

On the premise of suspending the running of the limitation period of a tax liability under Article 70 § 6 (1) of the Tax Ordinance. Expectations and the direction of changes

O przesłance zawieszenia biegu terminu przedawnienia zobowiązania podatkowego z art. 70 § 6 pkt 1 Ordynacji podatkowej. Oczekiwania i kierunek zmian

О предпосылке приостановления течения срока исковой давности по налоговому обязательству в статье 70 § 6 п. 1 Налогового кодекса. Ожидания и направления изменений

Передумова для призупинення нарахування строку давності податкового зобов'язання, передбаченого ст. 70 § 6 пункт 1 податкового закону. Очікування та напрямки змін

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Summary: It should be noted that one can find quite extensive studies on the suspension of the limitation period of a tax liability in literature, however, the present issue as covered by the project of abolishing the premise of suspension of the limitation period of a tax liability in connection with the commencement of the proceedings for a fiscal offence or a fiscal misdemeanour provides a completely new perspective. The paper proves that it is, in fact, unjustified to maintain the premise of suspension of the course of the statute of limitations in its construction, which is referred to in Article 70 § 6 (1) of the Tax Ordinance. In view of the above, the aim of the paper will be to assess, against the background of the current legal regulations, the directions of changes in the analysed institution. The tackled issues entail the inevitability of analysing the legal issues in the indicated area from the point of view of the character of changes, as well as the practical problems related to them.

Key words: tax liability, tax arrears, statute of limitations, taxpayer, instrumental initiation of fiscal criminal proceedings

Streszczenie: Należy stwierdzić, iż w literaturze można spotkać się z dość obszernymi opracowaniami dotyczącymi zawieszenia biegu terminu przedawnienia zobowiązania podatkowego, natomiast niniejsze zagadnienie w ujęciu projektu zniesienia przesłanki zawieszenia biegu terminu przedawnienia zobowiązania podatkowego w związku z wszczęciem postępowania w sprawie o przestępstwo skarbowe lub wykroczenie skarbowe stwarza zupełnie nową perspektywę. Praca będzie dowodzić, iż w istocie niezasadne jest utrzymywanie w konstrukcji przedawnienia przesłanki zawieszenia biegu jego terminu, o której mowa w art. 70 § 6 pkt 1 Ordynacji podatkowej. W związku z powyższym celem artykułu będzie ocena na tle obowiązujących przepisów prawnych, jakie są kierunki zmian analizowanej instytucji. Przedstawiona problematyka pociąga za sobą nieuchronność analizy zagadnień prawnych z tego zakresu pod kątem charakteru zmian, ale również problemów praktycznych z tym związanych.

Słowa kluczowe: zobowiązanie podatkowe, zaległość podatkowa, przedawnienie, podatek, instrumentalne wszczęcie postępowań karnych skarbowych

Резюме: Следует отметить, что в литературе можно найти достаточно обширные исследования, посвященные приостановлению течения срока исковой давности по налоговому обязательству, в то время как данный вопрос в части проекта отмены предпосылки приостановления течения срока исковой давности по налоговому обязательству в связи с возбуждением дела о налоговом преступлении или налоговом правонарушении создает совершенно новую перспективу. В статье будут приведены аргументы в пользу того, что фактически необоснованно сохранять в конструкции срока давности предпосылку для приостановления течения его срока, упомянутую в статье 70 § 6 п. 1 Налогового кодекса. В связи с вышесказанным, целью статьи будет оценка на фоне действующих правовых норм, каковы направления изменений анализируемого института. Представленные проблемы неизбежно влекут за собой анализ правовых вопросов в этой области с точки зрения характера изменений, но также и связанных с этим практических проблем.

Ключевые слова: налоговое обязательство, недоимка по налогам, срок исковой давности, налогоплательщик, инструментальное возбуждение уголовного налогового производства

Резюме: Слід зазначити, що в літературі можна знайти досить суттєві дослідження щодо призупинення нарахування строку давності податкового зобов'язання, тоді як це питання в проекті скасування передумови для призупинення нарахування строку давності податкового зобов'язання у зв'язку з ініціюванням провадження у справі про податковий або фіскальний злочин створює абсолютно нову перспективу. У статті буде доведено, що фактично невіправдано підтримувати передумову про призупинення нарахування його строку, про яку йдеться у ст. 70 § 6 пункт 1 податкового закону. У зв'язку з вищевикладеним, метою статті буде оцінити на тлі чинних правових норм, які є напрямки змін аналізованого інституту. Представлені проблеми зумовлюють неминучість аналізу правових питань у цій галузі з точки зору характеру змін, а також пов'язаних з ними практичних проблем.

Ключові слова: податкове зобов'язання, податкова заборгованість, строк давності, платник податків, порушення кримінально-податкової справи

Introduction

The discussion on the role and the function of the suspension of the statute of limitations of a tax liability is still ongoing. There is still no answer as to how to counteract the practice of instrumental initiation of fiscal criminal proceedings. It is undoubtedly one of the most frequent objections addressed at tax administration bodies. Apart from this, the issue of the premises for suspending the limitation period of a tax liability poses serious doubts of a constitutional nature as well.¹ It is perfectly illustrated by not only the abstract motion filed by the Ombudsman in this case, but mainly by the ever-increasing number of constitutional taxpayers' complaints themselves. It is hardly surprising, by the way, since the aforementioned application of the Ombudsman was filed in 2014 and the Constitutional Tribunal

¹ See: Article 43 and 44 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws [Dziennik Ustaw] 1997 no. 78, item 483 as amended; the Supreme Court, inter alia, in its Decision of 2 July 2002 in the case II KK 143/02, stated that there was no protected right of limitation, LEX no. 55526.

nearly five years ago postponed the ruling without setting a deadline.² As a result, the Ombudsman drew the attention of the Minister of Finance to a legal dilemma not resolved for years in subsequent amendments to the Tax Ordinance.³ Since 1 January 2003,⁴ the running of the limitation period has been suspended as a result of the commencement of proceedings for a fiscal offence or fiscal misdemeanour.⁵ Another amendment to the Tax Ordinance decided that the suspension of the running of the limitation period should take place as a result of the commencement of proceedings in a case of a tax offence or a tax misdemeanour, if the suspicion of a tax offence or misdemeanour involved the non-performance of that obligation.⁶ The Decision of the Constitutional Tribunal of 17 July 2012 in case P 30/11⁷ resulted in another statutory change, according to which the suspension of the running of the limitation period takes place as a consequence of the commencement of proceedings for a tax offence or misdemeanour resulting from failure to fulfil the tax liability, provided that the taxpayer was informed of the commencement of such proceedings before the expiry of the statutory limitation period.⁸ Finally, the current regulation provides that the limitation period for a tax liability does not commence, and that the period commenced shall be suspended, on the date on which proceedings are instituted for a tax offence or tax misdemeanour of which the taxpayer has been notified, if the suspicion of the offence is related to the non-performance of that obligation.⁹

Generally speaking, the essence of the problem is that the running of the limitation period is affected by the commencement of proceedings in a case (the issuance of a decision on the commencement of an investigation or enquiry) and not against a person (although the purpose of conducting proceedings in a case is to detect the

² The Letter from the Ombudsman of 20 June 2022, https://bip.brpo.gov.pl/sites/default/files/2022-06/Do_MF_Ordynacja_Podatkowa_20.06.2022.pdf [access: 26.08.2022], pp. 2–3.

³ The Act of 29 August 1997 – Tax Ordinance, consolidated text: Journal of Laws 2022 item 2651.

⁴ The Act of 12 September 2002 amending the Act – Tax Ordinance and certain other acts, Journal of Laws 2002 no. 169, item 1387 as amended.

⁵ From 1 January 2003 until 31 August 2005, the premise for suspending the running of the limitation period was only the commencement of criminal proceedings or proceedings for a fiscal offence or fiscal misdemeanour.

⁶ The Act of 30 June 2005 on amending the Act – Tax Ordinance and certain other acts, Journal of Laws 2005 no. 143, item 1199 as amended.

⁷ The Ruling of the Constitutional Tribunal of 17 July 2012, P 30/11, Journal of Laws 2012 item 848.

⁸ I. Andrzejewska-Czernek, W. Morawski, *Konsekwencje wyroku Trybunału Konstytucyjnego z dnia 17 lipca 2012 r. w sprawie niezgodności z Konstytucją zawieszania biegu terminu przedawnienia, o którym podatnik nie został powiadomiony*, Przegląd Podatkowy 2013, no. 7, pp. 36–44.

⁹ Cf. Article 70 § 6 (1) of the Tax Ordinance.

perpetrator, and Article 70 § 6 (1) of the Tax Ordinance actually presupposes the presence of a suspect).¹⁰

There is an opinion in legal studies that one of the intentions behind the implementation of the institution of the statute of limitations in the legal system was to guarantee the stability of legal transactions by means of the liquidation of overdue tax liabilities due to the lapse of statutory time.¹¹ One would rather conclude that this is an extremely ineffective safeguard in the rules of procedure by the simplest means. The above can be supplemented by the conviction of A. Sarna, who bases the institution of the statute of limitations of a tax liability ultimately on constitutional values.¹² Nevertheless, there is no norm in the Basic Law explicitly referring to the limitation mechanism. Irrespective of the above, however, the Author of the Glossary to the Act of the Supreme Administrative Court of 18 June 2018 in the case I FPS 1/18 correctly assumes that the expiry of a tax liability should occur within a reasonable period of time.

The judiciary has also paid attention to the issue under consideration. It is sufficient to mention almost a hundred rulings of the last two years relating to the suspension of the limitation period of a tax liability.¹³ Undoubtedly, it is worthwhile, in this context, to cite at least some of the statements of the Supreme Administrative Court, guiding the jurisprudence of administrative courts.¹⁴ For this reason, the ju-

¹⁰ B. Brzeziński, E. Szot, *Skutki wyroku Trybunału Konstytucyjnego z dnia 17 lipca 2012 r. (sygn. P 30/11) w świetle orzecznictwa sądów administracyjnych*, Przegląd Orzecznictwa Podatkowego 2013, vol. 22, no. 3, pp. 205–211.

¹¹ B. Banaszak, *O konstytucyjności ustawowej regulacji zawieszenia przedawnienia zobowiązań podatkowych*, Zeszyty Naukowe Sądownictwa Administracyjnego 2011, no. 1 (34), p. 12.

¹² A. Sarna, *Zawieszenie biegu terminu przedawnienia – o czym organ podatkowy musi powiadomić podatnika?*, Przegląd Podatkowy 2018, no. 12, p. 40.

¹³ Cf., inter alia, the Ruling of the Voivodeship Administrative Court in Gliwice of 19 July 2022, I SA/Gl 249/22, LEX no. 3375603; the Ruling of the Voivodeship Administrative Court in Gliwice of 7 July 2022, I SA/Gl 1090/21, LEX no. 3369371; the Ruling of the Voivodeship Administrative Court in Olsztyn of 7 July 2022, I SA/Ol 240/22, LEX no. 3367780; the Ruling of the Voivodeship Administrative Court in Łódź of 6 July 2022, I SA/Łd 141/22, LEX no. 3369163; the Ruling of the Voivodeship Administrative Court in Poznań of 15 June 2022, I SA/Po 42/22, LEX no. 3370981; the Ruling of the Voivodeship Administrative Court in Gdańsk of 14 December 2021, I SA/Gd 928/21, LEX no. 3274693; the Ruling of the Voivodeship Administrative Court in Kraków of 14 December 2021, I SA/Kr 216/21, LEX no. 3285641; the Ruling of the Voivodeship Administrative Court in Kraków of 30 November 2021, I SA/Kr 873/21, LEX no. 3273071; the Ruling of the Voivodeship Administrative Court in Kraków of 30 November 2021, I SA/Kr 1231/21, LEX no. 3271944; the Ruling of the Supreme Administrative Court of 25 November 2021, I FSK 1574/21, LEX no. 3302679; the Ruling of the Voivodeship Administrative Court in Gdańsk of 23 November 2021, I SA/Gd 1115/21, LEX no. 3264291.

¹⁴ L. Kaligowska, *Instrumentalne wszczęcie postępowania karnego skarbowego w świetle najnowszego orzecznictwa sądów administracyjnych*, Przegląd Podatkowy 2021, no. 11, pp. 47–48.

dicature came to the conclusion, inter alia, that if the course of the limitation period of a liability was suspended pursuant to Article 70 § 6 (1) of the Code of Civil Procedure, of which the interested party was informed prior to the expiry of the limitation period pursuant to Article 70c of the Code of Civil Procedure, the tax liability should not expire upon the lapse of five years. Well, in order to suspend the running of the limitation period of a tax liability, it is important to initiate proceedings for a tax offence in the case and not against a person. Although the Resolution of the Supreme Administrative Court of 24 May 2021, in the case I FPS 1/21 turned out to be quite relevant to the issue taken up, its generality verified its significance. It was noted that one should not derive from it the obligation of automatic and thoughtless removal from legal circulation of all previously existing verdicts of appeal bodies, in which the effects provided for in Article 70 § 6 (1) and Article 70c of the Tax Ordinance were referred to. The judicature justifies it with the need for simultaneous and detailed justification of the circumstances, which caused the initiation of penal fiscal proceedings and suspension of the limitation period of tax liability.¹⁵ It follows from the recitals of the rulings selected for the purpose of the present study that it is the court's task to examine the tax file in detail each time in order to determine whether the circumstances explaining the suspicion of instrumental initiation of fiscal penal proceedings exist in the case under consideration. Indeed, it is only in doubtful cases that a court may actually accuse an authority of failing to provide explanation in the reasons for its decision that the institution of the proceedings in question was not merely apparent.

It has to be stated that one can encounter quite extensive studies concerning the suspension of the course of the limitation period of a tax liability in the literature,¹⁶ while the issue taken up in terms of the Minister of Finance's response to the quoted position of the Ombudsman creates a completely new perspective. The abolition of the condition of suspension of the period of limitation of tax liability in connection

¹⁵ The Ruling of the Supreme Administrative Court of 25 May, I FSK 96/22, LEX no. 3348261.

¹⁶ *Zarys finansów publicznych i prawa finansowego*, ed. W. Wójtowicz, Warszawa 2008, p. 181; B. Brzeziński, *Glosa do postanowienia NSA z dnia 5 kwietnia 2011 r.*, I FSK 525/10, *Przegląd Orzecznictwa Podatkowego* 2011, vol. 20, no. 6, pp. 517–520; T. Kolanowski, *Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego*, *Glosa. Prawo Gospodarcze w Orzeczeniach i Komentarzach* 2014, no. 1, pp. 111–127; T. Dudek, *Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego ze względu na tok postępowania karnego skarbowego – artykuł dyskusyjny*, *Zeszyty Naukowe Sądownictwa Administracyjnego* 2014, no. 1, pp. 58–77; A. Brzozowski, A. Tałasiewicz, *Wszczęcie postępowania karnego skarbowego jako przesłanka zawieszenia biegu terminu przedawnienia zobowiązania podatkowego*, *Zeszyty Naukowe Sądownictwa Administracyjnego* 2019, no. 5 (86), pp. 91–109.

with the commencement of proceedings for a tax offence or a tax misdemeanor has been announced.¹⁷

The paper will argue that it is in fact groundless to preserve the premise of suspension of the running of the time limit of the statute of limitations in the construction thereof referred to in Article 70 § 6 (1) of the Tax Ordinance. The aim of the study will also be to assess, against the background of the current legal regulations, the directions of changes to the analysed institution, in particular in the light of the draft of the Tax Ordinance Code,¹⁸ which assumes the repeal of Article 70 § 6 (1) of the Tax Ordinance. Taxpayers should be guaranteed a deadline after which the correctness of their tax settlement will not be negated. In addition, for a long time, the doctrine of tax law has advocated not only systematising statutory definitions within the scope of limitation periods and cases of interruption of the running of the limitation period, but also deleting Article 70 § 6 (1) from the Tax Ordinance Code.¹⁹ The presented subject matter entails the inevitability of analysing the legal issues in the said area in terms of the character of changes as well as of the practical problems involved. In addition, however, over the years the discussed issue has undergone certain transformations, which may cause arbitrariness or impossibility of logically correct, functional and systemically coherent interpretation.

The paper assumes methodological pluralism. The two main research methods used in the work were the dogmatic-legal method and the theoretical-legal one. An auxiliary legal-historical and analytical method was used, which made it possible to present the subject of the research from the point of view of its evolution and thus to obtain a complete picture of the subject under discussion.

1. Limitation of tax liability

Article 70 § 1 of the Tax Ordinance provides that a tax liability is time-barred at the end of five years, counting from the end of the calendar year in which the deadline

¹⁷ The Letter of the Minister of Finance of 18 July 2022, https://bip.brpo.gov.pl/sites/default/files/2022-07/Odpowiedz_MF_Ordynacja_Podatkowa_18.07.2022.pdf [access: 26.08.2022], p. 3, cf. also the Explanatory Memorandum to the Government Draft Law – Tax Ordinance, Parliamentary print no. 3517, <https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=3517> [access: 12.10.2022], p. 203.

¹⁸ Government draft law – Tax Ordinance, draft no. UD409, Parliamentary print no. 3517, <https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?id=CE6B73E53195B2C9C1258417003990D4> [access: 26.08.2022].

¹⁹ L. Etel et al., *Nowa Ordynacja podatkowa. Z prac Komisji Kodyfikacyjnej Ogólnego Prawa Podatkowego*, Białystok 2017, p. 254.

for payment of tax expired. Therefore, one has to conclude that after the lapse of a certain period of time, the tax liability, even if unpaid, expires according to Article 59 § 1 (9) of the Tax Ordinance *ex lege* together with interest on arrears. It is unnecessary to issue separate decisions. The tax authority, after the expiry of the limitation period, has no competence to effectively demand payment of the amount due, while the optional payment of the tax after that date generates an overpayment subject to refund to the taxpayer. The essence of a tax liability is that it is concretised as to the amount, as to the time of payment and as to the place of payment. The liability to pay is both concrete and actualised.²⁰

When analysing the present issue, one should note that under the general tax law, the statute of limitations exists – as the statute of limitations on tax assessment, the statute of limitations on tax liability, the statute of limitations on the right to determine the tax liability of a third party, and the statute of limitations on the liability of a third party. Depending on the unveiling in which it appears, it can therefore have different effects.

The expiry of a specific tax obligation in the statute of limitations of a tax liability is only a consequence of the wording of Article 59 § 1 item 9 of the Tax Ordinance. Incidentally, it may only be added that the legislator was right to shape this provision in the indicated manner. Indeed if, as in civil law, a time-barred tax liability were to develop into a natural liability, there would be a risk of abuse of the law by the tax administration. It is worth noting that although the creditor – the State Treasury – would be deprived of the possibility to enforce the benefit, such obligation as a natural one would still remain. As a result, complete elimination of the tax liability from legal circulation would become virtually impossible and tax authorities could claim it as unexpired at any time.²¹ It should therefore be assumed that if the legislator had wished to shape the statute of limitations for a tax liability along the lines of its counterpart in the civil law, it would have been difficult to formulate normative arguments against such a procedure.

The subject matter in question is widely commented on in the literature. On the one hand, the discussed provision is intended to protect the interests of the state against criminal or fiscal offences but, on the other hand, the complete exclusion of the possibility of limitation raises an objection. However, it turns out that the legislator has not included a regulation, enabling a party subject to tax proceedings to assert its rights by challenging the suspension as of the date of the institution

²⁰ L. Etel, *Komentarz do art. 70 o.p.*, w: *Ordynacja podatkowa. Komentarz aktualizowany*, ed. L. Etel, 2020 [LEX database], subheading no. 7.

²¹ A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2008, p. 387.

of criminal proceedings or proceedings for a tax offence or a tax misdemeanour.²² O. Nieczepa, is right to claim that the specific legal regulation does not solve any problems as regards its application in practice.²³ In particular, the stage of providing information to the taxpayer at the stage of pre-trial proceedings is not clear enough.²⁴ The moment at which proceedings are initiated against a person plays an important role. In this context, it is worth referring to the stance of the Supreme Court indicating that the issuance of the decision on the presentation of charges, as well as its subsequent announcement and possible questioning of the suspect should take place even within one day, provided that the premises expressed in Article 313 § 1 of the Code of Criminal Procedure do not occur. Taking into account the standpoint of the Supreme Court, the pre-trial proceedings authority, having in view the expiry of the limitation period, should act immediately.²⁵ As a result, it seems necessary to inform the taxpayer of the presentation of charges, because, as O. Nieczepa states, it is the moment of notifying the taxpayer of the suspension of the running of the limitation period, as from that time the taxpayer has knowledge of the pending penal-fiscal proceedings.²⁶

However, the mechanism described above does not change the fact that it can lead to a situation that the taxpayer does not know after what date these liabilities may be enforced. The ambiguity of the regulation in question is updated when the initiated penal-fiscal proceedings are themselves suspended pursuant to Article 114a of the Act of 10 September 1999 – Fiscal Penal Code.²⁷ The taxpayer is only informed that the statute of limitations does not apply because its course has been suspended. No assumption can be made as to when the taxpayer will become aware of the deadline for the final enforcement of the tax liability. The authorities, during the 5-year limitation period, may initiate and conduct proceedings for a fiscal ('misdemeanour') offence,²⁸ thereby leading to the suspension of the limitation period for tax liability.²⁹ When the 5-year limitation period expires, the taxpayer is

²² B. Banaszak, *O konstytucyjności ustawowej...*, pp. 14–16.

²³ O. Nieczepa, *Poinformowanie podatnika o wszczęciu postępowania karnoskarbowego jako moment skutecznego zawieszenia biegu terminu przedawnienia zobowiązania podatkowego po upływie 5-letniego terminu przedawnienia*, Glosa. Prawo Gospodarcze w Orzeczeniach i Komentarzach 2015, no. 3, p. 123.

²⁴ T. Dudek, *Zawieszenie postępowania karnego skarbowego ze względu na prejudykat*, Prokuratura i Prawo 2012, no. 11, p. 103.

²⁵ The Supreme Court Ruling of 26 June 2013, V KK 453/12, LEX no. 1341289.

²⁶ O. Nieczepa, *Poinformowanie podatnika...*, p. 125.

²⁷ The Act of 10 September 1999 – Fiscal Penal Code, consolidated text: Journal of Laws of 2023 item 654.

²⁸ T. Grzegorzczak, *Kodeks postępowania karnego*, vol. 1. *Komentarz do art. 1–467*, Warszawa 2014, s. 1038.

²⁹ Cf. G. Dźwigala, *Instrumentalne wszczęcie postępowania karnego skarbowego a zakres kontroli sądowno-administracyjnej*, Przegląd Podatkowy 2021, no. 1, p. 54.

merely informed that the limitation period does not occur, as its course has been suspended due to the commencement of penal-fiscal proceedings.³⁰

One may obviously still resort to the catalogue of premises for the suspension of the statute of limitations of a tax liability compiled by M. Guściora for the purposes of the issue under consideration. Therefore, if comparisons are to be resorted to at all, the one that is most relevant is the manner in which information is provided. It should allow the taxpayer himself to determine whether the initiated proceedings for a fiscal offence or a fiscal misdemeanour are linked to a default. It should also be accepted that the action finally taken should lead to the final conclusion of the proceeding for a fiscal offence or fiscal misdemeanour.³¹ In this context, one should pay attention to the view of W. Modzelewski, who stated that the limitation period itself is misconstrued. In his view, the erroneous normative construction in question determines the massive scale of criminal proceedings, thus multiplying persons suspected of having committed criminal fiscal offences.³²

Obviously, all arguments aim at the conclusion that the legislator's response to the indicated problems has been to subordinate the penal fiscal regulations to the institutions of tax law. In this way, it is supposed to be the duty of the administrative court to assess a possible abuse of the law. In turn, the heterogeneous position of the judicature on the said matter generates a real risk of depriving taxpayers of legal protection.³³

2. The stance of judicature

As has already been pointed out above, the institution of suspension of the running of the limitation period of a tax liability has received quite a lot of attention in court jurisdiction. Considering the challenges associated with it at the moment, it should not come as a surprise that Article 70 § 6 (1) of the Tax Ordinance has aroused particular interest of tax authorities in fiscal penal proceedings, since fiscal issues man-

³⁰ Cf. The Ruling of the Voivodeship Administrative Court of 15 April 2014, III SA/Po 78/14, LEX no. 1465777.

³¹ M. Guściora, *Skutki wszczęcia postępowania karnego skarbowego będącego przyczyną zawieszenia biegu przedawnienia zobowiązania podatkowego*, Przegląd Podatkowy 2020, no. 10, pp. 50–51.

³² Komisja Kodyfikacyjna Ogólnego Prawa Podatkowego, *Kierunkowe założenia nowej ordynacji podatkowej*, Warszawa 2015, https://mf-arch2.mf.gov.pl/c/document_library/get_file?uuid=c5583761-7069-4816-8f1f-63fb34b9d86b&groupId=764034 [access: 13.10.2022], p. 69.

³³ The Ruling of the Voivodeship Administrative Court in Wrocław of 22 July 2019, I SA/Wr 365/19, LEX no. 2725718.

date counteracting the expiry of tax liabilities. The fear of expiry of a tax liability often determines their instrumental behaviour – the commencement of preparatory proceedings for a tax offence or a tax misdemeanour,³⁴ leading at the same time to the suspension of the statute of limitations of the liability.³⁵ As I. Lipowicz, the Ombudsman, correctly pointed out, the premise of Article 70 § 6 (1) of the Code of Criminal Procedure has become a ‘handy’ tool, thanks to which a peculiar ‘perpetuum mobile’ of never-ending proceedings is created: the criminal and also the administrative ones.³⁶ Moreover, it is difficult to expect a clear understanding of the analysed institution, since Article 2 of the Constitution of the Republic of Poland itself creates, as it were, a state of uncertainty for a taxpayer, violating the standard of constitutional control under Article 2 of the Constitution of the Republic of Poland.³⁷ This line of interpretation allows for non-initiation or suspension of the running of the limitation period of a tax liability also in the absence of factual grounds justifying the commencement of criminal proceedings for a fiscal offence or fiscal misdemeanour,³⁸ without the need to charge the taxpayer with the commission of the indicated forbidden acts.³⁹ In this manner, the courts assume that a linguistic interpretation is fully sufficient, and they are content to rely on the first, even the intuitive, meaning of a particular normative phrase. In such a case, of course, it is difficult to expect a real analysis of the legal text if other methods of interpretation become unknown.⁴⁰ Meanwhile, administrative courts should analyse the hypothesis of a legal norm from all the rules applicable to the whole system of law,⁴¹ and not only from the literal wording of the provisions.⁴²

³⁴ L. Wilk, J. Zagrodnik, *Prawo i proces karny skarbowy*, Warszawa 2019, p. 307.

³⁵ G. Łabuda, *Zawieszenie postępowania karnego skarbowego ze względu na prejurykat*, Prokuratura i Prawo 2011, no. 3, p. 80.

³⁶ The Application of the Ombudsman to the Constitutional Tribunal of 22 October 2014, <https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2031/14> [access: 13.10.2022], pp. 3, 8.

³⁷ Cf. B. Banaszak, *O konstytucyjności ustawowej...*, pp. 11–18.

³⁸ Cf. the Ruling of the Supreme Administrative Court of 1 October 2015, II FSK 995/15, LEX no. 1986527; the Ruling of the Supreme Administrative Court of 24 November 2016, I FSK 759/15, LEX no. 2169607; the Ruling of the Supreme Administrative Court of 1 October 2015, II FSK 995/15, LEX no. 1986527; the Ruling of the Supreme Administrative Court of 6 December 2017, I FSK 212/16, LEX no. 2445954; the Order of the Supreme Administrative Court of 8 March 2018, I FSK 657/16, LEX no. 2474887; the Order of the Supreme Administrative Court of 24 May 2018, I FPS 1/18, LEX no. 2492448.

³⁹ H. Gajewska-Kraczkowska, *O prawdziwej funkcji zawieszenia postępowania karnego skarbowego*, Monitor Podatkowy 2012, no. 4, p. 16.

⁴⁰ *Rzeźbienie państwa prawa. 20 lat później. Ewa Łętowska w rozmowie z Krzysztofem Sobczakiem*, eds. E. Łętowska, K. Sobczak, Warszawa 2012, p. 8.

⁴¹ Cf. M. Szubiakowski, *W sprawie ograniczenia przedawnienia zobowiązań podatkowych*, Monitor Podatkowy 2012, no. 4, p. 12.

⁴² R. Mastalski, *Tworzenie prawa podatkowego a jego stosowanie*, Warszawa 2016, pp. 128–139.

While considering the scope of the institution in question, it is necessary to draw attention to the solutions adopted in the Resolution of the Supreme Administrative Court of 7 judges of the Supreme Administrative Court of 24 May 2021 in the case I FPS 1/21.⁴³ Drawing on this decision, one may pose the question: what legal issues should be the subject of analysis in order to conclude that the authority acted instrumentally when initiating fiscal penal proceedings?⁴⁴ The control of the administrative courts, in a situation in which proceedings for a fiscal offence or fiscal misdemeanour have been initiated, cannot aim at a comprehensive and general verification of the correctness of its initiation from the point of view of the provisions of the Fiscal Penal Code.⁴⁵ The mere issuance of a ruling on the initiation of proceedings for a fiscal offence or fiscal misdemeanour results in the effect specified in Article 70 § 6 (1) in connection with Article 70c of the Tax Ordinance, and would precisely lead to the abuse of the title institution, thus undermining the rule of law resulting from Articles 2 and 7 of the Constitution of the Republic of Poland.⁴⁶ It follows from a reading of the ruling cited above that the fundamental reason for overruling decisions of the authorities is the issue of the lack of reference to the allegation of instrumental use of the law. At the same time, it has been highlighted that the courts cannot decide on the direction of the ruling or limit themselves in the assessment of a possible abuse of the institution of substantive law. Thus, the difficulty resides in finding out, on the basis of the established facts and evidence, the real reasons for initiating criminal tax proceedings if the material from the tax case does not allow it to be concluded. However, it results in the observation that jurisprudence still approves of the behaviour of an authority that initiates proceedings without actually being interested in the actual conclusion thereof,⁴⁷ because the only element of the initiation of criminal tax proceedings is the inevitable passage of time and the risk of the creditor losing the possibility of demanding satisfaction of the liability before the end of tax proceedings, the culmination of which is the

⁴³ The Resolution of 7 judges of the Supreme Administrative Court of 24 May 2021, I FPS 1/21, LEX no. 3178297.

⁴⁴ D. Strzelec, *Konsekwencje uchwały NSA z 24.05.2021, I FPS 1/21, w orzecznictwie sądów administracyjnych*, Przegląd Podatkowy 2021, no. 12, p. 13.

⁴⁵ B. Szyprowski, *Uzasadnione podejrzenie popełnienia przestępstwa jako faktyczna przesłanka wszczęcia postępowania przygotowawczego*, Prokuratura i Prawo 2006, no. 3, p. 133.

⁴⁶ Cf. B. Brzeziński, *O zjawisku nadużycia prawa podatkowego przez administrację podatkową*, Kwartalnik Prawa Podatkowego 2014, no. 1, pp. 9–16.

⁴⁷ Cf. K. Machalica-Drozdek, A. Drozdek, *Wszczęcie postępowania przygotowawczego w sprawie karnej skarbowej a zawieszenie biegu terminu przedawnienia dochodzenia należnego cla*, Prokuratura i Prawo 2016, no. 4, pp. 129–130.

determination of its amount.⁴⁸ Unfortunately, statistics confirm this conclusion. In fact, the report on practical application of Article 70 § 6 (1) of the VAT Act shows, that in 91% of control proceedings, marked with the 'flaw' of instigating criminal tax proceedings – their subject was a tax liability expiring at the end of the year, in which these proceedings were instituted.⁴⁹

Thus, in practice, it is not possible, in the context under discussion, to make such an 'automatic' allegation that there has been an abuse of the suspension of the limitation period which is the subject of the hypothesis of a substantive tax law rule.⁵⁰ One should consider the meaning of the situation specified in Article 106 § 3 of the Code of Civil Procedure on the sidelines of the above considerations. It may be relevant for the issue under consideration. If the court, when assessing the ruling relating to Article 70 § 6 (1) of the Tax Ordinance, has doubts as to its justification, then – it could, pursuant to Article 106 § 3 of the Code of Civil Procedure⁵¹ take evidence from the documents of the fiscal penal case file to which the authority refers when explaining the suspension of the running of the limitation period of the tax liability.⁵²

3. Amendments to the Tax Ordinance

However, it is impossible to see that adequate protection of the taxpayer could easily be guaranteed by a statutory construction – the abandonment of the regulation contained in the current Article 70 § 6 (1) of the Tax Ordinance. The legislator looks for a justification for such a solution in the forthcoming draft of the Tax Ordinance at least in the principle of speed and simplicity of tax proceedings.⁵³ The

⁴⁸ A. Ladziński, J. Waško, T. Burczyński, W. Waško, K. Kudlek, *Instrumentalne wszczynanie postępowań karnych skarbowych w trakcie postępowań kontrolnych i podatkowych – analiza praktyki stosowania art. 70 § 6 pkt 1 ordynacji podatkowej. Raport podsumowujący wyniki badania danych uzyskanych w trybie dostępu do informacji publicznej*, Toruń 2019, p. 91.

⁴⁹ Ibidem, pp. 38–39.

⁵⁰ Cf. R. Mastalski, *Glosa do wyroku NSA z 30 lipca 2020 r., I FSK 128/20*, Orzecznictwo Sądów Polskich 2021, no. 3, item 143, p. 174.

⁵¹ The Act of 30 August 2002 – Law on proceedings before administrative courts, consolidated text: Journal of Laws 2022 item 1457.

⁵² Cf. J. Waško, *Instrumentalne wszczęcie postępowania karnego skarbowego – fakt znany sądowi z urzędu i jego konsekwencje*, Przegląd Podatkowy 2021, no. 1, p. 52; M. Jendraszczyk, *Czy wszczęcie postępowania karnoskarbowego zawsze skutkuje zawieszeniem biegu terminu przedawnienia zobowiązania podatkowego?*, Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych 2020, vol. 12, pp. 35–36.

⁵³ Cf. Article 125 of the Tax Ordinance; the Letter from the Minister of Finance of 18 July 2022, p. 1.

Explanatory Memorandum to the draft of the new Tax Ordinance explicitly states that an important issue of the new limitation formula is the repeal of the flawed premise leading to the suspension of the running of the limitation period for tax liabilities in connection with the initiation of fiscal penal proceedings.⁵⁴ Practice has shown that Article 70 § 6 (1) of the Tax Ordinance has become a tool for tax authorities serving only de facto to prolong enforcement of tax liabilities and to conduct a considerable number of inspection and tax proceedings. It is worth noting, following M. Zagórski, that the modified content of the provisions in connection with the Decision of the Constitutional Tribunal leads to the conclusion that the enforcement of the disposition of Article 70c of the Tax Ordinance exhausts the condition of notification in Article 70 § 6 (1), which does not at all denote the freedom of notifying the taxpayer of the commencement of penal-fiscal proceedings.⁵⁵ There is no doubt that the purpose of the institution in question was to compel the creditor to enforce financial receivables in due time. However, when one proceeds to analyse the current regulation through the prism of the quoted rulings of administrative courts, it becomes apparent that the evident lack of a direct connection with the non-fulfilment of a specific tax obligation results in the suspension of the running of the limitation period of its tax liability.⁵⁶ A situation in which legislative ambiguities take place at the expense of entrepreneurs and business entities causes a violation of the stability of social relations guaranteed by the constitutional principle of legal security.⁵⁷ Doubts finally arise as to the legal consequences of actions aimed at waiving the principle *in dubio pro tributario*.⁵⁸

Given the above, it may appear that the amendment in question will solve the indicated problems. In a situation in which the law does not provide any other way to achieve the goal – to end the practice of instrumental initiation of penal-fiscal proceedings just before the expiry of the limitation period for tax, such an initiative should be assessed positively. Changes moving in the opposite direction in the

⁵⁴ The Letter from the Ombudsman..., p. 3.

⁵⁵ M. Zagórski, *Zawieszenie biegu przedawnienia zobowiązań podatkowych a wszczęcie postępowania w sprawie o przestępstwo karnoskarbowe*, <https://isp-modzelewski.pl/serwis/zawieszenie-biegu-przedawnienia-zobowiazan-podatkowych-a-wszczecie-postepowania-w-sprawie-o-przestepstwo-karnoskarbowe/> [access: 4.09.2022].

⁵⁶ Cf. B. Błaszczak, *Wszczywanie postępowań karnych skarbowych w celu zawieszenia biegu terminu przedawnienia – analiza wybranego orzecznictwa*, *Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych* 2020, vol. 12, p. 42.

⁵⁷ Cf. Article 2 of the Constitution of the Republic of Poland.

⁵⁸ P. Kulik, *Czy każde zawiadomienie organu skarbowego o zawieszeniu terminu przedawnienia zobowiązania podatkowego z powodu wszczęcia postępowania karnoskarbowego skutecznie zawiesza ten termin? Interpretacja art. 70 § 6 pkt 1 i art. 70c ustawy Ordynacja podatkowa w świetle orzecznictwa sądów administracyjnych*, *Palestra* 2016, no. 7–8, p. 165.

assumption of the proponent himself worsen the situation of taxpayers.⁵⁹ However, the assumptions should be real and supported by facts, it is not enough here to make a laconic statement about the elimination of the premise of suspension of the tax liability limitation period in connection with the commencement of proceedings for a tax offence or a tax misdemeanour.

One would rather expect a rational proponent to include precise information concerning at least an analysis of the level of impact of other changes introduced at the same time. Meanwhile, the latest proposals of the Minister of Justice with regard to amendments to the Fiscal Penal Code may have even further increased the lack of clarity and unambiguity of the provisions in force.⁶⁰ Serious reservations were aroused by the changes, in particular with regard to the statute of limitations for punishment for fiscal offences and misdemeanours. The withdrawal of the Minister of Justice from the proposed amendments to the Fiscal Penal Code, which could have even further increased the lack of clarity and unambiguity of the provisions in force, should be assessed positively. The project assumed the deletion of § 2 from Article 44 of the Fiscal Penal Code, according to which the punishability of a fiscal offence consisting in the depletion or exposure to depletion of a public law receivable ceases also when the statute of limitations for this receivable has expired. Such reasoning of the proponent was burdened with serious shortcomings. It could have turned out that the modified regulation would have made it possible to hold indebted taxpayers criminally accountable even after the expiry of the statutory limitation period for tax liabilities. The amendment in such a form would not, therefore, have led to the view that in the situation of changes in the Tax Ordinance, after the expiry of the tax liability through the statute of limitations, there would be no possibility of conducting criminal-fiscal proceedings. The work on the bill was eventually abandoned because, as the body responsible for drafting the amendment correctly stated, it would have actually turned out to be pointless. Otherwise, the proponent would simply show a far-reaching inconsistency. On the one hand, there is a desire to counteract the instrumental initiation of criminal fiscal proceedings with the announced amendment to the Tax Ordinance, while on the other hand, a regulation would be implemented depriving once again of certainty as to the scope of liability in the event of the statute of limitations of a tax liability. Although the proponent

⁵⁹ M. Szulc, A. Pokojska, *Nowelizacja ordynacji podatkowej: Nowe uprawnienia fiskusa i podatników*, *Dziennik Gazeta Prawna* 2022, no. 132, <https://podatki.gazetaprawna.pl/artykuly/8488963,nowelizacja-ordynacji-podatkowej-zmiany-w-podatkach.html> [access: 4.09.2022].

⁶⁰ The Withdrawn Bill on Amendments to the Act – Fiscal Penal Code and Certain Other Acts, project no. UD357, <https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-karny-skarbowy-oraz-niektorych-innych-ustaw> [access: 4.09.2022].

of the project admitted that penal fiscal liability should be based on the *ultima ratio* principle of criminal law, the very attempt to introduce a model assuming that penal fiscal liability is incurred despite the statute of limitations, is not conducive to the implementation of the principle of the citizen's trust in the state and the law instituted by it. In addition, according to the project assumptions of the Minister of Finance, the premises suspending the running of the limitation period of a tax liability due to the order for securing the repayment of a potential tax arrears and due to the application of enforcement measures, inter alia, in connection with granting an immediate enforceability order to a non-final decision, are to remain in force.⁶¹ The conclusions drawn after the analysis of the proposed provisions at this stage are sceptical.

Conclusions

Bearing in mind the conclusions drawn from the present study, it should be noted, that the discussed legal regulations allow one to unequivocally state that it is in fact unjustified to maintain the premise of suspension of the course of the statute of limitations in the construction thereof, referred to in Article 70 § 6 (1) of the Tax Ordinance. Undoubtedly, disadvantages resulting from the essence of its functioning cannot be overruled.

Given the already mentioned exemplary nature of the possible forms of the institution in question and the needs of practice, taxpayers remain 'at the mercy' of tax authorities taking advantage of the illegibility of regulations in the discussed scope. A. Brzozowski and A. Tałasiewicz draw attention to doubts about the administrative practice itself accurately. Not only are many of the cases dealt with by the authorities based on a premise which, as it turns out, results in rather vexatious sanctions for the taxpayer, these circumstances are all the more questionable when the authority takes completely different actions in relation to those which it is obliged or entitled to take in dealing with the case.⁶² As it seems, genuine protection should be inherent in ensuring the clarity and consistency of the procedure.⁶³ The specific

⁶¹ Cf. A. Pokojńska, M. Szulc, *Zmiany w ordynacji podatkowej. Jedne korzystne, inne ryzykowne*, Dziennik Gazeta Prawna 2022, no. 133, p. B2.

⁶² A. Brzozowski, A. Tałasiewicz, *Wszczęcie postępowania karnego skarbowego...*, p. 107.

⁶³ Cf. A. Nita, *Czynnik czasu w prawie podatkowym. Studium z dziedziny zobowiązań podatkowych*, Gdańsk 2007, p. 270.

looping of the running of the statute of limitations referred to by G. Łabuda⁶⁴ places the creditor, i.e. the State Treasury, in a very advantageous position – the suspension of the running of the tax statute of limitations until the completion of the tax case proceedings with the extension of the period of punishment of the tax offence.⁶⁵ Naturally, one could reduce the issue to a statement that ignorance of tax law may simply be extremely burdensome for a taxpayer. However, the situation is quite different, all the more so when the Ombudsman's actions go unanswered by the state authorities. The inaction of the Constitutional Court towards the Ombudsman's abstract request cited above as well as the constitutional complaints filed in this case deserves particular disapproval.⁶⁶ It leads not only to the conclusion that the current legal status is unacceptable from the point of view of the protection of constitutional rights and freedoms but it makes one question the assumption of the co-participation of the Constitutional Court in the exercise of justice.

Closing the reflections on the title issues, the announced dynamic changes to the Tax Ordinance itself should also be approached with great caution. The best example of this is the attempt to enact a draft of a new Tax Ordinance, prepared by the Codification Committee of the General Tax Law.⁶⁷ The draft assumed, among other things, a distinction between the statute of limitations applicable to the right to assess tax and the statute of limitations regarding the right to its collection. The Commission paid particular attention to the guarantee function of the institution of the statute of limitations. It has been pointed out that it is currently weakened due to the existing grounds for suspending the running of the limitation period and abusing the interruption of this period. However, despite five years of work on the new Tax Ordinance, it has not yet been decided to adopt the finished draft.⁶⁸

Although one may argue with the accuracy of the currently proposed solutions, there is no doubt that, *de lege ferenda*, one should rather consider a final elimination of the existing legal regulations pertaining to the premises for suspending the

⁶⁴ G. Łabuda, *Art. 44*, in: P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy. Komentarz*, 2017 [LEX database].

⁶⁵ Cf. M. Oleksy, *Postępowanie karnoskarbowe i zawieszenie biegu terminu przedawnienia zobowiązania podatkowego – „trik” fiskusa czy naruszenie podstawowych praw podatnika?*, <https://www.oleksy-podatki.pl/2019/12/postepowanie-karnoskarbowe-i.html> [access: 4.09.2022].

⁶⁶ Cf. SK 100/19, SK 50/20, SK 122/20, SK 52/21, SK 4/22.

⁶⁷ The Act established by the Regulation of the Council of Ministers of 21 October 2014 on the establishment, organization and procedures of the Codification Commission of the General Tax Law, consolidated text: *Journal of Laws* 2014 item 1471.

⁶⁸ Ł. Zalewski, *Prof. Eteł: Nie widzę możliwości dalszego funkcjonowania obecnej ordynacji podatkowej*, *Dziennik Gazeta Prawna* 2020, no. 19, <https://podatki.gazetaprawna.pl/artykuly/1451016,leonard-etel-ordynacja-podatkowa-zmiany-2020.html> [access: 13.10.2022].

running of the limitation period of a tax liability from legal turnover, so that even in the event of a ruling of the Constitutional Tribunal in relation to the problem posed in the Ombudsman's motion, no further changes would have to be made. Indeed, M. Wojtuń is right claiming that the finding of the Constitutional Tribunal rendering Article 70 § 6 (1) of the Code of Civil Procedure inconsistent with Article 2 of the Constitution of the Republic of Poland to the extent that it provides that the running of the limitation period of a tax liability does not commence, and that a commenced period is suspended, with the date of commencement of proceedings in the case and not against the person, will not ensure protection against instrumental use of the said provision. As a result, it will be the duty of administrative courts to carry out such control,⁶⁹ and as practice shows, it is impossible to collect all the premises for the suspension of the statute of limitations of a tax liability. Well, the legal predictability is desirable especially from the perspective of the interpretation of the provisions of the fiscal law.

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⁶⁹ M. Wojtuń, *Zawieszenie biegu terminu przedawnienia zobowiązania podatkowego na skutek wszczęcia postępowania karnoskarbowego*, Glosa. Prawo Gospodarcze w Orzeczeniach i Komentarzach 2017, no. 2, p. 115.

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