results from the fact that the financial investigative authority is obliged to inform the prosecutor about the activities undertaken. As a result, the prosecutor is immediately notified of the fact that the financial investigative authority has filed an indictment for a fiscal crime by being sent a copy of this indictment. In

²¹ Article 331(1) of k.p.k. in connection with Article 113(1) k.k.s.

²² Skwarczyński H, Uprawnienia Żandarmerii Wojskowej w postępowaniu karnym skarbowym. *Wojskowy Przegląd Prawniczy*, 2001, No. 3–4, pp. 33 ff.

²³ K.k.s., Article 121(1).

²⁴ Gostyński Z, Komentarz do kodeksu karnego skarbowego. Warsaw, 2000, p. 62.

²⁵ Skwarczyński H, Meandry interpretacyjne art. 122 k.k.s. *Wojskowy Przegląd Prawniczy*, 2004, No. 2, p. 67.

the case of a financial misdemeanour, the financial investigative authority notifies the prosecutor of a bill of indictment being filed only if the prosecutor has previously assumed supervision over the investigation in this case²⁶. In these two cases, however, the financial investigative authority becomes an independent public prosecutor. This is a special situation, as some non-financial law enforcement agencies (Border Guard and Police) can only become independent public prosecutors in a fiscal crime case if they have drawn up and filed the bill of indictment and substantiated it in court²⁷. It should be emphasised that the Internal Security Agency, Central Anti-Corruption Bureau and Military Police do not have the competence to bring and substantiate an indictment by themselves²⁸.

The fact that these authorities become public prosecutors may be linked with the principle of the identity of procedural powers. As a result, the financial and non-financial investigative authority acting as a public prosecutor has such powers and duties as those that the law attributes to the prosecutor as a party to the proceedings, *i.e.* those for which the Code of Criminal Procedure explicitly uses the terms 'prosecutor' and 'party'. For example, the provision of Article 396a(1) of k.p.k. in relation to Article 113(1) of k.k.s., introduces the possibility of summoning a public prosecutor to present evidence before the court, if, during the main hearing, significant deficiencies of the preparatory proceedings are revealed, and the overcoming of these deficiencies by the court would not make it possible to pass a just sentence within a reasonable time, and the court cannot remedy these deficiencies by applying Article 396 of k.p.k. in relation to Article 113(1) of k.k.s. (which provides for a derogation from the principle of directness, as it allows the evidence to be heard by a judge appointed from the bench or by another court). Since Article 396a(1) of k.p.k. defines the addressee broadly using the term 'public prosecutor', and not only the term 'prosecutor', it means that in the case of an indictment brought by a financial or non-financial investigative authority, the court's request to present evidence should be addressed to those public prosecutors. However, the financial investigative authority, when acting as a public prosecutor before a court, also has the powers and obligations of a prosecutor, but only to the extent described in Article 122(1)(1) of k.k.s.²⁹. There is no such regulation for a non-financial investigative authority. Therefore, the above considerations confirm the key role of the prosecutor with a strong position of the financial investigative authority. Moreover, the regulations adopted by the Penal Fiscal Code allow the primacy of financial law enforcement authorities over non-financial ones.

²⁶ Article 155(5) of k.k.s.

²⁷ Skwarczyński H, Uprawnienia Straży Granicznej w postępowaniu o przestępstwa skarbowe i wykroczenia skarbowe. *Wojskowy Przegląd Prawniczy*, 2003, No. 3, pp. 120 ff; wyrok SN z 7 grudnia 2017 (Supreme Court decision), sygn. IV KK 433/17, LEX No. 2407833.

²⁸ Świetlicka M, Udział prokuratora w postępowaniu karnym skarbowym. *Prokuratura i Prawo*, 2007, No. 5, p. 143.

²⁹ Grzegorzczak T, Kodeks karny skarbowy. Komentarz. Warsaw, 2009, p. 512.

The obligation for the financial investigative authority to participate in the main hearing if it has filed the bill of indictment for a fiscal crime, which was introduced in the first sentence of Article 157(1) of k.k.s., also requires clarification. The second sentence of the abovementioned provision, on the other hand, indicates that if the indictment concerns a fiscal misdemeanour, the obligation to participate in the main hearing may be relaxed if the president of the court or the bench in a given case orders so. According to Article 165 of k.k.s., the participation of the financial investigative authority as a public prosecutor in an appeal hearing shall be defined by Article 157 of k.k.s.

It should be stated, therefore, that in the situation described in the first sentence of Article 157(1) of k.k.s. the lack of appearance of a financial investigative authority hinders the hearing (a similar situation occurs in the appeal hearing according to Article 165 of k.k.s. in relation to Article 157(1) of k.k.s.). The failure to appear by this particular body requires a break in the trial and the setting of another date for the trial to be resumed. At the same time, this provision constitutes a break from the rule specified in Article 46(2) of k.p.k., according to which, if the preparatory proceedings have had the form of an investigation, the failure of the public prosecutor to appear at the hearing does not stop its proceedings. However, this break applies only to the situation when the indictment has been filed by a financial investigative authority. If the bill of indictment has been filed by a prosecutor or a non-financial investigative authority, Article 46 of k.p.k. shall apply in relation to Article 113(1) of k.k.s.

The obligatory participation of the financial investigative authority in the main hearing expressed in the first sentence of Article 157(1) of k.k.s. should be explained by the need for a person with specialist knowledge and experience in financial matters to participate in the hearing, which obviously impacts the effectiveness of conducting tax crimes cases³⁰, as the court proceedings involve inquiring into issues which are strictly concerned with activities of financial authorities, *i.e.* tax, customs, foreign exchange, and gambling issues³¹. The above is also related to the fact that financial investigative authorities are an element of the National Revenue Administration structure. According to Article 11(1)(2, 5 and 6) of the act of 16 November 2016 on National Revenue Administration³², the bodies of the National Revenue Administration include: the head of the National Revenue Administration, the head of a tax office, and the head of a revenue and customs office. Following the act of 29 August 1997 – Tax Ordinance³³, the head of a tax office, the head of a revenue and customs office and the head of the National Revenue Administration are

³⁰ Skowronek A, Skowronek G, Pierwotne i wtórne aspekty przemytu celnego. Część 1, *Gazeta Sądowa 2004*, No. 3, pp. 8–11.

³¹ Stefański R.A, Postępowanie przed powszechnym sądem pierwszej instancji w sprawach karnych skarbowych, *Prokuratura i Prawo*, 2000, No. 5, p. 80.

³² Unified text, DzU, 2019, item 768 as amended; hereinafter: the Act on KAS.

³³ Unified text, DzU, 2019, item 900 as amended.

tax authorities³⁴. On the other hand, according to, *e.g.*, Article 28(1)(1) of the Act on National Revenue Administration, the tasks of the head of a tax office include the determination and collection of taxes, fees and non-taxable government charges. This task corresponds to the autonomous objective defined for fiscal penal cases through Article 114(1) of k.k.s., in the form of compensation for financial damage caused by a fiscal crime or misdemeanour to the State Treasury, a local government unit or another eligible entity. Therefore, there are no bodies more predisposed to deal with tax issues as the ones indicated above. At the same time, they have the appropriate infrastructure — a group of expert employees prepared to resolve the most difficult tax issues. Finally, these authorities conduct tax proceedings under which they are obliged to provide the necessary information and explanations about tax law provisions related to the subject matter of the proceedings³⁵. It has happened on several occasions that tax proceedings are conducted concurrently with proceedings in cases concerning a tax crime or misdemeanour and the latter may be suspended if its course is significantly impeded by the ongoing proceedings before the tax authorities³⁶.

It has already been mentioned that Article 157(2) of k.k.s. constitutes the legal basis for joint participation in the proceedings on side of the active party. This means that in tax crime cases in which the bill of indictment has been brought by the prosecuting attorney, the financial investigative authority³⁷ or its legal representative may act alongside the prosecutor as a public prosecutor. If the provision uses the phrase ‘act alongside’, it places the financial investigative authority in a secondary position, and, therefore, not before the prosecutor. However, the word ‘alongside’ does not necessarily place the financial investigative authority in a secondary position. It can be concluded that in a sense, it is a question of acting side by side. The stronger trial position of a prosecutor is not due to this provision, but more to the general principles of the code that shape the status of a prosecutor as a central figure in the criminal process. The fact that the financial investigative authority is a fully fledged public prosecutor must be accepted. As a result, since the Code of Criminal Procedure provides for the obligation to notify the prosecutor of the time limits for activities or the obligation to serve him/ her with copies of decisions, this obligation in fiscal criminal cases, therefore, also includes notifying the financial investigative authority and serving them with copies of decisions.

Moreover, the statement ‘to act alongside the prosecutor’ allows the financial investigative authority or its representative to formulate their

³⁴ *Ibid.*, Article 13(1)(1) and Article 1a and § 2.

³⁵ *Ibid.*, Article 121(2).

³⁶ Article 114a of k.k.s.

³⁷ Article 157(2) of k.k.s. mentions the financial prosecuting body, which has to be regarded as an obvious mistake, left out after the amendment by the Act of 28 July 2005 amending the Act — Fiscal Penal Code and some other Acts (DzU, 2005, No. 178, item 1479). This amendment replaced the name ‘financial prosecuting body’ with ‘financial investigative authority’.

own statements³⁸. In such a case, according to Article 157(2) of k.k.s., court proceedings are attended by a prosecuting attorney acting as a public prosecutor and a financial investigative authority which exercises its powers by virtue of acting as a public prosecutor directly after the prosecutor³⁹. Nevertheless, it should be remembered that they function in a sense ‘as one team’, although due to the status of the prosecutor and his/her position, it is the prosecutor who should be considered the ‘captain’ of this ‘team’. Thus, on the one hand, the financial investigative authority may, for example, offer evidence which has not been submitted by the prosecutor. On the other hand, one should bear in mind that the situation described in Article 157(2) of k.k.s. entail an indictment being brought by the prosecutor. This means that the bringing of an indictment has been preceded by an investigation conducted by a financial investigative authority or an investigation under the supervision of a prosecutor. Therefore, it should be assumed that by bringing a bill of indictment, the prosecutor has accepted the findings of the financial investigative authority, which, as a matter of fact, have been previously accepted by the prosecutor as part of his/her supervision. Such a criminal process structure, *i.e.* first the prosecutor’s supervision of the case, then the indictment, implies that there should not be any different views presented in the court by both public prosecutors. However, we cannot rule it out either, just as it cannot be ruled out that the prosecutor will change his/her mind as to the legitimacy of further substantiation of the indictment.

The analysis of Article 121(1) of k.k.s. shows that after bill of indictment has been brought it must be substantiated. Such conclusions can be drawn from the content of that provision, namely ‘[the public prosecutor] ... brings and substantiates’⁴⁰. If a prosecutor files an indictment, it should be assumed, on the basis of logical and linguistic interpretation, that only the prosecutor can refrain from substantiating the indictment that they have filed. For this reason, the prosecutor may nevertheless, under certain circumstances, dominate the financial investigative authority by virtue of being the author of the indictment and, if necessary, act against the will of the financial investigative authority⁴¹.

There was also an opinion (based to a large extent on the broadened scope of the adversarial principle of a jurisdictional stage of criminal proceedings in recent years) that there is no justification for this traditional possibility for two public prosecutors to act before the court in fiscal crime cases⁴². Following this opinion, the current adversarial principles need the parties to meet particular requirements; among others, the knowledge of

³⁸ Sawicki J, Skowronek G, Prawo..., *op. cit.*, pp. 382–383.

³⁹ Grzegorzczuk T, Kodeks..., *op. cit.*, pp. 638–640.

⁴⁰ Article 121(1) of k.k.s.

⁴¹ Świecki D, Cofnięcie..., *op. cit.*, pp. 469–470.

⁴² Razowski T, Dychotomia oskarżycieli publicznych w postępowaniu w sprawach o przestępstwa skarbowe, [in:] Żylińska J, Filipowska-Tuthill M (Eds), Realizacja zasady kontradiktoryjności w polskim procesie karnym — wybrane zagadnienia. Warsaw, 2015, pp. 165–166.

the subject of the proceedings, their equal rights, and the possibility to influence the course and result of the proceedings through their behaviour. On the other hand, the participation of the financial investigative authority in court proceedings does not preclude the prosecutor from acting independently. Thus, these prosecutors are independent in their actions⁴³. However, if the prosecutor has brought an indictment and has been confronted with a second independent prosecutor, a situation may arise in which the financial investigative authority expresses a different view and even challenges some of the prosecutors' views. In such a situation, the possibility for a public prosecutor to influence the outcome of the trial may be limited by the financial investigative authority acting as a public prosecutor⁴⁴.

It is necessary to emphasise that in the analysed cases, in which the bill of indictment has been brought by a prosecutor, there is a place for both a prosecutor and a financial investigative authority. The idea of acting 'as one team' and a certain domination of the prosecutor is correct. Although the participation of the financial investigative authority or its representative is optional in cases where the bill of indictment has been filed by a prosecutor, due to the complex legal and factual state relevant to a given authority, the participation of this authority or its representative may be highly desirable. This concerns in particular the substantive aspect because it is the financial investigative authority who conducts most of preparatory proceedings in such cases. Due to the specific nature of fiscal penal cases, involving such complex issues as tax obligations, customs duties, foreign exchange turnover and finally the organisation of gambling, the expertise of financial investigative authorities specialising in this area may prove to be crucial for the final success of the case.

The presented discussion refers to important issues resulting from the analysis of the regulations shaping the status of public prosecutors in proceedings in cases of fiscal offences. Following the conducted research and taking into account Articles 121, 155 and 157 of k.k.s., the circle of authorities which can act as public prosecutors in the light of the provisions of the Penal Fiscal Code was determined. These are as follows:

- the prosecutor of the case, in which the financial investigative authority has conducted an investigation, and in the case of fiscal crimes in which investigation has been supervised by the prosecutor,
- the financial investigative authority for cases in which the authority has conducted the investigation, drew up the bill of indictment within 14 days of its conclusion, brought it before the competent court and substantiated it before that court,
- the financial investigative authority, acting alongside the prosecutor as a public prosecutor, in fiscal crime cases, in which the indictment has been brought by the prosecutor,

⁴³ Postanowienie SN z 26 kwietnia 1982, sygn. V KRN 14/82, OSNKW 1982, No. 7–8, item 57; Skwarcow M, Kodeks karny skarbowy — wybrane zagadnienia procesowe. *Przegląd Sądowy*, 2001, No. 6, p. 86.

⁴⁴ Kardas P, Łabuda G, Razowski T, Kodeks..., *op. cit.*, pp. 1358–1359.

- the prosecutor entitled, in light of properly applied provisions of the Code of Criminal Procedure, to bring and substantiate a bill of indictment in a court, if a non-financial investigative authority has conducted pre-trial proceedings in a case involving a fiscal crime,
- the prosecutor for military matters in fiscal crime and fiscal misdemeanour cases before a military garrison court or in cases of fiscal crimes before a military district court, *i.e.* in cases involving persons referred to in Article 53(36) of k.k.s.,
- the Border Guard and the Police in cases of fiscal offences, as under Article 121(2) of k.k.s. these non-financial law enforcement authorities are authorised in cases of fiscal offences to draw up and file a bill of indictment and to substantiate it before the court, as well as to appear in the course of the entire proceedings, not excluding activities after the judgement becomes final,
- the prosecutor, if he/ she has taken over the case to handle it himself/ herself, because then the prosecutor brings and substantiates the indictment before the court, regardless of the nature of the act⁴⁵.

Appropriate training and preparation of employees and officers of the financial investigative authorities are components of the final success expected by the legislator in terms of achieving one of the objectives in fiscal penal cases, *i.e.* compensation for financial loss of the State Treasury, local government units, and other eligible entities. This objective is to be achieved by means of the regulation obliging the financial investigative authority or its representative to participate in the main and appeal hearing before the court, if that authority has filed a bill of indictment in a case of a fiscal crime. Therefore, answering the question posed in this article, it should be stated that the legal structure of two public prosecutors functioning side by side defined in the Penal Fiscal Code is correct.

Despite the discussion which ensued in the doctrine about the legitimacy of maintaining such a specific judicial system providing for the possibility of two public prosecutors participating in fiscal crime proceedings, *i.e.* a prosecutor and a financial investigative authority acting as a public prosecutor, this legal solution should be considered as reasonable. The financial investigative authority as a public prosecutor is thus an active and relatively independent party to proceedings.

In conclusion, it should be recognised that both by the compulsory participation of the financial investigative authority or its representative in the main hearing and by allowing this authority to become a public prosecutor in cases in which it is not entitled to bring an indictment, the legislator underlines the importance of the penal fiscal law for securing the compensation for financial losses. Undoubtedly, having a financial investigative authority alongside a prosecutor ensures more complete protection of the fiscal interest of the State Treasury, local government units, and the European Union budget.

⁴⁵ Article 122(3) of k.k.s.

References

Publications

- Gostyński Z, Komentarz do kodeksu karnego skarbowego. Warsaw, 2000.
- Grzegorzczuk T, Kodeks karny skarbowy. Komentarz. Warsaw, 2009.
- Kardas P, Łabuda G, Razowski T, Kodeks karny skarbowy. Komentarz. Warszawa, 2017.
- Mistyga M, Usytuowanie i strój urzędowy prokuratora w postępowaniu sądowym. *Prokuratura i Prawo*, 2014, No. 10.
- Razowski T, Dychotomia oskarżycieli publicznych w postępowaniu w sprawach o przestępstwa skarbowe, [in:] Żylińska J, Filipowska-Tuthill M (Ed.), Realizacja zasady kontradyktoryjności w polskim procesie karnym — wybrane zagadnienia. Warsaw, 2015.
- Sawicki J, Skowronek G, Prawo karne skarbowe. Zagadnienia materialno-prawne, procesowe i wykonawcze. Warsaw, 2017.
- Siwik Z, “Odpowiednie” stosowanie przepisów kodeksu karnego w prawie karnym skarbowym (studium na tle systemu środków penalnych). *Przegląd Prawa i Administracji*, 1987, No. XXIII.
- Skowronek A, Skowronek G, Pierwotne i wtórne aspekty przemytu celnego. Część 1. *Gazeta Sądowa*, 2004, No. 3.
- Skwarcow M, Kodeks karny skarbowy — wybrane zagadnienia procesowe. *Przegląd Sądowy*, 2001, No. 6.
- Skwarczyński H, Meandry interpretacyjne art. 122 k.k.s. *Wojskowy Przegląd Prawniczy*, 2004, No. 2.
- Skwarczyński H, Uprawnienia Straży Granicznej w postępowaniu o przestępstwa skarbowe i wykroczenia skarbowe. *Wojskowy Przegląd Prawniczy*, 2003, No. 3.
- Skwarczyński H, Uprawnienia Żandarmerii Wojskowej w postępowaniu karnym skarbowym. *Wojskowy Przegląd Prawniczy*, 2001, No. 3–4.
- Stefański R.A, Postępowanie przed powszechnym sądem pierwszej instancji w sprawach karnych skarbowych. *Prokuratura i Prawo*, 2000, No. 5.
- Świecki D, Cofnięcie aktu oskarżenia przez oskarżyciela publicznego w postępowaniu karnym skarbowym, [in:] Grzegorzczuk T, Olszewski R (Eds), Verba volant scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Konferencja naukowa w rocznicę śmierci Profesor Moniki Zbrojewskiej. Łódź, 8 grudnia 2016 r. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej. Warsaw, 2017.
- Świetlicka M, “Odpowiednie” stosowanie kodeksu postępowania karnego w sprawach o przestępstwa skarbowe i wykroczenia skarbowe. *Prokuratura i Prawo*, 2006, No. 10.
- Świetlicka M, Udział prokuratora w postępowaniu karnym skarbowym. *Prokuratura i Prawo*, 2007, No. 5.

Waltoś S, Hofmański P, Proces karny. Zarys systemu. Warsaw, 2016.

Legal acts

Ustawa z 26 października 1982 o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi (Unified text, DzU, 2018, item 2137 as amended).

Ustawa z 28 września 1991 o lasach (Unified text, DzU, 2018, item 2129 as amended).

Ustawa z 13 października 1995 — Prawo łowieckie (Unified text, DzU, 2018, item 2033).

Ustawa z 6 czerwca 1997 — Kodeks postępowania karnego (Unified text, DzU, 2018, item 1987 as amended).

Ustawa z 29 sierpnia 1997 — Ordynacja podatkowa (Unified text, DzU, 2019, item 900 as amended).

Ustawa z 10 września 1999 — Kodeks karny skarbowy (Unified text, DzU, 2020, item 19).

Ustawa z 28 lipca 2005 o zmianie ustawy — Kodeks karny skarbowy oraz niektórych innych ustaw (DzU, 2005, No. 178, item 1479).

Ustawa z 28 stycznia 2016 — Prawo o prokuraturze (Unified text, DzU, 2019, item 740).

Ustawa z 16 listopada 2016 o Krajowej Administracji Skarbowej (Unified text, DzU, 2019, item 768 as amended).

Rozporządzenie ministra sprawiedliwości z 22 września 2015 w sprawie organów uprawnionych obok Policji do prowadzenia dochodzeń oraz organów uprawnionych do wnoszenia i popierania oskarżenia przed sądem pierwszej instancji w sprawach, w których prowadzono dochodzenie, jak również zakresu spraw zleconych tym organom (Unified text, DzU, 2018, item 522).

Other sources

Postanowienie SN z 26 kwietnia 1982, sygn. V KRN 14/82, OSNKW 1982, No. 7–8, item 57.

Wyrok SN z 7 grudnia 2017, sygn. IV KK 433/17, LEX No. 2407833.

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Summary: This study is a thorough analysis of the status of a public prosecutor in proceedings involving tax offences. It examines the regulation obliging financial investigative authorities or their representative to participate in the main and appeal hearings if they filed the bill of indictment for a fiscal offence. Moreover, there is a research question in the text whether it is right

to apply the system of two public prosecutors functioning next to each other in the Penal Fiscal Code, *i.e.* a prosecutor and a representative of the financial investigative authorities acting as a public prosecutor?

The set of entities which may act as public prosecutors under the provisions of the Penal Fiscal Code has been identified in the course of the research. It has also been pointed out that the legislator underlines the importance of fiscal penal law as regards compensating for financial loss through both the obligatory participation of the financial investigative authority or its representative in the main hearing, and allowing this body to become a public prosecutor although it is not entitled to file an indictment. Maintaining two public prosecutors in a court of law when dealing with fiscal offences has also been advocated.