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ANATOCISM IN THE CZECH TAX LAW

Abstract

The paper examines legal disputes regarding the possibility of taking interest of interest (anatocism) payed by the tax administrators in the Czech legal order. The aim of this paper is to assess the outcome of the above-mentioned disputes and to determine whether the current legislation still allows taking interest on interest in tax law. Author draws conclusions mainly from case law of the Czech Supreme Administrative Court and uses analysis, synthesis and descriptive method.

Key words: tax, law, tax administration, interest, anatocism, judicial review.

JEL Classification: K34

1. Introduction

The Czech tax law contains a system of interest which the tax administrator is obliged to pay in cases where the tax administrator withholds payment from the taxpayer for certain specific reasons. Such interest may be caused by the payment of tax on the basis of an illegal or void decision, the failure to pay the overpayment within the statutory time limit or the withholding of an excessive value added tax deduction during the period of its examination. In recent years, it has become a matter of dispute whether interests paid by the tax authorities may be subject to further interest. Their essence is the question

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whether a taxpayer may have a claim against a public budget even though the law does not expressly allow such a claim. Moreover, in view of the historical tradition, based on the reception of Roman law and Christian morality, it is a claim whose very nature is somewhat controversial. As a result of these disputes, interest on interest in tax law has been recognized by the administrative courts (ultimately with certain limitations).

The aim of this paper is therefore to assess the outcome of the above-mentioned disputes and to determine whether the current legislation still allows interest on interest in tax law. To do so, the methods of description, analysis and synthesis will be used. The paper itself is then divided into five parts, apart from the introduction and conclusion. The first part of the paper is therefore focused on defining the concept of anataocism and the way in which the Czech legislation treats interest on interest. It is also here that I focus on the definition of the interest that could be subject to further interest within the limits of tax law. The second part of the thesis is devoted to an analysis of case law which, in my opinion, has opened up the possibility of further interest in tax law. The third and fourth parts of this thesis are devoted to the subsequent development of the case law on interest on interest in tax law. Finally, the last part of this paper is devoted to the development of the legislation in question and the question whether further interest on interest in Czech tax law is also possible after 1 January 2021.

2. The concept of anatocism and the legal regulation in the Czech Republic

Anatocism is a usury, which consists in taking interest on interest, or receiving compound interest. Anatocism is often perceived as a negative phenomenon and is prohibited, or at least restricted to some extent, in most EU Member States' legal orders, often at least as a consumer protection measure. Its restriction or prohibition is aimed at preventing the uncontrolled exponential growth of debt through unpaid interest, which would be subject to further interest [Reifner, Schröd 2012: 111-118]. In my opinion, if the phenomenon of anatocism is viewed so negatively, it should not affect the public sector either, i.e. public budgets should also be protected against the need to pay interest on interest, at least to the same extent as other entities.

This brings me to why the issue of anatocism is also relevant for Czech tax law. Since the establishment of the independent Czech Republic, it has basically regulated the system of interest which the tax administrator is obliged to pay in favour of the tax payer in specific cases where he had to endure an intervention in the form of non-receipt of certain funds. The whole system has been revised several times, when both the conditions for

entitlement to various types of interest and the interest rates themselves were changed from the ground up. The last major change to the system was made with effect from 1 January 2021 by the Act no. 283/2020 Coll., amending Act no. 280/2009 Coll., the Tax Code, as amended, and other related laws. In my opinion, the latter also fundamentally changes the conditions for assessing the accrual of interest on interest and is discussed in the last part of this paper. However, I devote a substantial part of this paper to the legal situation as of 31 December 2020, as a substantial part of the disputes described herein relate to the regulation in force until that date. However, this is not merely a historical interest, as the related claims do not expire for at least the duration of the six-year tax period [judgment of the Supreme Administrative Court of 10 June 2015, no. 2 Afs 234/2014-43]. It can therefore be assumed that some of the disputes in this area will not be resolved until later years.

The interests that are most relevant to the content of this paper are interest on refundable overpayments, interest on unlawful conduct of the tax administrator, and interest on tax deductions. The right to interest on a refundable overpayment within the meaning of Section 155(5) of the Tax Code arises in a situation where the tax administrator fails to refund a refundable tax overpayment to the taxpayer within the statutory time limit. In order to be entitled to interest on an unlawful act pursuant to Section 254(1) of the Tax Code, the law required the annulment or amendment of a tax assessment decision on the grounds of illegality or maladministration, or the declaration of the decision as null and void, and the prior payment of tax on the basis of or in connection with that decision, with the amount so paid becoming the subject of interest [judgment of the Supreme Administrative Court of 28 August 2014, No 7 Afs 94/2014-53]. Lastly, interest on the tax deduction was due under Section 254a of the Tax Code where the tax authority, before assessing the excessive deduction of value added tax, had examined the claim within the framework of one of the control procedures, thereby effectively delaying the payment of the excessive deduction. The interests described above have a number of common features. First of all, they are an accessory to the tax within the meaning of Article 2(5) of the Tax Code, which follows the fate of the tax. However, both the tax and the accessory are regarded as a tax for the purposes of the Tax Code and are administered as such. Their second common characteristic is that they represent a certain representation of the time value of money, which the legislator has assigned to them for the purposes of tax law. This is reflected in the period of interest and the rate of interest, whereby, in the event of non-payment of the principal (i.e. in public law terms, absence of redress), interest is gradually added to it. The final common feature is that all the interest in question is set off against

the compensation for the damage which the tax authority would have had to pay in connection with the legal fact giving rise to the interest. Some authors then regard the interest arising under the Tax Code as penalties by which the law punishes the tax administrator's misconduct [Novotná et al. 2019: 232].

As far as the issue of anatocism itself is concerned, it has not been explicitly regulated in the Czech legal system for a long time. However, in its judgment of 24 March 2004, Case No. 35 Odo 101/2002, the Supreme Court of the Czech Republic held that since the civil law rules do not allow the creditor to demand from the debtor an accessory (default interest) in the event of default in payment of the claim's accessory, anatocism is in principle prohibited. The Supreme Court also reached this conclusion on the basis of the doctrine that the possibility of claiming interest on interest was already prohibited in ancient Rome, and this prohibition has been recognised in the Czech territory until the present day. However, the Supreme Court admitted that the parties to a private legal relationship may agree that the agreed interest becomes part of the principal. In such a case, the interest will undergo a certain transformation and only the principal will continue to bear interest.

In the tax area, the Supreme Administrative Court dealt with the issue of anatocism in a fundamental way in its judgment of 29 October 2009, No. 1 Afs 80/2009-45. In that judgment, following the example of the Supreme Court of the Czech Republic, the Court held that the principle of prohibition of further interest on default interest in private law undoubtedly applies. The Court saw an important parallel to the situation where the tax administrator fails to return a refundable overpayment within the statutory time limit and is therefore obliged to pay interest on that refundable overpayment to the taxpayer, since the purpose of interest arising under tax law (or interest on a refundable overpayment) is, similarly to private law default interest, to penalise the obliged entity (the tax administrator in tax proceedings, or the debtor in a private law relationship) for a breach of a certain obligation. Having regard to the principle of the uniformity of the legal order, the Court then concludes, on the basis of a systematic interpretation, that the principle of the prohibition of anatocism also applies to tax proceedings. Accepting the view that interest on a refundable overpayment should be calculated on the overpayment gradually increased by its accessories would deny the validity of the principle of the prohibition of further interest, already recognised in Roman law, in the field of tax law. However, according to the Supreme Administrative Court, such an interpretation would impermissibly and completely unjustifiably give interest under tax law a meaning different from its original meaning and, as a result, would mean a violation of the unity and

consistency of the Czech legal order. In the Tax Code, the prohibition of anatocism was expressly provided for only in relation to interest on late payment by the taxpayer, in Section 253. However, the commentary literature on this provision stated that it was an unambiguous expression of the prohibition of anatocism, generally valid since the times of ancient Rome, also for the area of tax law and that therefore interest on interest is not permissible, and generally interest on tax accessories is not permissible [Baxa 2011: 1427].

However, the general principle of the prohibition of anatocism in the Czech legal system was broken with effect from 1 January 2014, when the provisions of Section 1806 of Act No. 89/2012 Coll., the Civil Code, as amended (the "Civil Code"), which expressly permits it, came into force. However, the legislator has expressly allowed interest only in the area of private law, and only under precisely defined conditions: if the parties expressly agree to it or if it is a claim arising from an unlawful act that has been brought before a court. Since it is essentially inconceivable in tax law that the taxpayer and the tax authorities could agree that the taxpayer would be awarded interest on due interest in addition to interest on the principal, the latter option is particularly relevant to this thesis. As will be shown below, it was the application of Article 1806 of the Civil Code by analogy iuris that constituted the main reason why anatocism was finally allowed in tax law in the period before 1 January 2021.

3. Erosion of the Prohibition of Anatocism in Czech Tax Law

If previously the question of the admissibility of anatocism in Czech tax law could be considered resolved in favour of this prohibition, this changed at the end of 2017. At that time, the Supreme Administrative Court issued a judgment of 14 December 2017, No. 2 Afs 148/2017-36 (hereinafter also referred to as the "judgment of the Second Chamber"), which expressly allowed interest on the tax administrator's unlawful conduct to be charged with the same type of interest. The judgment is considered to have opened the way for obtaining interest on interest in Czech tax law [Rozehnal 2019: 444].

The judgment of the Second Chamber dealt with a dispute based on the taxpayer's objection to the tax administrator's action in failing to credit his personal tax account with interest on the taxpayer's unlawful conduct within the meaning of section 254(1) of the Tax Code. The tax administrator rejected that objection by a decision, but the appellate authority found fault with its action. It therefore reversed the tax administrator's decision on the objection in that it upheld the taxpayer's objection. The Supreme Administrative Court then proceeded to consider the case on the basis that the interest in question can be

regarded as a refund of a tax from the public budget, i.e. as a tax as it is defined in its broadest possible sense for the purposes of its administration by Article 1(2) of the Tax Code. From that conclusion, the Court concluded that the two conditions mentioned above for the possibility of further interest being charged are cumulatively fulfilled. He likened the proceedings on the objection to the award and payment of interest to an inquiry, i.e. for the purposes of applying Section 254 of the Tax Code, he considered the decision on such an objection to be a decision on the assessment of tax. If, on the basis of such a decision, the first interest was not awarded and paid, then the amount was withheld on the basis of an unlawful tax assessment decision. According to the Supreme Administrative Court, this was the equivalent of payment of tax on the basis of an unlawful decision, so that this condition under section 254(1) of the Tax Code was also satisfied.

In this respect, in my opinion, it is particularly noteworthy that the Supreme Administrative Court did not deal in any way with the question of the current validity of the prohibition of anatocism in tax law, but rather bypassed it completely. According to the Supreme Administrative Court, the case it dealt with did not involve genuine 'interest on interest' at all, since the amount of the initial interest 'crystallised', was limited and fixed and did not continue to accrue to the original principal. Therefore, according to the Supreme Administrative Court, it was a new principal of a tax overpayment sui generis. In my opinion, it is necessary to emphasise here that this transformation did not consist in the interest becoming part of the principal, as stated in the judgment of the Supreme Court of the Czech Republic of 24 March 2004, Case No 35 Odo 101/2002, but became principal as a result of the repayment of the principal to which it had accrued. In the Court's view, what was relevant was that the taxpayer sought to be granted interest on one particular principal amount of the tax overpayment, the issue of which the tax administrator had unlawfully delayed for approximately nine months. He therefore considered it relatively incidental and insignificant that the title for the amount claimed was the first interest. It was precisely because the tax authorities had unlawfully delayed in declaring and paying that sum that the taxpayer was also entitled to interest on that sum.

The judgment of the Second Chamber has, of course, been criticised. First of all, it was criticised that the Supreme Administrative Court referred to the amount of interest as a sui generis principal, which is explicitly referred to as an accessory to tax in Section 2(5) of the Tax Code. The term principal is understood in legal practice to mean the main debt, to which only accessories are added. The fact that the crediting of interest to the taxpayer's personal tax account gives rise to an overpayment does not alter the nature of that overpayment, which is still an accessory to the tax. It is therefore difficult to accept the

conclusion that the manner in which an overpayment arises can be regarded as random and insignificant. Where an overpayment has arisen as an accessory to tax, it does not lose that character even when it becomes due. In order to assess the case, it was therefore necessary to determine in particular whether the principle of the prohibition of anatocism still applies to Czech tax law. The subject of criticism was also the fact that the decision on the objection against the actual act of the tax administrator in the payment of taxes was also considered to be a decision on the determination of tax, in a situation where the decision on the determination of tax was defined in Section 147(1) of the Tax Code as a payment order, an additional payment order and a collective prescription list [Rozehnal, Feldek 2018].

The judgment of the Second Chamber, however, was far from being accepted uncritically even by the regional courts. Many of them found the reasoning of the judgment of the Second Chamber unconvincing and considered it an excessively deviant departure from the generally accepted prohibition of interest in tax law. [judgment of the Regional Court in Prague of 17 October 2019, No 45 Af 9/2017-56, the judgments of the Regional Court in Hradec Králové, Pardubice Branch, of 15 April 2020, No 52 Af 4/2019-63, and of 21 October 2020, No 52 Af 2/2020-57, and the judgment of the Municipal Court in Prague of 17 February 2021, No 14 Af 26/2019-38]. The regional courts argued that new legislation in the field of civil law could not in itself constitute a reason for allowing anatocism in other branches of law. In order for interest to be anatomised in tax law, the Tax Code or another tax law would have to expressly provide for it, as Section 1806 of the Civil Code did. However, no such provision is to be found in the legal order, nor can it be substituted by the legislature's presumed intention to compensate the taxpayer for the fact that he is temporarily unable to use a sum of money to which he is entitled. Nor can the use of analogy be resorted to, since that procedure serves to fill a gap in the law, i.e. to fill an unintended incompleteness in the legal order. However, the fact that the legislature has decided not to allow interest without further consideration is not a gap in the law, since interest is not a principle which is immanent to the legal order as a whole and which the legislature has failed to take into account. Indeed, even in the recodified private law, interest on interest is not laid down as a general rule, but is limited to enumerated cases, however much economic theory would lead to the conclusion that the creditor should be fairly compensated with interest on the principal as well as with interest on interest. It is true, however, that any accruing interest may run out once and be fixed, which would then mean, according to the judgment of the Second Chamber, that interest on interest is permissible in tax law. Thus, the only and wholly inadequate distinction offered by the

Second Chamber is the point at which interest can continue to accrue, but that does not alter the fact that it is still interest. The regional courts in question have therefore decided not to follow the judgment of the Second Chamber of the Supreme Administrative Court in their decisions in similar cases, which in itself must be regarded as rare.

However, it should be noted that some regional courts, on the contrary, uncritically adopted the conclusions of the judgment of the Second Chamber and based their decisions on it [the judgment of the Regional Court in Pilsen of 18 November 2020, No 77 Af 11/2020-36, or the judgment of the Regional Court in Brno of 18 February 2021, No 62 Af 87/2019-35]. Even before the judgment of the Second Chamber, it was possible to find in the literature the opinion that the overpayment arising as interest is in essence a tax overpayment under the Tax Code, and therefore there is no reason to treat it differently from other overpayments, i.e. to exclude their further interest [Tesař 2016: 63-65]. Some of the literature already following the judgment of the Second Chamber also takes the conclusions described therein rather as self-evident. [Novotná et al. 2019: 248]. In my view, this illustrates to a large extent the controversy surrounding the subject under discussion, for which it is difficult to find an objectively correct answer.

4. Burial of the prohibition of anatocism in Czech tax law?

In view of the controversy described above concerning the admissibility of interest accruing under tax law, it was to be expected that the Supreme Administrative Court would have to take a position on the matter again. It did so in its judgment of 6 May 2021, No. 10 Afs 382/2020-51 ('the Opatovice Power Plant judgment'). It must then be concluded that, in that judgment, the Supreme Administrative Court not only followed the legal opinion described in the judgment of the Second Chamber, but also extended it further. In the present case, the subject-matter of the dispute was the interest on the tax administrator's unlawful conduct, which the taxpayer had already requested at the end of 2015. The tax administrator did not grant that request and the appeal against its decision was dismissed. However, at the end of 2018, the taxpayer requested the same interest again, and this time the tax administrator granted his request in light of the development of case law and administrative practice. Thus, the facts were such that the first objection decision was neither reversed nor amended, but the tax administrator granted the later request for the award of interest, based on a change in administrative practice. However, in relation to the terms of section 254(1) of the Tax Code, that situation was, in the eyes of the Supreme Administrative Court, tantamount to a change in the original decision on the ground of illegality.

The Supreme Administrative Court in the Opatovice Power Plant judgment first pointed out the different purpose of interest on late payment and interest on unlawful conduct of the tax administrator. While interest on late payment is payable by the taxpayer if it fails to pay the tax due on the due date, interest on unlawful conduct is payable by the tax administrator who has assessed the tax in breach of the law or who has committed an error of administration. Therefore, the two interests cannot be interchangeable. The Supreme Administrative Court then considered it essential that, pursuant to Section 1806 of the Civil Code, it had provided for interest on interest on a claim arising from an unlawful act. The main argument of the Supreme Administrative Court's judgment of 29 October 2009, No. 1 Afs 80/2009-45, which based the conclusion on the prohibition of anatocism in tax law on the principle of the uncontroversial nature of the Czech legal order, has thus literally "dissolved" since 2014, according to the Supreme Administrative Court. Moreover, it was not possible to apply Section 253 of the Tax Code, which prevented further interest on interest on late payment, to the case.

In relation to the conclusion that the interest on the tax administrator's unlawful conduct constitutes a tax paid within the meaning of Section 254(1) of the Tax Code, the Supreme Administrative Court fully adhered to the reasoning contained in the judgment of the Second Chamber. The amount of the initial interest was therefore crystallised in this case, too, and was limited and fixed in amount, and did not further accrue to the original principal, so that it became a principal of a kind in itself. As regards the fact that in the present case the decision on interest was not annulled or changed on the ground of illegality, the Supreme Administrative Court stated in the judgment Opatovice Power Plant that the formal aspects of the tax administrator's decision-making are not decisive for the taxpayer's entitlement to interest under section 254 of the Tax Code, but whether the original decision was illegal. The tax law knows the institutes by which it is possible to obtain a change in the last known tax or in the balance of a personal tax account even in situations where there is no formal change, annulment or nullity of a certain decision. This was the case here in relation to a decision on an objection by which the tax authority refused to grant and pay interest to the taxpayer as early as 2015, only to assess the same claim in the opposite way several years later. According to the Supreme Administrative Court, it is therefore the delay in charging or reimbursing the amount of the first interest on the original unlawful conduct of the tax administrator that is subject to further interest under Section 254 of the Tax Code, until such interest is credited to the taxpayer's account. Therefore, if the tax administrator has twice acted unlawfully in respect of two different amounts due to the same taxpayer (both the original principal and the first

interest under section 254 of the Tax Code), it cannot compensate for this double wrongful act by charging the taxpayer a single (first) interest under section 254 of the Tax Code. According to the Supreme Administrative Court, only by charging the second interest will the entire period of the wrongful act be 'covered'. The Supreme Administrative Court then repeated essentially identical conclusions less than a month later in its judgment of 2 June 2021, no. 10 Afs 405/2020-41.

In my opinion, a simple comparison of the text of Section 254(1) of the Tax Code and the judgment Opatovice Power Plant raises fundamental doubts as to whether the provision in question was applied in the case at all. The two conditions, the cumulative fulfilment of which is a prerequisite for the creation of interest on the basis of the tax administrator's unlawful conduct, were almost unrecognizable. First of all, this is a case where there was no annulment or modification of the decision on the assessment of the tax for illegality, nor was it declared null and void. The tax which must be paid on the basis of an unlawful decision has thus also become interest paid by the tax authorities to the taxpayer. Finally, it is not even a problem that the amount to be charged as interest is to be additional interest, i.e. it is an anatocism which was considered to be prohibited in Czech law.

It is undoubtedly possible to agree with the conclusion that tax law does indeed have institutes that can be used to change the last known tax or the balance in a personal tax account even in situations where there is no formal change, annulment or declaration of nullity of a certain decision.[1] The problem, however, is that the legislator has made it a condition for the accrual of interest that a certain decision has been amended or revoked on the grounds of its illegality or has been declared null and void. In order to achieve such an effect, it is therefore necessary to have a decision of the competent authority, the operative part of which is the amendment or annulment of the tax assessment decision, and such a procedure must be duly justified by the illegality of the amended or annulled decision. The situation is slightly different in relation to a null and void decision. If a decision is void, it cannot, by its very nature, produce any legal effects from the outset. However, the law links the accrual of interest only to the declaration of nullity of such a decision by the competent authority. In my opinion, the above conclusions lead to the conclusion that the legislator did not intend to allow interest to accrue even in the event of a change in the last known tax or in the balance of a personal tax account in ways other than those just mentioned. I believe that the Supreme Administrative Court's contrary

[1] In this respect, the institute of the additional payment assessment, which determines the difference compared to the last known tax, plays a crucial role without the need to change or cancel the last decision on tax assessment.

conclusion constitutes a bridging of a non-existent legal gap. The fact that a particular provision does not apply to a particular factual situation does not imply that it must be applied by analogy.

In this respect, however, it is necessary to point out that the Supreme Administrative Court, in applying the analogy iuris, completely overlooked a fundamental condition for the possibility of further interest accruing on the claim for an unlawful act under civil law. That is, according to Article 1806 of the Civil Code, the filing of such a claim with the court, since interest accrues in such a case from the time when it is filed. It is conceivable that the analogy of making such a claim in court (in the sense of bringing an action for payment of the amount due in a civil court) would be to make a similar submission to the tax authorities.[2] If, however, the Supreme Administrative Court saw the moment from which interest on interest accrues as the day following the expiry of the time limit within which the tax administrator should have declared and prescribed interest ex officio, it apparently omitted that condition. If the decisive date is the date on which the tax authorities should have acted ex officio, then there is clearly no act by the taxpayer in the form of a claim which would constitute the beginning of accruing interest.

5. Resurrection of the prohibition of anatocism in Czech tax law

In view of the discussion in the preceding sections of this paper, it could be assumed that the question of the admissibility of anatocism in relation to interest paid by the tax administrator has been completely overcome by case law. Indeed, the greatest obstacle to further interest was overcome by the fact that interest arising under tax law was not regarded as interest at all, but as principal sui generis. It always crystallised after the original principal (i.e. the tax overpayment) had been returned to the taxpayer, after which there was no obstacle to its further interest. In my view, it was the fact that the amount accruing as interest was to be the subject of further interest that made it necessary to regard the phenomenon in question as anatocism in its pure form. However, it cannot be disregarded that all the judgments referred to in the preceding parts of this thesis concern precisely interest on unlawful conduct of the tax authorities within the meaning of section 254(1) of the Tax Code. It is the different purposes of the various interest that eventually led the Supreme Administrative Court to treat them differently in terms of the possibility of further interest.

[2] Such a submission could take the form of a request for the award and payment of interest due, or a formalized objection to the non-payment of interest, or a complaint for protection against inaction.

This distinction was made by the Supreme Administrative Court in its judgment of 16 September 2021, No 9 Afs 52/2021-42 (hereinafter also referred to as the 'ERAMENT Trading judgment'). The subject matter of the dispute this time was the possibility of further interest in relation to interest on a refundable overpayment within the meaning of Article 155(5) of the Tax Code, which arose from an excessive deduction of value added tax claimed by the taxpayer during the period of its examination by the tax administrator. It was the accrual of the interest in question that played a crucial role. The Supreme Administrative Court took into account the fact that withholding the excessive deduction during the period of its verification (i.e. before the tax is assessed) constitutes conduct permitted by law. The interest in such a case does not therefore constitute interest on the unlawful act of the tax administrator, but compensation for the loss suffered during the period when the amount of the excessive deduction claimed was lawfully verified. Since the reason for the first interest is not the unlawful act of the tax administrator, the Supreme Administrative Court considers that no parallel can be drawn with the provisions of Section 1806 of the Civil Code in such a case.

In the ERAMENT Trading judgment, the Supreme Administrative Court held that the failure to repay the initial interest so incurred within the statutory period was unlawful. However, it did not consider this to be decisive for the award of secondary interest, in the analogous application of Article 1806 of the Civil Code, since the reason for the principal amount is decisive. The Supreme Administrative Court then, referring to the doctrine of civil law, held that it is necessary to assess whether the unlawful act gave rise to the claim itself, which accrues the interest to be paid. The fact that default interest also accrues as a result of the unlawful act (the debtor's default) is irrelevant. Section 1806 of the Civil Code contains a normative rule according to which interest on interest may be recovered from the date on which the creditor brought a claim against the debtor's wrongful act before the court. Thus, in particular, a creditor who has caused damage or injury to the creditor's personal rights will be indirectly penalised if he refuses to provide compensation voluntarily. The proposed rule of law is expressly linked to a claim arising from an unlawful act; it is therefore precluded from being applied to non-contractual obligations arising from another legal cause.

Thus, while the award of interest on interest under Section 254 of the Tax Code is supported by analogy iuris with the Civil Code, the award of interest on the late refund of interest incurred in connection with the examination of the excess deduction has no support in law. By not awarding such interest on interest, the general prohibition of anatocism is fulfilled, since, in the words of the judgment of the Opatovice Power Plant in

the present case, the denial of this old principle had no support in the letter of the law or in its internal scheme for a particular class of cases. By awarding the secondary interest claimed, the tax administrator would therefore have exceeded its competence as defined by the Tax Code, which is precluded by Article 2(3) of Constitutional Act No 1/1993 Coll., the Constitution of the Czech Republic, according to which State power may be exercised only in the cases, within the limits and in the manner prescribed by law.

Thus, in the ERAMENT Trading judgment, the Supreme Administrative Court reiterated the validity of the prohibition of anatocism in Czech law, including tax law. The regulation contained in Section 1806 of the Civil Code thus constitutes a specific exception to this prohibition. Interest on a refundable overpayment within the meaning of Article 155(5) of the Tax Code then constitutes typical default interest. It is the amount to which a refund is due if a sum is repaid after the expiry of the period laid down by law for that purpose. Moreover, in the case of interest on withheld deductions, it is not even a typical delay, but compensation for the burden which the tax subject is obliged to bear in connection with the tax authority's control procedures. There is therefore no question of any form of unlawful conduct which would give rise to a claim for such interest. This must be contrasted with the meaning and purpose of interest on unlawful conduct of the tax administrator within the meaning of Article 254(1) of the Tax Code, which represents a lump-sum compensation for the damage caused by the payment of tax on the basis of (or in connection with) an unlawful or void decision.

The Supreme Administrative Court also considers the above distinction to be important for the purposes of awarding interest on the amount which has itself accrued as interest on the tax administrator's unlawful conduct. In the judgment Opatovice Power Plant, the Supreme Administrative Court emphasises the nature of interest on unlawful conduct as an amount payable by a tax administrator who has assessed a tax contrary to the law or who has committed an incorrect official procedure within the meaning of Section 254(1) of the Tax Code. It is in this context that the Supreme Administrative Court also refers to the rule contained in Section 1806 of the Civil Code, which permits the accrual of interest on interest in cases of claims arising from unlawful acts. In doing so, the Supreme Administrative Court has directly clarified that the two types of interest differ in their nature, the conditions for their creation and the period for which they are awarded.

In my view, therefore, there is no room for the consideration that further interest on the refundable overpayment could be justified by the existence of the rule contained in section 1806 of the Civil Code. If interest on interest can be claimed only in cases of claims arising from unlawful acts, that rule is directed at the cause of the principal. It therefore clearly

does not apply to situations where interest on the principal has merely been paid after the due date. In such a case, the rule would be completely meaningless, since any interest paid late would have to be subject to interest without further conditions. The distinction between the purpose of the two institutions, i.e. interest

It should be added, however, that the above interpretation of the ERAMENT Trading judgment is not entirely uncontroversial. The Regional Court in České Budějovice, in its judgment of 3 November 2021, No 61 Af 3/2021-27, also allows interest on interest on a refundable overpayment under Section 155(5) of the Tax Code. It distinguishes itself from the ERAMENT Trading judgment in that its conclusions apply only to interest that originates from the retention of the excess VAT deduction during the period of its examination by the tax administrator. According to the Regional Court, there is thus a legitimate legal reason for withholding the principal in the form of the excessive deduction, i.e. it cannot be regarded as originating from an unlawful act. However, according to the Regional Court, the failure to repay another overpayment within the statutory period (e.g. an overpayment of corporate income tax) is in itself an unlawful act, and if such an overpayment is interest, its further interest is in principle permissible. In my opinion, however, the Regional Court in České Budějovice erred in its judgment in that it identified the unlawful act only with the delay in repaying the overpayment and not in relation to the creation of that overpayment.

6. Possibility of awarding interest on interest under the new legislation

The Tax Code, as amended from 1 January 2021, contains a regulation of three types of interest paid by the tax administrator in favour of tax payers. These are, according to Section 251c(1) of the Tax Code, interest on refundable overpayment, interest on incorrectly assessed tax and interest on tax deduction. Interest on refundable overpayment, according to the explicit wording of Section 253a(3)(b) of the Tax Code, does not arise in case of late repayment of interest paid by the tax administrator. Therefore, the late repayment of interest by the tax administrator cannot be the basis for the award of interest on such interest, as the statutory provision expressly precludes it. According to Article 254(1) of the Tax Code, the basis for calculating interest on incorrectly assessed tax, which replaced interest on unlawful conduct of the tax administrator with effect from 1 January 2021, may be only the part of the tax paid by which the tax assessed in excess of the taxpayer's tax return or ex officio was reduced, or the part of the tax deduction claimed in the tax return by which the tax deduction assessed differently from the tax return was increased, or the amount paid on the basis of an unlawful or void

securing order. Since no interest constitutes a tax determined on the basis of a tax return or an amount secured by a securing order, the conditions for the award of interest on incorrectly determined tax are not met in respect of that interest. The accrual of interest on the tax deduction is then conditional on the filing of a tax return in which the tax deduction is claimed and on the withholding of payment of the claim from the expiry of a period of four months from the last day of the period prescribed for filing the tax return. Since no interest constitutes a tax for which the law requires the filing of a tax return, the conditions for the award of interest on a tax deduction are not satisfied in such a case.

In relation to the new legislation, it is essential that pursuant to Section 251a(1) of the Tax Code (as amended effective from 1 January 2021), interest accrues for each individual day on which the conditions for its accrual are met. That provision is to be interpreted as meaning that the fulfilment of the statutory conditions for interest on a given amount must be examined on a day-by-day basis. According to the transitional provision contained in Article II(11) of Act No 283/2020, interest in respect of which the conditions for its accrual continue to apply on the date on which Act No 283/2020 enters into force is applicable until the day preceding the date on which that Act enters into force. From the date of entry into force of Act No 283/2020 Coll., the provisions of the Tax Code in the version in force from the date of entry into force of the said Act, which, according to Article XII thereof, falls on 1 January 2021, will apply to such interest. The new rules will therefore always apply when assessing the accrual of interest from 1 January 2021 onwards, irrespective of whether the conditions for the accrual of interest were met for the period prior to that date. According to the previous legislation, the conditions for the accrual of interest will therefore only apply until 31 December 2020, so claims arising before that date will not be affected by the new legislation. This is therefore a quasi-retroactivity arrangement where the end of 2020 represents a clear dividing line for the assessment of individual claims.

In my opinion, the new legislation therefore no longer allows interest to arise from interest, either by expressly prohibiting it or by defining the potential principal in such a way that no interest can be included in its set. However, it cannot be ruled out that the new legislation will also be subject to a very creative interpretation by the administrative courts. For example, if interest continues to be treated as a tax without further consideration, it is conceivable that a claim or objection to its non-payment could be treated in a material sense as a tax return. Failure to comply with such a request may then be seen as a tax assessment in an amount different from such a tax return. It is then only a short step from that line of reasoning to making such interest subject to interest on the incorrectly

assessed tax. In my view, however, it is possible to be slightly optimistic in this respect. As a result of the amendment, the very general legal regulation of the accrual of interest under tax law has become very specific, essentially casuistic. I therefore consider disputes about the conditions under which interest now accrues to be a matter of history.

7. Conclusion

In this paper I have tried to present the development of case law and legal regulation in relation to the validity of the principle of the prohibition of anatocism in Czech tax law. While on the basis of the earlier legislation and its interpretation by the courts it was possible to infer the general validity of this prohibition, due to the adoption of the new Civil Code, which explicitly allows anatocism in certain cases, and the case law of administrative courts since 2017, the answer to this question was no longer entirely clear. Particularly due to the aforementioned case law of the administrative courts, interest on interest paid by the tax authorities under the tax law was finally allowed. However, the reasoning that led the Supreme Administrative Court in particular to adopt this decision is, in my opinion, worthy of a number of reservations. It was, in essence, a case-law construction of a claim against the public budget which, at least initially, was based solely on a refinement of the applicable legislation and on the abstract assumption that interest under tax law ceases to be an accessory and becomes a separate principal of its own kind once the original principal has been repaid. Over time, however, the case-law has to some extent become more precise in this respect. Nevertheless, the justification for the admissibility of interest on interest in tax law, which is contained in the judgments analysed in this thesis, still leaves me with the impression that the Supreme Administrative Court, instead of evaluating cases by traditional methods of interpretation, sought a way to reach this result.

However, the final outcome of the considered jurisprudential development is that the prohibition of anatocism is applicable in Czech tax law. However, there is an exception to this rule in cases where the original principal has arisen as a result of an unlawful procedure of the tax administrator, either in the form of an unlawful or null and void decision or an incorrect official procedure. However, unlawfulness in that sense cannot consist in a mere delay in repaying the amount due. The story of the origin of the principal is therefore crucial. However, that exception does not originate in tax law but has been transposed into it by analogous application of the rules of civil law. In my view, however, this was an imperfect analogy which did not take into account all the specifics of the legislation transferred. This concerns, in particular, the definition of the period of interest

accruing on a claim arising from an unlawful act, which in the case of civil law generally begins at the moment of assertion of the right before the court, but in the case of tax law, its commencement was derived by the administrative courts from the moment of the expiry of the time limit for the tax administrator to act ex officio.

The change in the legal regulation of the interest in question with effect from 1 January 2021 also plays a crucial role in the assessment of the admissibility of anatocism in Czech tax law. The new legal regulation either expressly excludes the accrual of interest to such interests or defines the interest-bearing principal in such a way that no interest arising under the Tax Act can be considered as such. Although a creative interpretation or refinement of these new statutory provisions to the effect that interest on interest will continue to be allowed in some cases cannot be entirely ruled out, I personally consider such an outcome to be highly unlikely.

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