CRIMINAL-LAW QUALIFICATION OF FAILURE TO PAY SOCIAL INSURANCE CONTRIBUTIONS

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An interesting article was published in Ius Novum, Number 3 of 2016 by Krzysztof Ślebzak and Jacek Kosonoga, *Liability of a social security contribution payer for calculation, deduction and submission of social security contributions*, which covers issues that are important from theoretical and practical points of view.[1] The authors faced a very difficult task of presenting in a short paper the essence of a liability of social insurance payers who fail to comply with the obligations highlighted in the title of the study, against the background of broadly understood criminal law (Article 98 para. 1(1a) Act on social security system,[2] Article 218 § 1a Criminal Code[3]).

There is no doubt that the issue of criminal liability for failure to pay social insurance contributions is disputable and deserves to be discussed in many aspects, in particular covering legal qualification of the act of failure to pay social insurance payments. The value of the article by Krzysztof Ślebzak and Jacek Kosonoga consists in the presentation of unambiguous standpoints relating to the controversial issues. In my opinion, some of the views expressed by the authors could be argued, i.e. those relating to criminal effects of failure to pay social insurance contributions. Additionally, with respect to qualification as an offence of the behaviour of a contribution payer or a person acting on the payer's behalf consisting in failure to pay social insurance contributions, it is *de lege lata* justified to offer other interpretations. I will try to prove the above further in my study.[4]

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1 K. Ślebzak, J. Kosonoga, *Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne*, Ius Novum Vol. 10, No. 3, 2016.

2 Act of 13 October 1998 on the social security system, Dz.U. 1998, No. 137, item 887, as amended; hereinafter also Social Security Act or SSA.

3 Act of 6 June 1997: Criminal Code, Dz.U. 1997, No. 88, item 553, as amended; hereinafter Criminal Code.

4 Due to the fact that this is a polemical article, I will limit further discussion to disputing certain arguments presented by the authors, yet without focusing on the entire complex issues of criminal liability for failure to pay social insurance contributions.

1. CALCULATION, DEDUCTION AND TRANSFER OF SOCIAL INSURANCE CONTRIBUTIONS VERSUS FAILURE TO PAY SOCIAL INSURANCE

Writing about the liability of contribution payers in relation to calculating, deducting and transferring of social insurance contributions in the context of criminal liability, it should be noted that in the definition of the offence of failure to pay social insurance contributions the legislator uses the following phrase "failure to pay contributions".

In literature an assumption is made that the contribution is the price of insurance guarantee. Zakład Ubezpieczeń Społecznych (ZUS Social Insurance Institution in Poland) guarantees payment of benefits in case of occurrence of factual and legal circumstances as stipulated in the applicable Act.[5] The contribution is neither a deposit with a bank nor an investment fund but the insured's contribution to the development of a general fund covering specific risk; if an assumption is made that the risk will not affect every contributor, the individual contribution is calculated at a certain average level, distributing the burden to provide funds to cover future expenditure to members of each specific risk group.[6] Thus, the operations of ZUS are subject to certain payments to specified accounts, including payments of social insurance contributions.[7] The contributions understood as specified above are cash benefits that are mandatory, specific, payable and non-refundable.[8]

The fact that contribution payers have an obligation to calculate, settle and transfer social insurance contributions is specified in Article 17 para. 1 SSA. It should be further noted that the concept of a contribution payer under the Social Security Act is not identical to the concept of a remitter under the tax law[9] to which the legislator refers in the Social Security Act both explicitly[10] and also when establishing certain legal institutions.[11] In accordance with the Tax Ordinance,[12] tax remitters are natural persons, legal persons or unincorporated bodies, obliged in accordance with tax regulations to calculate tax and collect it from taxpayers and transfer it at the right time to the relevant tax authority.[13] The characteristic aspect of the legal structure is that the whole is charged to funds owed to taxpayers, for instance: advance payments

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[5] K. Antonów, [in:] K. Baran (ed.), *Prawo pracy i ubezpieczeń społecznych*, Warszawa 2017, p. 751; compare I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2018, p. 49.

[6] K. Antonów, [in:] K. Baran (ed.), *Prawo*, *op. cit.*, p. 751.

[7] See Article 52 para. 1 SSA and Article 54(1) SSA.

[8] I. Jędrasik-Jankowska, *Pojęcia*, *op. cit.*, pp. 53–55; T. Sowiński, *Finanse ubezpieczeń emerytalnych*, Warszawa 2008, p. 246.

[9] Cf. R. Pacud, *Zobowiązania składkowe w ubezpieczeniach społecznych a zobowiązania podatkowe*, Studia z Zakresu Prawa Pracy i Polityki Społecznej, 2012, pp. 477–488.

[10] See, in particular, Article 31 SSA.

[11] See, for instance, Article 26 SSA.

[12] Act of 29 August 1997: Tax Ordinance, Dz.U. 1997, No. 137, item 926, as amended; hereinafter Tax Ordinance.

[13] Article 8 Tax Ordinance. Naturally, social insurance contributions may not be treated as identical to taxes, see more in K. Antonów, [in:] K. Baran (ed.), *Prawo*, *op. cit.*, p. 752, and T. Sowiński, *Finanse*, *op. cit.*, pp. 248–249.

for employees' income tax are fully deducted from their remuneration for work. The situation with social insurance contributions is different. Such payments transferred by contribution payers are usually total amounts covering a portion funded by the insured and a portion funded by the contribution payer.[14] The first portion is an amount of correctly calculated retirement and disability insurance premiums and sickness insurance premiums funded by the insured, and deducted from the funds owed to the insured. The other portion is an amount covering properly calculated retirement and disability insurance premiums and occupational accident insurance premiums financed with funds that are not owed to the insured and it is the contribution payers that are obliged by law to provide these funds and transfer them to the account of ZUS.[15] The premiums are paid by transfer of an appropriate amount to the account of ZUS, i.e. a sum that is the entire contribution for each insured.[16] Failure to pay social insurance contributions within the statutory time limit is an offence under Article 98 para. 1(1a) SSA, being an offence – as rightly emphasized by K. Ślebzak and J. Kosonoga – against correct ZUS operations.[17] Thus, the operations of ZUS are primarily dependent on timely payment of social insurance contributions to specified accounts.[18] In the context of liability for the offence under the Social Security Act, it is not so much about failure to calculate, deduct or transfer the contribution but about failure to make social insurance payments; this is how the legislator identifies the subject of the obligation in Article 98 para. 1(1a) SSA.

The features of the prohibited act as defined in Article 98 para. 1(1a) SSA are complied with at the time of failure to pay even a part of social insurance contribution concerning a specific insured for a month or payment thereof after the statutory deadline.[19] The offence may be committed intentionally and unintentionally. The conduct by the offender may relate both to premiums for employees and also for other insured.[20]

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[14] If the insured pay their full contribution, they are also contribution payers within the meaning of the Social Security Act (Article 4(2)(d) SSA), but obviously they do not deduct the premiums but only calculate and transfer the contributions to ZUS (Article 17 para. 3 SSA).

[15] See Article 16 paras 1, 1b, 2 and 3 SSA.

[16] The contribution as a rule is a sum of the part funded by the contribution payer and the part funded by the insured.

[17] K. Ślebzak, J. Kosonoga, *Odpowiedzialność*, *op. cit.*, p. 286.

[18] See Article 52 para. 1 SSA and Article 54 para. 1 SSA.

[19] Cf. Supreme Court ruling of 25 May 2010, I KZP 4/10, OSNKW 2010, No. 7, item 57 with comments by T. Snarski, *Wykroczenie trwałe a wykroczenie z zaniechania. Niedopuszczalność kierowania do SN pytań prawnych o charakterze pozornym. Glosa do postanowienia SN z dnia 25 maja 2010 r., I KZP 4/10*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 1, 2011, pp. 147–152; S. Kowalski, *Wykroczenie nieterminowego opłacania składek*, Służba Pracownicza No. 3, 2009, p. 4.

[20] Except contribution payers who are sole proprietors and who are obliged to pay social insurance contributions only for themselves. In the light of Article 40 para. 1(2) SSA, the account of such persons records contributions actually paid, and thus failing to pay the contributions the insured harm themselves. Compare J. Lachowski, *Odpowiedzialność karna płatnika składek – wybrane zagadnienia*, Praca i Zabezpieczenie Społeczne No. 12, 2004, p. 30.

2. FAILURE TO PAY CONTRIBUTIONS AS AN OFFENCE BREACHING EMPLOYEE RIGHTS

The authors of the article mentioned above proposed a stand that persistent or intentional failure to pay social insurance contributions may constitute a breach of employee rights related to social insurance, and thus may meet the statutory features of a prohibited act as set forth in Article 218 § 1a Criminal Code.[21] The stand is quite common in Polish jurisprudence[22] and finds acceptance in part of the legal doctrine,[23] however, in my opinion it is incorrect, also after amendments introduced in the Act of 10 May 2012 amending the Criminal Code and the Act on the social security system[24] which resulted in the ascertainment by the Constitutional Tribunal in its judgment of 18 November 2010[25] that Article 218 § 1 Criminal Code[26] and Article 98 para. 1(1) and Article 98 para. 2 and Article 24 para. 1 SSA are incompliant with Article 2 of the Polish Constitution due to the fact that they allow, in relation to the same natural person and for the same act, criminal liability (for a crime) or liability for an offence as well as an additional fee.

The issue of criminal liability under Article 218 § 1a Criminal Code in relation to a person who fails to pay social insurance contributions for employees is treated as exceptionally difficult and disputable in the legal doctrine.[27] However, in the

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[21] K. Ślebzak, J. Kosonoga, *Odpowiedzialność*, *op. cit.*, p. 293.

[22] Compare, e.g. judgment of the District Court in Opole of 10 April 2013, VIII Ka 97/13, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018); judgment of the District Court in Olsztyn of 29 June 2017, VII K 574/16, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018); judgment of the District Court in Gorzów Wielkopolski of 8 June 2016, IV Ka 188/16, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018).

[23] For instance, see: J. Marciniak, *Odpowiedzialność karna pracodawcy*, Warszawa 2010, p. 118; K. Makowski, *Niektóre aspekty odpowiedzialności płatnika składek z tytułu popełnienia przestępstwa lub wykroczenia*, Przegląd Ubezpieczeń Społecznych No. 5, 2000, p. 7. Otherwise: S. Kowalski, *Ochrona praw pracownika w Kodeksie karnym. Zagadnienia teoretyczne i praktyczne*, Toruń 2014, pp. 182–184; J. Lachowski, *Odpowiedzialność*, *op. cit.*, p. 30; commentary on the Constitutional Tribunal judgment of 18 November 2010, P 29/09K in K. Woźniewski, *Reguła ne bis in idem w kontekście prawidłowej legislacji. Glosa do wyroku TK z dnia 18 listopada 2010 r., P 29/09*, Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 2, 2011, pp. 157–158. Discussing the institution of criminal liability resulting from a breach of employee rights related to social insurance (Article 218 § 1a Criminal Code), the following authors do not mention any right related to the obligation to pay contributions by social insurance contribution payers among the rights that may be breached by perpetrators: U. Kalina-Prasznic, *Odpowiedzialność karna płatnika składek na ubezpieczenie społeczne*, [in:] J. Sawicki, K. Łucarz (eds), *Na styku prawa karnego i prawa o wykroczeniach: Zagadnienia materialnoprawne oraz procesowe. Księga jubileuszowa dedykowana Profesorowi Markowi Bojarskiemu*, Vol. I, Wrocław 2016. Additionally, J. Unterschűtz in her monograph entitled *Karnoprawna ochrona praw osób wykonujących pracę zarobkową* (Warszawa 2010) writes first that employees' rights resulting from social insurance include inter alia the right that "the contribution in the appropriate amount should be paid by the employer" (p. 94), and afterwards that "Article 98 para. 1(1) SSA does not infringe the right of persons performing gainful work to benefits under social insurance but it is breach of the payers' obligations to ZUS" (p. 249).

[24] Dz.U. 2012, item 611.

[25] P 29/09, OTK-A 2012, No. 1, item 10.

[26] The wording of Article 218 § 1a Criminal Code corresponds to the wording of its predecessor, i.e. Article 218 § 1 Criminal Code.

[27] Further on in the study I will present only some statements that treat differently the same issues relating to criminal effects of failure to pay social insurance contributions. I admit

judgments of criminal courts concerning sanctions for failure to pay social insurance contributions often a number of simplifications are made that not only introduce confusion as to notions but also result in quite surprising rulings. The above applies primarily to an incorrect classification of certain premiums (in particular for health insurance and for the Labour Fund) as social insurance contributions.[28] It is worth noting that the established view in the judgments of criminal courts that persistent or intentional failure to pay social insurance contributions could constitute a crime of violation of employee rights related to social insurance to a large extent resulted from the judgment of the Constitutional Tribunal of 18 November 2010 referred to above.[29] This partly incorrect, not only in my opinion,[30] judgment has led to a change in the legal status as the legislator *expressis verbis* accepted that it is indeed possible to convict a contribution payer who is a natural person for the crime of "failure to pay contributions or underpay such contributions" (Article 24 paras 1b–1d SSA). Since that time, *de lege lata*, a statement has been invalid that failure to pay social insurance contributions would not have features of a prohibited act as defined in Article 218 § 1a Criminal Code.[31] However, that does not mean there is a simple correlation of the provisions of Article 98 para. 1(1a) SSA and Article 218 § 1a Criminal Code resulting in a situation when indeed failure to pay social insurance contributions for employees is a breach of the Social Security Act and may be an offence pursuant to Article 98 para. 1(1a) SSA, and persistent and intentional failure to pay social insurance contributions constitutes a violation of employee rights related to social insurance. Such relationship does not exist by the mere fact that there is a completely different direct subject of protection against prohibited acts defined in those penal regulations.

The crime of intentional or malicious violation of employee rights, defined in Article 218 § 1a Criminal Code may consist in violating employee eights related

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that I also once accepted that statement that failure to pay social insurance contributions was a violation of employee rights relating to social insurance within the meaning of the former Article 218 § 1 Criminal Code; however, when I conducted research for my PhD thesis, I found that *de lege lata* it is an incorrect view.

[28] See, for instance, the judgment of the District Court in Olsztyn of 3 November 2014, VII K 254/14, http://www.orzeczenia.ms.gov.pl (accessed on 10.02.2018); judgment of the District Court in Opole of 10 April 2013, VII Ka 97/13, http://www.orzeczenia.ms.gov.pl (accessed on 10.02.2018); and judgment of the District Court in Gorzów Wielkopolski of 8 June 2016, IV Ka 188/16, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018); judgment of the Court of Appeal in Gdańsk of 30 March 2017, II AKa 256/16, LEX No. 2383361; in those judgments the courts convicting for offences under Article 218 § 1a Criminal Code or identifying the basis for such rulings, incorporated as the features of a prohibited act conduct that constitutes a violation of employee rights related to social insurance and consisting in failure to pay health insurance premiums, premiums for the Labour Fund or the Guaranteed Employee Benefits Fund, although the coverage of social insurance is explicitly specified in Article 1 SSA.

[29] P 29/09, Dz.U. 2010, No. 225, item 1474.

[30] See critical comments on the judgment by J. Unterschűtz published in Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 1, 2012, pp. 56–64 and K. Woźniewski published in Gdańskie Studia Prawnicze – Przegląd Orzecznictwa No. 2, 2011, No. 2, pp. 151–158.

[31] The District Court in Gorzów Wielkopolski rightly noted in the justification to the judgment of 8 June 2016, IV Ka 188/16, http://www.orzeczenia.ms.gov.pl (accessed on 4.02.2018).

to social insurance.[32] It is symptomatic that supporters of the view of violation of employee rights relating to social insurance by failure to pay social insurance contributions avoid an explicit statement what employee rights were to be violated as a result of such conduct.[33] Often criminal courts fail to specify the above in describing the acts attributed to people convicted pursuant to Article 218 § 1a Criminal Code for failure to pay social insurance contributions, although as it seems a reference of the recently modified provision of Article 413 § 2(1) of the Criminal Procedure Code[34] makes it mandatory to specify in the description of the attributed act which specific employee right was *in concreto* violated by the perpetrator.[35] In my opinion, such omission should not be surprising since even persistent failure to pay social insurance contributions does not violate any employee rights related to social insurance that are subject to protection pursuant to Article 218 § 1a Criminal Code. However – with respect to the portion of the premium deducted from a salary – it may constitute a violation of employee rights relating to employment relationship: the right to remuneration for work.[36]

As a rule, employees are subject to mandatory social insurance due to: retirement, disability, sickness and accident.[37] Retirement insurance premiums are funded in equal parts by employees and employers,[38] disability insurance are covered partly by employees and partly by employers,[39] sickness insurance premiums are funded by employees[40] and occupational accident insurance premiums by employers.[41] Employers are obliged to calculate and deduct from the remuneration for work the part of the premiums that are funded by employees.[42] As judgments cor-

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[32] See more in S. Kowalski, *Ochrona*, *op. cit.*, p. 194 et seq.

[33] Similarly, K. Ślebzak and J. Kosonoga fail to identify the employee rights related to social insurance that could be violated by such conduct (*Odpowiedzialność*, *op. cit.*, p. 293). It is worth noting that J. Wantoch-Rekowski in the book entitled *Składki na ubezpieczenie emerytalne – konstrukcja i charakter prawny* (Toruń 2005), when listing the obligations of contribution payers, first identifies contribution payment (p. 138), yet while listing the rights of the insured he fails to identify any right of the insured related to contribution payment by contribution payers (p. 124).

[34] Act of 6 June 1997: Criminal Procedure Code, Dz.U. 1997, No. 89, item 555, as amended.

[35] Compare: judgment of Supreme Court of 9 February 2006, III KK 164/05, OSN PiP 2006, No. 9, item 12; ruling of the Supreme Court of 30 September 2015, I KZP 6/15, OSNKW 2015, No. 12, item 99 and comments by R.A. Stefański in his article entitled: *Przegląd uchwał Izby Karnej Sądu Najwyższego w zakresie postępowania karnego za 2015 r.*, Ius Novum Vol. 11, No. 1, 2017; judgment of the Court of Appeal in Szczecin of 7 July 2016, II AKa 32/16, Legalis No. 1532915; judgment of the Court of Appeal in Kraków of 12 May 2009, II AKa 66/09, Legalis No. 216814.

[36] However, it is worth noting that even the above causes controversies in the doctrine; for instance, J. Jędrasik-Jankowska explicitly notes that an increase of salaries by premiums in 1999 was only a socio-technical procedure. Indeed, in her opinion, social insurance contributions do not even constitute an element of remuneration for work (*Pojęcia*, *op. cit.*, pp. 52–53). However, in my opinion, those views are contradicted by the wording of the quoted Article 87 § 1 LC.

[37] An exception to this rule is an employee who is a cooperating person in compliance with the Social Security Act (Article 8 para. 2 and Article 8 para. 11, Article 11 para. 2 SSA).

[38] Article 16 para. 1 SSA.

[39] Such employer's part is several times larger, cf. Article 16 para. 1b SSA.

[40] Article 16 para. 2 SSA.

[41] Article 16 para. 1 SSA.

[42] J. Jończyk, *Rekonstrukcja zatrudnienia i zabezpieczenia społecznego: podstawowe pojęcia prawne*, Praca i Zabezpieczenie Społeczne No. 1, 2014, p. 5.

rectly provide, remuneration for work as a notion of labour law means the entire amount of remuneration for work due in compliance with regulations on salaries and employment contracts, including also the part that the employer deducts for social insurance contributions. As a result, the employer is a debtor vis-a-vis the employee, obliged to pay the remuneration due if full amount and the amounts that the employer transfers as the income taxpayer and advances for insurance premiums are a part of the employee's remuneration.[43] The fact that such amounts are not physically disbursed to the employee but transferred to the relevant bodies as advances and premiums is the legally required method of complying with the obligation to pay a part of the remuneration to the employee. Therefore, the entire remuneration for work constitutes the employee's receivables from the employer as a salary for work (Article 22 § 1 of the Labour Code[44]). The salary understood like this is the subject of determining remuneration for work in compliance with Article 78 LC and is due to the employee in compliance with Article 80 LC. The remuneration defined as above should be – in compliance with Article 29 § 1(3) and § 2 LC – specified in writing in the employment contract.[45]

The employer, as an entity obliged to pay remuneration for work, is obliged to provide the entire remuneration for work on the payment date and disburse to the employee only the part left after deductions for social insurance premiums and advances for income tax.[46] A portion of the social insurance contribution deducted from the disbursed remuneration should be added by the employer to the part of the contribution that it funds and the employer should pay the amount being the sum of both parts. Failure to pay the entire contribution may be evidence that the employer has not provided sufficient funds for remuneration for work. Considering that the deadline to pay contributions for employees falls on the 15th day of the month following the month for which the premium is due,[47] it should be noted that to determine whether the employer has indeed failed to provide funds for remuneration for work, it is crucial to make an *in concreto* assessment of its activities between the disbursement date of the remuneration for work to the employee and the due day for the contribution payment. Long-term and repeated failure to pay contributions in the part constituting the amount deducted from remuneration for work may be evidence of persistent breach by the employer or a person representing the employer of employees' right to remuneration for work.[48]

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[43] Supreme Court judgment of 9 July 2014, I PK 250/13, OSNP 2015, No. 12, item 161. Otherwise in I. Jankowska-Jędrasik, *Pojęcia*, *op. cit.*, pp. 52–54.

[44] Act of 26 June 1974: Labour Code, Dz.U. 1974, No. 24, item 141, as amended; hereinafter LC.

[45] Supreme Court judgment of 9 July 2014, I PK 250/13, OSNP 2015, No. 12, item 161.

[46] Cf. K. Antonów, *Sprawy z zakresu ubezpieczeń społecznych*, Warszawa 2012, p. 61.

[47] Article 47 para. 1(3) SSA.

[48] On the subject of the features of persistency, see inter alia: O. Górniok, [in:] O. Górniok, S. Hoc, S.M. Przyjemski, *Kodeks karny. Komentarz*, Vol. III (art. 117–363), Gdańsk 1999, p. 220; S. Kowalski, *Ochrona*, *op. cit.*, p. 281 et seq.; W. Radecki, *Przestępstwa przeciwko prawom osób wykonujących pracę zarobkową: rozdział XXVIII Kodeksu karnego. Komentarz*, [in:] *Nowa kodyfikacja karna. Kodeks karny. Krótkie komentarze*, book No. 18, Warszawa 1998, pp. 154–155; Z. Siwik, *Przestępstwo niealimentacji ze stanowiska polityku kryminalnej*, Wrocław 1974, pp. 99–101.

Failure to pay employees' social insurance contributions in the part funded by the employer means failure to comply with the employer's duties (as social contribution payer) pursuant to the provisions of the Social Security Act. However, this is not a breach of employee rights resulting from social insurance in the meaning used by the legislator in Article 218 § 1a Criminal Code. In the doctrine of criminal law, it is rightly noted that the term "breach of law" used in Article 218 § 1a Criminal Code refers only to such conduct that is contrary to the relevant regulations and either fully deprives the employee of the right or reduces the use of such right (irrespective of the fact if finally the employee becomes harmed).[49] However, failure to pay social insurance contributions by the contribution payer who is the employer basically is of no importance to benefits under social insurance due to the employed personnel.[50]

The offence of failure to pay social insurance contributions is stipulated among the provisions of the chapter entitled "Liability for offences against the provisions of the Act". Thus, the legislator specifies that the protection provided in the regulation covers correct operations of the social insurance system and not protection of the rights of the insured (although the correct functioning of the social insurance system is in the interest of a large proportion of the insured). Further, the crime of breach of employee rights related to social insurance can be found in the chapter of the Criminal Code entitled "Crimes against the rights of people performing gainful work". Article 218 § 1a Criminal Code explicitly identifies employees as the harmed and not as the insured. This is not accidental. Criminal law protection of employee rights is a specific "extension" of the protection awarded under labour law, in particular resulting from offences against employee rights defined in Articles 281–282 LC.[51] Such more extensive protection of employees, contrary to people providing work under other types of contracts, in particular civil-law contracts, is justified inter alia with the fact that employees providing work to generate income to maintain themselves and their closest ones, being directed by the employer or persons representing the employer and being generally a financially weaker party to the employment relationship, have a specific position vis-a-vis that guaranteed by provisions of substantial labour law. The position guaranteed for employees is translated into their rights to social insurance benefits, being substitute benefits under employment relationship and the performance of such benefits is partly assumed by the employer (e.g. disbursement of a sickness benefit).

Additionally, the situation of an employee as the insured whose social contributions are partly funded with monies due to the employee and partly by the contribution payer, is not different in any way from the situation of the other insured who are in the same situation.[52] There is no justification for extending criminal-law

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[49] O. Górniok, [in:] O. Górniok et al., *Kodeks karny*, *op. cit.*, pp. 220–221.

[50] The situation of those persons who have the status of cooperating persons as stipulated in the Social Security Act is specific, cf. Article 40 para. 1(2) SSA.

[51] Compare W. Radecki, *Kryteria rozgraniczenia wykroczeń i przestępstw przeciwko prawom pracownika*, Monitor Prawa Pracy No. 9, 2005, *passim.*

[52] With only one reservation which applies to employees with the status of cooperating persons under the Social Security Act, see Article 8 para. 11 and Article 50 para. 1a(3) SSA.

protection to the insured in this respect. So, even if we were to interpret, based on the Social Security Act, a right of the insured (including employees) to have a portion of the contribution paid by the contribution payer (including the employer), this is not a public right since the contributions are the core resources of the Social Insurance Fund.[53] The right is not due to employees as such but to each insured person and is not related to an employee relationship and the resultant participation of the insured in the establishment of a general risk fund.[54] In other words, such understood right is the right of the insured and not of employees who are only some of the entities subject to social insurance whose social insurance contributions are partly funded by the contribution payers. Thus, this is not a right resulting from social insurance as specified in Article 218 § 1a Criminal Code.

In summary, persistent or wilful failure to pay the social contribution is not a breach of employee rights resulting from social insurance within the meaning of Article 218 § 1a Criminal Code. Articles 16–17 SSA show that the funding of the contributions is the obligation imposed simultaneously on employees and employers. This is a duty requiring a deduction of a part of remuneration for work due to the employee, and an obligation imposed on the employer to provide monies to fund its part of the contribution. Performance of the employer's obligations in that respect is sanctioned by the authority awarded to ZUS and specified in Articles 23–24 SSA and Articles 26–27 SSA.[55] With reference to the portion of the contribution deducted from remuneration for work (or employee's other income), failure to pay the premiums may be *de lege lata* evidence of a beach of employee rights to remuneration for work. Persons performing activities required by labour law or social insurance who persistently fail to pay the portion of the contributions deducted from remuneration for work may be held liable for a persistent breach of the employee right to remuneration for work.

3. FAILURE TO PAY CONTRIBUTIONS AS THE CRIME OF MISAPPROPRIATION

Views can be found both in the legal doctrine and in court judgments that failure to pay social contributions constitutes the crime of misappropriation (Article 284 § 1 Criminal Code).[56] Such opinions were also expressed by K. Ślebzak and J. Kosonoga with reference to the portion of the contributions funded by the insured that is left

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[53] See: Z. Ofiarski, *Prawno-finansowa specyfika podsektora ubezpieczeń społecznych*, [in:] E. Ruśkowski (ed.), *System prawa finansowego. Prawo finansowe sektora finansów publicznych*, Vol. II, Warszawa 2010, p. 330; M. Bosak, P. Majka, *Umarzanie należności z tytułu składek na ubezpieczenia społeczne w świetle orzecznictwa sądów administracyjnych*, Prawo Budżetowe Państwa i Samorządu Vol. 2, No. 4, 2014, pp. 33–34.

[54] K. Antonów, [in:] K. Baran (ed.), *Prawo*, *op. cit.*, p. 751.

[55] See more in S. Kowalski, *Ochrona*, *op. cit.*, pp. 178–179 and 182–184.

[56] Possibly, as a crime under Article 284 § 1 or § 2 Criminal Code in conjunction with Article 294 § 1 Criminal Code or as an offence under Article 119 § 1 Code of Petty Offences, due to the amount of the contribution. Compare the justification to the judgment of the Court of Appeal in Gdańsk of 30 March 2017, II AKa 256/16, LEX No. 2383361.

at the "payers' disposal".[57] The authors further noted it is correctly stated that the "legislator recommends only specific application of the funds that are held by the employer and which are owned by the insured, and have to be invested in a prescribed manner".[58] However, the authors do not refer to issues that are crucial: (1) what is misappropriated?, and (2) at what time does the thing to be misappropriated become third-party property for the perpetrator?

It seems that an explicit statement on a potential crime under Article 284 § 1 Criminal Code as a result of payment of social insurance contributions is based on an incorrect, somewhat hasty interpretation of the Social Security Act, identifying the entity funding the premium. In compliance with those regulations, the premium is funded with the insured's "own funds".[59] However, in my opinion, such regulatory provision does not specify that the Social Security Act contains particular rules for transfer of the title to funds that are a surrogate of the contribution or a part thereof.

The Social Security Act is not a statute regulating the aspects of acquisition, loss or transfer of title to assets, in particular money. That is due to the nature of the act and its wording, in particular the provisions defining the subject of the regulation (Articles 1–2 SSA). The legislator – using well-known institutions of civil law in the Social Security Act – explicitly changes their meaning only when this indeed is required. For instance, mandate work within the meaning of the Social Security Act is a contract regulated in Article 627 et seq. Civil Code, but additionally Article 8 para. 2 SSA regulates the specific status of certain people accepting the commission who are treated as employees in line with the Social Security Act. Stipulation in this regulation that a portion of the insurance contribution is partly funded by the insured with their own funds and partly by the contribution payer does not constitute a specific legal basis to determine the title to the funds held by the contribution payer but only the rules of splitting the funding of the contribution. However, it should be remembered that the Social Security Act has implemented a revolutionary solution as compared to the previous regulation: both the contribution payer and the insured fund the contribution. The legal structure reflects the differentiation of insurance contributions in terms of the subject.[60]

It is symptomatic that when they write about misappropriation in case of failure to pay social insurance contributions, K. Ślebzak and J. Kosonoga fail to identify the object of the misappropriation, while Article 284 § 1 Criminal Code clearly refers to misappropriation of a "third-party movable or property right". The context in which the authors refer to misappropriation manifests that they mean misappropriation of things: money, being a portion of contributions funded with the insured's funds. However, it is hard to misappropriate the contribution itself or a part thereof if such is an individual contribution of each of the insured to the general risk fund whose

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[57] K. Ślebzak, J. Kosonoga, *Odpowiedzialność*, *op. cit.*, p. 294.

[58] *Ibid*., pp. 294–295 with reference to J. Lachowski – comment No. 55 in the quoted article.

[59] See, for instance, Article 16 para. 1 SSA.

[60] W. Sanetra, *O genezie i ewolucji składki na ubezpieczenie społeczne*, [in:] K. Ślebzak (ed.), *Składki na ubezpieczenie społeczne*, Warszawaa–Poznań 2015, pp. 27–28.

resources are used to compensate for "losses" to members of risk groups constituting components of the social insurance system that have suffered such losses.[61]

Money is an object specified by type. Transfer of the title to money basically requires transfer of holding thereof (Article 155 § 2 Civil Code).[62] In this manner it is easy to identify the moment of acquisition and loss of the title to the objects. Employees, entities providing services or other persons paid for the work they provide, become owners of the money disbursed to them at the moment their bank accounts are credited or when they are provided with physical cash as compliance with the disbursement of remuneration by the employer. It is only at that time that the disbursed money can be misappropriated by other persons to their detriment. However, no such operation is provided for by the legislator with reference to the portion of the contribution funded by the insured. It does provide either for any other moment of transfer of the title to a portion of the insured's income to be calculated, deducted and transferred to ZUS.[63] The employee's receivable in the form of remuneration for work in compliance with the Social Security Act is burdened with the ZUS claim (subject to public law) and therefore the employer, which in compliance with the Social Security Act calculates, deducts and transfers the contribution to ZUS to contribute to the Social Insurance Fund, is released from its debt to the employee in the part in which the employer complies with the obligation.[64] Thus, there is no ground for a statement that any funds are left at the disposal of the contribution payer even if the wording were to be referred solely to the deduction of a portion of the contribution from the income to be disbursed to the insured. The obligation to disburse remuneration is a duty resulting from the existing civil-law relationship under which the insured is the creditor to the social contribution payer (debtor).[65] Therefore, failure by the employer or a person representing the employer to disburse the remuneration for work on time is an offence under Article 282 § 1(1) LC, and sometimes it may be a crime of breaching employee rights under employment relationship – the right to remuneration for work if such conduct is characterised by persistence or wilfulness – however, in such case it is not a misappropriation of funds due to the employee. The time to disburse remuneration for work does not result in the separation of any part in the employer's assets the title to which is *ex lege* transferred to the employee on that date.

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[61] K. Antonów, [in:] K. Baran (ed.), *Prawo*, *op. cit.*, p. 751; see more in U. Kalina-Prasznic, *O kontrowersjach w finansowaniu ubezpieczenia emerytalnego*, [in:] *Problemy emerytur, rent i opieki zdrowotnej. Materiały na IV Konferencję Polskiego Stowarzyszenia Ubezpieczeń Społecznych*, Warszawa–Wrocław 1992, pp. 36–37.

[62] Compare the judgment of the Supreme Court of 29 May 2015, V CSK 448/14, Legalis No. 1331221 and resolution of the Supreme Court of 4 January 1995, III CZP 164/94, OSNC 1995, No. 4, item 62.

[63] Nota bene, there is similarly no other moment for the transfer of the title to the part of income that is due to the competent tax office as an advance for income tax or to a court bailiff when such receivables are seized.

[64] Cf. justification to the resolution of the Supreme Court of 7 August 2001, III ZP 13/01, OSNP 2002, No. 2, item 35.

[65] Cf. justification to the judgment of the Supreme Court of 9 July 2014, I PK 250/13, OSNP 2015, No. 12, item 161.

The portion of employee social insurance contribution funded by the insured is a part of remuneration for work.[66] However, failure to pay contributions is not a misappropriation of a part of the right to remuneration for work. The conduct of the perpetrator who fails to transfer appropriate amounts to ZUS consists in failing to comply with their public law obligation and is not a disposal of a part of the employee's remuneration. The person who fails to pay social insurance contributions being part of remuneration for work does not question the employee's right to that part of it, neither uses nor tranfers it to anybody else. Beyond any doubt, such conduct is not misappropriation of the right to remuneration for work.

It should be added that references to judgments of criminal courts passed in cases on fiscal crimes or fiscal offences as an argument supporting the view that failure to pay social insurance contributions or the part deducted from remuneration for work constitutes misappropriation of money are incorrect.[67] Moreover, the reference of those judgments to the provisions of the Fiscal Penal Code unavoidably leads to quite contrary conclusions to assumed by those applying this solution. Articles 77–78 Fiscal Penal Code define fiscal crimes and fiscal offences consisting in failure to pay tax deducted by the tax remitter or collector or failure to collect tax by the tax remitter. The articles refer to activities similar to calculation, deduction and transfer of social insurance contributions by social contribution payers, yet which have nothing in common with an increase of the remitters' property as a result of misappropriating third-party objects or rights.[68] Therefore, such fiscal crimes and fiscal offences may also be committed by even those who *tempore criminis* have no property rights, while one cannot imagine such misappropriation of third-party objects or rights as a result of which the perpetrators' assets are not increased.[69]

4. INSTEAD OF A SUMMARY

As a matter of fact, in compliance with regulations, performance of the duty to pay social insurance contributions and other forms of social security is a condition for the state to ensure the citizens' right to social security that is based on the Constitution (Articles 67–68).[70] The basic form of criminal liability for failure to pay social insurance contributions and other forms of social security is liability for offences. The criminal law protection in that case is insufficient for two reasons. Firstly, the statutory penalty for the offence of failure to pay social insurance contributions

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[66] O. Górniok, [in:] O. Górniok et al., *Kodeks karny*, *op. cit.*, p. 357; B. Michalski, *Przestępstwa przeciwko mieniu. Przestępstwa przeciwko mieniu. Rozdział XXXV Kodeksu karnego. Komentarz*, Warszawa 1999, p. 170.

[67] For instance, the District Court in Rzeszów in the justification to the judgment of 5 September 2013, II Ka 322/13, http://www.orzeczenia.ms.gov.pl (accessed on 10.02.2018).

[68] S. Kowalski, O. Włodkowski, *Kodeks karny skarbowy. praktyczny komentarz z orzecznictwem*, Warszawa 2016, pp. 221–224 and the judgments quoted therein.

[69] Compare, e.g. judgment of the Court of Appeal in Katowice of 29 July 2016, II AKa 479/15, Legalis No. 1522802.

[70] Cf. M. Zieleniecki, *Prawo do zabezpieczenia społecznego*, Gdańskie Studia Prawnicze Vol. XIII, 2005, pp. 580–582.

(Article 98 para. 1(1a) SSA) is much too low. Secondly, it is necessary to define the crime of failure to pay the contributions.

The offence of failure to pay social insurance contributions is subject to a fine of up to PLN 5,000. However, it covers behaviour that may generate very high losses, even up to tens of thousands of zlotys as well as the conduct that is unintentional and intentional, characterised by willingness on the part of perpetrators to generate financial benefits. There is no doubt that the offence of failure to pay social insurance contributions often causes much higher losses than offences against employee rights defined in Articles 281–283 LC and offences defined in Article 120 paras 1–4 APLMI,[71] however, those regulations set forth much more severe statutory penalties. Therefore, irrespective of the need for a comprehensive reform of the regulations concerning the offence, I find it necessary to raise the lower and upper limits of the statutory penalty for the offence of failure to pay social insurance contributions and other forms of social security to a level corresponding to sanctions set forth for offences against employee rights defined in the Labour Code.[72]

Certain behaviour types consisting in failure to pay social insurance contributions and other forms of social security deserve a much more severe penalty, more definite stigmatisation than may be applied in proceedings in case of offences. Thus, if the failure to pay the contributions is regular, this applies to premiums of a high amount and thus the perpetrator gets enriched at the expense of the Social Insurance Fund, and the extent of social harms is much higher than for many other crimes defined in the Criminal Code.[73] This is an encouragement for an institutional search for grounds to support a view that there is a legal basis to raise criminal liability of perpetrators of acts consisting in failure to pay social insurance contributions and other forms of social insurance, pursuant to Article 218 § 1a Criminal Code or Article 284 § 1 or § 2 Criminal Code. However, the possibility to attribute criminal liability *sensu stricto* to perpetrators of such acts is very limited. Only Article 218 § 1a Criminal Code may constitute such legal basis which restricts the scope of criminal recognition only to behaviour concerning employment relationship and to the part of the social insurance contribution that is remuneration for work.

The legislator defines the crime of failure to report data to social insurance (Article 219 Criminal Code); this does not cover solely the negligence of obligations relating to hiring employees, being a reinforcement to the criminal-law protection of the duty to report data to social insurance as set forth in Article 98 para. 1(2) SSA. Therefore, the legislator should also ensure that certain behaviour that consists in failure to pay social insurance contributions due also under titles other than employment relationship should be treated as crime. In my opinion, a reasonable solution would be to introduce a new type of crime into the Criminal Code defined

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[71] Act of 20 April 2004 on promotion of employment and labour market institutions, consolidated text, Dz.U. 2017, item 1065, as amended; hereinafter APLMI.

[72] This may be easily done with appropriate modifications to the provisions of Article 98 SSA with a simultaneous repeal of the provisions of Article 122 para. 1(1) and Article 122 para. 2 APLMI and Article 193(3) of the Act of 27 August 2004 on publicly funded health benefits (consolidated text, Dz.U. 2017, item 1938, as amended).

[73] Including, for instance, acts that are treated as crimes under Article 218 Criminal Code.

as persistent[74] failure to pay social insurance contributions or other premiums statutorily collectable by ZUS from contribution payers or other persons obliged to act on their behalf, to be subject to a fine, a penalty of limitation of liberty or deprivation of liberty for up to two years. The solution would significantly simplify the problem of qualifying the behaviour that would deserve such penalty, like the penalty provided for crimes under Article 218 § 1a Criminal Code. *In concreto* the concepts of a continuous series of acts, combined penalty and a series of crimes could be applicable and courts would have access to a wider range of penalty instruments than in case of offences. More importantly, an appropriate identification of statutory penalty limits would, on the one hand, provide for a possibility to apply measures mitigating liability of persons who have committed a prohibited act due to the lack of adequate skills, while on the other hand, more severe punishment of perpetrators of socially harmful acts and those committed intentionally.

However, it would be incorrect to place such crime in Chapter XXVIII of the Criminal Code, among crimes against persons performing gainful work. The protection would be extended to appropriate forms of social security and not to individual interests. It seems that such type of crimes should be rather included in Chapter XXXV or Chapter XXVI of the Criminal Code since beyond any doubts failure to pay contributions is most often connected to generating financial benefits or involvement of the perpetrator in broadly understood business transactions.[75]

5. CONCLUSIONS

1) The legislator does not provide for *sensu stricto* criminal liability for offences consisting in incorrect calculation, deduction and transfer of contributions but liability for the offence of failure to make social insurance contributions. A criminal law protection is thus extended solely to the obligation of transferring of the appropriate amount of premiums to the ZUS bank account.
2) The offence of failure to pay social insurance contributions, defined in Article 98 para. 1(1a) SSA, applies to all insurance titles that are subject to the obligation to pay premiums, i.e. not only employee insurance.
3) Failure to pay social insurance contributions for employees does not breach any employee right related to social insurance that would be protected under Article 218 § 1a Criminal Code. However – with respect to the portion of the premium deducted from remuneration for work – failure to pay constitutes a violation of employee rights relating to employment relationship: the right to

[74] The sanctions for failure to pay contributions in other cases, as specified in the Social Security Act, are in my opinion sufficiently severe for contribution payers. As a rule, they are obliged to pay interest for delay and additionally an additional fee may be charged, especially when such failure to pay contributions is due to gross negligence on the part of the payer.

[75] It is also worth adding that in the legal doctrine and case law the notion of business transaction as an activity protected with the provisions of Chapter XXXVI of the Criminal Code is often understood broadly; compare the Supreme Court ruling of 24 January 2013, I KZP 22/12, OSNKW 2013, No. 3, item 18; the Supreme Court resolution of 26 November 2003, I KZP 32/03, OSNKW 2004, No. 1, item 3 with comments by O. Górniok, OSP 2004, No. 7–8, item 103.

remuneration for work. With reference to the portion of unpaid social insurance contribution, the crime under Article 218 § 1a Criminal Code may be committed.

4) Social insurance contributions in the portion in which they are deducted from the insured's income may not be misappropriated since they are not objects, property rights as referred to in Article 284 § 1 Criminal Code.
5) The monies that have not been disbursed to employees due to deduction from the remuneration for work, funded by the insured, may not be misappropriated to the detriment of the employee since – in the light of Article 155 § 2 Civil Code – such resources are not owned by the employee.
6) The conduct consisting in failure to pay social insurance contributions *de lege lata* may not be qualified either on the basis of Article 284 § 1 Criminal Code or even under Article 284 § 2 Criminal Code, unless this refers to misappropriation of money that has been provided to a specific person who should have transferred it to the account of ZUS as social insurance contributions and who has misappropriated the funds. Then the crime affects the entity whose money has been misappropriated by such person.
7) It is necessary to propose the introduction of a type of crime to the Criminal Code that would consist in failure to pay social insurance contributions or premiums for other forms of social security that are by law collected by ZUS.

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CRIMINAL-LAW QUALIFICATION OF FAILURE TO PAY SOCIAL INSURANCE CONTRIBUTIONS

Summary

This article is a polemic against some views expressed by Krzysztof Ślebzak and Jacek Kosonoga in their paper entitled *Liability of a social security contribution payer for calculation, deduction and submission of social security contributions* [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne], published in Ius Novum No. 3 of 2016. Appreciating the value of the views presented in the above study, the author disputes some of them concerning criminal-law qualification of a conduct consisting in failure to pay social insurance contributions. In the view of the author of this polemic, failing to pay social insurance contributions for an employee does not violate any of the employee rights in the area of social insurance that would be subject to protection by virtue of Article 218 § 1a Criminal Code. However, if the due contributions were deducted from the salary, failure to pay them may constitute the violation of an employee right resulting from employment, i.e. the right to remuneration for work. Only with reference to that part of unpaid contribution, is it possible to commit a crime under Article 218 § 1a Criminal Code. Furthermore, social insurance contributions in the part deducted from the salary of the insured person cannot be misappropriated, because they are neither material things nor a property right provided for in Article 284 § 1 Criminal Code. The author also suggests that a crime consisting in failure to pay social insurance contributions or other forms of social security premiums which are statutorily due to the ZUS Social Insurance Institution should be introduced to the Criminal Code.

Keywords: contributions, social insurance, criminal liability, offence, social insurance contribution payer

O KARNOPRAWNEJ KWALIFIKACJI ZACHOWANIA POLEGAJĄCEGO NA NIEOPŁACANIU SKŁADEK NA UBEZPIECZENIA SPOŁECZNE

Streszczenie

Artykuł jest polemiką z niektórymi poglądami wyrażonymi przez Krzysztofa Ślebzaka i Jacka Kosonogę w opracowaniu pt. „Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne", opublikowanym w trzecim numerze „Ius Novum" z 2016 roku. Doceniając wartość rozważań zawartych w wymienionej publikacji, autor polemizuje jednak z częścią z nich, dotyczącą karnoprawnych kwalifikacji zachowań, polegających na nieopłacaniu składek na ubezpieczenia społeczne. Zdaniem autora polemiki, nieopłacanie składek na ubezpieczenia społeczne pracownika nie narusza żadnego z praw pracownika z zakresu ubezpieczeń społecznych, które podlegałoby ochronie na podstawie art. 218 § 1a k.k. W części, w jakiej składki podlegające opłaceniu zostały potrącone z wynagrodzenia za pracę, ich nieopłacenie stanowić może jednak naruszenie prawa pracownika, wynikającego ze stosunku pracy – prawa do wynagrodzenia za pracę. W odniesieniu do tej tylko części nieopłaconej składki na ubezpieczenia społeczne możliwe jest popełnienie przestępstwa z art. 218 § 1a k.k. Ponadto składki na ubezpieczenia społeczne w części, w jakiej zostały potrącone z przychodu ubezpieczonego, nie mogą zostać przywłaszczone, ponieważ nie są one ani rzeczami, ani prawem majątkowym, o którym mowa w art. 284 § 1 k.k. Dodat-

kowo, autor postuluje wprowadzenie do Kodeksu karnego typu przestępstwa polegającego na nieopłacaniu składek na ubezpieczenia społeczne lub składek na inne formy zabezpieczenia społecznego, do których poboru z mocy ustawy zobowiązany jest Zakład Ubezpieczeń Społecznych.

Słowa kluczowe: składki, ubezpieczenia społeczne, odpowiedzialność karna, wykroczenie, płatnik składek

SOBRE LA CALIFICACIÓN JURÍDICO-PENAL DE LA CONDUCTA QUE CONSISTE EN OMISIÓN DE DEBER DE COTIZAR A LA SEGURIDAD SOCIAL

Resumen

El artículo es una polémica con algunas posturas presentadas por Krzysztof Ślebzak y Jacek Kosonoga en la obra titulada "La responsabilidad de sujeto obligado por el cálculo, deducción y remisión de la cuotas a la Seguridad Social" [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne] publicada en el tercer número de Ius Novum de 2016. Apreciando el valor de consideraciones presentadas en la citada publicación, el Autor no concuerda con una parte de ellas, relativas a la calificación jurídico-penal de la conducta que consiste en omisión de deber de cotizar a la Seguridad Social. Según el Autor del presente artículo, la falta de pago de cuotas a la Seguridad Social no infringe ninguno de los derechos de trabajadores en cuanto a la Seguridad Social, que sea protegido en virtud del art. 218 § 1a del código penal. Sin embargo, en caso las cuotas sujetas a pago hayan sido deducidas de la remuneración, pero no pagadas, estamos ante posible infracción de derecho de trabajador resultante de su contrato laboral – el derecho a recibir remuneración por el trabajo. Sólo en cuanto a la cuota no pagada a la Seguridad Social existe la posibilidad de la comisión de delito del art. 218 § 1a del código penal. Además, las cuotas a la Seguridad Social deducidas del ingreso, no pueden ser objeto de apropiación, porque no se consideran bienes ni derechos reales a los que se refiere el art. 284 § 1 del código penal. Adicionalmente, el Autor propone introducir al código penal el delito consistente en falta de pago de cuotas a la Seguridad Social o cuotas a otras formas de seguros sociales para cuyo cobro la Seguridad Social queda autorizada por ley.

Palabras claves: cuotas, seguridad social, responsabilidad penal, falta, contribuyente

ОБ УГОЛОВНО-ПРАВОВОЙ КВАЛИФИКАЦИИ НЕУПЛАТЫ ВЗНОСОВ НА СОЦИАЛЬНОЕ СТРАХОВАНИЕ

Резюме

В статье автор полемизирует с некоторыми взглядами, выраженными Кшиштофом Сьлебзаком и Яцеком Косоногой в работе «Ответственность плательщика взносов за расчет, удержание и перечисление взносов на социальное страхование» [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne], опубликованной в третьем выпуске журнала «Ius Novum» за 2016 год. Признавая обоснованность большинства соображений, содержащихся в вышеупомянутой публикации, автор, однако, полемизирует с ними в той части, которая касается уголовно-правовой квалификации неуплаты взносов на социальное страхование. По мнению автора, неуплата взносов на социальное страхование работника не нарушает тех его прав, которые подлежат защите в соответствии со ст. 218 § 1a УК. Однако, в той части, в которой подлежащие выплате взносы на социальное страхование были удержаны из оплаты труда, их неуплата может представлять собой нарушение права работника, вытекающего из трудовых отношений, а именно, права на оплату труда. Таким образом, совершение преступления, предусмотренного ст. 218 § 1a УК, возможно только по отношению к этой части неуплаченных взносов на социальное страхование. Кроме того, взносы на социальное страхование в той части, в которой они были вычтены из дохода застрахованного лица, не могут быть присвоены, поскольку они не являются ни предметами имущества, ни имущественным правом, о которых идет речь в ст. 284 § 1 УК. В завершение автор предлагает ввести в Уголовный кодекс состав преступления, заключающийся в неуплате взносов на социальное страхование либо других взносов на социальное обеспечение, сбор которых возложен по закону на Управление социального страхования.

Ключевые слова: страховые взносы, социальное страхование, уголовная ответственность, правонарушение, плательщик взносов

ÜBER DIE STRAFRECHTLICHE BEURTEILUNG DER NICHTABFÜHRUNG VON SOZIALVERSICHERUNGSBEITRÄGEN

Zusammenfassung

Der Artikel ist als polemische Antwort auf einige von Krzysztof Ślebzak und Jacek Kosonoga in dem in der dritten Nummer der Vierteljahresschrift Ius Novum von 2016 erschienenen Beitrag „Die Verantwortlichkeit des Beitragszahlers für die Berechnung, den Abzug und die Überweisung der Beiträge zur Sozialversicherung" [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne] zum Ausdruck gebrachte Positionen gedacht. Die in der genannten Veröffentlichung enthaltenen Überlegungen werden durchaus vom Autor geschätzt, doch kann er dem Teil der Erwägungen, der sich auf die strafrechtliche Qualifikation der Nichtabführung von Sozialversicherungsbeiträgen bezieht, nicht zustimmen. Nach Auffassung des Autors verstößt die Nichtabführung von Sozialversicherungsbeiträgen eines Arbeitnehmers nicht gegen Arbeitnehmerrechte im Bereich der sozialen Sicherheit, die gemäß Artikel 218 § 1a des polnischen Strafgesetzbuches dem Schutz unterliegen würden. In Bezug auf abzuführende Beiträge, die vom Arbeitsentgelt einbehalten werden, kann ihre Nichtabführung dagegen eine Verletzung der Arbeitnehmerrechte aus dem Arbeitsverhältnis, und zwar des Rechts auf Arbeitsvergütung darstellen. In Bezug auf solche nicht abgeführten Sozialversicherungsbeiträge ist es möglich, dass eine Straftat

gemäß Artikel 218 § 1a des polnischen Strafgesetzbuches vorliegt. Darüber hinaus können sich Sozialversicherungsbeiträge, soweit sie von der Arbeitsvergütung des Versicherten einbehalten wurden, nicht widerrechtlich angeeignet werden, da es sich bei ihnen weder um in Artikel 284 § 1 des polnischen Strafgesetzbuches angeführte Sachen, noch um dort genanntes Eigentum handelt. Außerdem spricht sich der Autor dafür aus, den Straftatbestand der Nichtabführung von Sozialversicherungsbeiträgen und Beiträgen für andere Formen der sozialen Absicherung, zu deren Erhebung die staatliche Sozialversicherung in Polen (ZUS) laut Gesetz verpflichtet ist, in das polnische Strafgesetzbuch aufzunehmen.

Schlüsselwörter: Beiträge, Sozialversicherungen, strafrechtliche Verantwortlichkeit, Vergehen, Beitragszahler

SUR LA QUALIFICATION JURIDIQUE PÉNALE DU COMPORTEMENT CONSISTANT EN LE NON-PAIEMENT DE COTISATIONS DE SÉCURITÉ SOCIALE

Résumé

L'article est une polémique avec certaines opinions exprimées par Krzysztof Ślebzak et Jacek Kosonoga dans l'étude intitulée «Responsabilité du payeur de cotisations pour le calcul, la déduction et le transfert de cotisations de sécurité sociale» [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne] publiée dans le troisième numéro de Ius Novum de 2016. Tout en reconnaissant la valeur des considérations contenues dans la publication susmentionnée, l'auteur conteste certaines d'entre elles en ce qui concerne la qualification juridique pénale du comportement consistant en le non-paiement de cotisations de sécurité sociale. Selon l'auteur de la polémique, le non-paiement des cotisations de sécurité sociale des employés ne porte atteinte aux droits d'aucun employé dans le domaine de la sécurité sociale, qui ferait l'objet d'une protection en vertu de l'article 218 § 1bis du code pénal. Toutefois, dans la partie dans laquelle les cotisations à payer ont été déduites de la rémunération du travail, leur non-paiement peut constituer une violation du droit du salarié découlant de la relation de travail – le droit à une rémunération pour le travail. En ce qui concerne cette partie des cotisations de sécurité sociale impayées, il est possible de commettre une infraction au sens de l'article 218 § 1bis du code pénal. En outre, les cotisations de sécurité sociale dans la partie dans laquelle elles ont été déduites du revenu de l'assuré ne peuvent être détournées, car elles ne sont ni un bien ni un droit de propriété au sens de l'article 284 § 1 du code pénal. En outre, l'auteur propose d'introduire dans le code pénal un type de délit consistant en le non-paiement de cotisations de sécurité sociale ou de contributions à d'autres formes de sécurité sociale, que l'institution de sécurité sociale est tenue de percevoir en vertu de la loi.

Mots-clés: cotisations, assurance sociale, responsabilité pénale, infraction, payeur de cotisations

SULLA CLASSIFICAZIONE TRIBUTARIO PENALE DEL COMPORTAMENTO CONSISTENTE NEL MANCATO PAGAMENTO DEI CONTRIBUTI PREVIDENZIALI

Sintesi

L'articolo è una polemica nei confronti di alcune opinioni espresse da Krzysztof Ślebzak e Jacek Kosonoga nell'elaborato intitolato "Responsabilità del soggetto pagatore dei contributi previdenziali per il calcolo, la deduzione e il versamento dei contributi previdenziali" [Odpowiedzialność płatnika składek za obliczanie, potrącanie i przekazywanie składek na ubezpieczenie społeczne] pubblicato nel terzo numero di Ius Novum nel 2016. Apprezzando il valore delle riflessioni contenute nella pubblicazione richiamata, l'autore polemizza tuttavia con parte di esse, riguardante la classificazione tributario penale dei comportamenti consistenti nel mancato pagamento dei contributi previdenziali. Secondo l'autore della polemica, il mancato pagamento dei contributi previdenziali del dipendente non viola alcun diritto del dipendente nell'ambito della previdenza sociale, soggetto a tutela sulla base dell'art. 218 § 1a del codice penale. Invece per quanto riguarda la parte di contributi soggetti a versamento dedotta dallo stipendio, il loro mancato pagamento può costituire una violazione di un diritto del dipendente derivante dal rapporto di lavoro: il diritto della retribuzione per il lavoro. Solo in riferimento a questa parte di contributi previdenziali non pagata è possibile ravvisare il reato dell'art. 218 § 1a del codice penale. Inoltre i contributi previdenziali, nella parte in cui sono stati dedotti dal reddito dell'assicurato, non possono essere oggetto di appropriazione indebita, in quanto non sono né cose, né diritti patrimoniali, di cui all'art. 284 § 1 del codice penale. Inoltre l'autore propone l'introduzione nel codice penale di un tipo di reato consistente nel mancato pagamento dei contributi previdenziali o di contributi per altre forme di assicurazione sociale, alla cui esazione è tenuto in virtù di legge il Zakład Ubezpieczeń Społecznych (Ente di Previdenza Sociale).

Parole chiave: contributi, previdenza sociale, responsabilità penale, contravvenzione, soggetto pagatore dei contributi previdenziali

Cytuj jako:

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