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## INITIATION OF PROCEEDINGS IN A CASE OF TAX OFFENSE AS A PREMISE FOR SUSPENDING THE LIMITATION PERIOD FOR A TAX LIABILITY IN POLISH LAW

### Abstract

The subject of the article is to discuss the premise for the suspension of the limitation period for a tax liability, concerning the initiation of proceedings in the case of a tax offense, about which the taxpayer has been notified, if the suspicion of committing a crime or offense is related to failure to fulfill this tax liability. The authors analyzed the latest jurisprudence of administrative courts, judgments of the Constitutional Tribunal, and scientific literature devoted to the indicated topic. Attention was drawn to practical problems with applying the provisions of the Tax Ordinance, including those related to providing taxpayers with constitutional guarantees, such as respecting the principle of trust in the state and the law. Doubts related to the instrumental use of the law when instituting penal fiscal proceedings by tax authorities, aimed solely at suspending the limitation period, as well as the issue of implementing the institution of fiscal penal law into tax regulations, were discussed. The article ends with conclusions and an attempt to evaluate the current legal regulations in the light of the resolution of the Supreme Administrative Court of May 24, 2021, file ref. act I FPS 1/21.

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## 1. Introduction

Prescription of tax liability is one of the ineffective forms of expiry of a tax liability referred to in art. 56 § 1 of the Act of August 29, 1997. Tax Ordinance. It consists of the fact that after the expiry of the statutory period, this obligation expires *ex lege* [Nowak-Far 2017: 490-491]. On the one hand, this institution aims to protect the taxpayer's rights by organizing the relationship between the debtor and the tax creditor. Thus, it implements significant constitutional values, mainly related to legal security and the certainty of trading, derived from the art. 2 of the Constitution of the Republic of Poland, the principles of a democratic state ruled by law. Therefore, the passage of time may in the Polish legal system speak in favor of excluding the possibility of an effective pursuit of a tax claim [Krzywoń 2013].

On the other hand, the limitation of the tax liability serves to maintain a budget balance, as it is supposed to discipline public authorities in the scope of enforcing the tax due - after all, by art. 84 of the Constitution, everyone is obliged to bear public burdens and benefits, including taxes specified in statutes. For this reason, the provisions related to the limitation of tax liabilities should be interpreted per the principle *in dubio pro tributario* [Brzeziński 2002: 14-17].

The subject of limitation in tax law has been regulated in Chapter 6, Section III of the Tax Ordinance. Article 68 of the Tax Ordinance concerns the limitation of the right to issue a decision establishing a tax liability, while art. 70 of the Tax Ordinance regulates the issue of the statute of limitations on an existing tax liability - i.e., one that has already arisen by specifying the tax obligation in the manner specified in art. 21 § 1 point 1 or 2 of the Act - as well as suspending and interrupting the limitation period. These issues have repeatedly been the subject of interest to representatives of Polish tax law researchers and administrative courts, and even the Constitutional Tribunal; therefore, it is unjustified to duplicate theses and conclusions already expressed [Ofiarski 2006; Krzywoń 2013; Banaszak 2011]. The purpose of this study is, however, to analyze one of the conditions for suspending the limitation period for a tax liability, concerning the initiation of proceedings in a case of a tax offense or a tax offense, about which the taxpayer was notified of the suspicion of committing a crime or misdemeanor is associated with failure

to perform this obligation. This topic will be discussed considering the recently issued resolution of seven judges of the Supreme Administrative Court [NSA, I FPS 1/21] has a significant impact on the jurisprudence of tax authorities and administrative courts in this regard.

The article presents the views of Polish tax law science representatives on the indicated premise for the suspension of the limitation period and the rulings of administrative courts that resolved disputed issues before adopting the indicated resolution. In the authors' opinion, tax authorities and administrative courts are not only allowed to examine the legitimacy of initiating proceedings in a case for a fiscal offense or a fiscal offense in the context of suspending the limitation period – but it is their legal obligation resulting from art. 121 § 1 of the Tax Ordinance, the principles of conducting proceedings in a manner that inspires confidence in the tax authorities and is based on constitutional principles: the rule of law, legitimate expectations, or legal certainty. The instrumental use of the law and administrative power by tax authorities may lead to an extension of the time in which tax receivables may be enforced that is unacceptable in a democratic state – bypassing the statutory mechanisms, which should affect not only the speed of proceedings but above all the taxpayer's certainty as to his legal position and equality before the law. These theses will be extended later in the article.

## **2. Initiation of proceedings in a case for a tax offense and the statute of limitations on a tax liability - interpretation problems**

### **2.1. The moment of effective suspension of tax proceeding**

Initiation of proceedings concerning a tax offense, about which the taxpayer has been notified<sup>1</sup>, based on art. 70 § 6 point 1 of the Tax Ordinance, is a condition suspending the limitation period for tax liability – provided that the suspicion of committing a crime or misdemeanor is related to the failure to fulfill this obligation. Importantly, the date of commencement of such proceedings is the date of issuing the decision to initiate an investigation or inquiry. However, the effect of suspending the limitation period occurs

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<sup>1</sup> The requirement to notify the taxpayer of the initiation of criminal proceedings or proceedings for a tax offense – at the latest upon the expiry of the tax liability limitation period – for the effectiveness of the suspension of the tax liability limitation period, was introduced after the Constitutional Tribunal found it inconsistent with art. 2 of the Constitution, the principle of protection of citizens' trust in the state and the law of the earlier wording of the provision established by it. In the version in force until October 15, 2013, Art. 70 § 6 point 1 of Tax Ordinance took the following wording: The period of limitation of the tax liability does not start, and the started one is suspended on the date of initiation of proceedings in the case of a tax offense or a tax offense if the commission of a crime or offense is associated with the failure to perform this obligation. More: the judgment of the Constitutional Tribunal of 17th July 2012, file ref. P 30/11.

only after the fulfillment of two information obligations of the authorities towards the taxpayer: notification that proceedings for a crime or misdemeanor have been initiated penal fiscal related to the failure to perform this obligation, as well as the fact that the limitation period has been suspended due to the premise of art. 70 § 6 point 1 of the Tax Ordinance - which is required by art. 170c of this Act [NSA, I FPS 1/18; Sarna 2018].

A literal interpretation of the provision in question could lead to the conclusion that the limitation period for tax obligations is suspended by operation of law each time the competent authority decides to initiate appropriate proceedings and effectively notifies the party about it - without the need for further examination by tax authorities or administrative courts, or the initiation of it was reasonable. It should be emphasized that proper notification should be understood as the delivery of information on this subject in the manner provided for in art. 148-150 of the Tax Ordinance - and thus also to the people indicated in art. 149 of the Act (provided that they undertake to hand over the letter to the addressee), and even a fiction of delivery, which follows a double notification at the correct taxpayer's address and failure to collect the parcel within 14 days from the date of the first notification [Wojtuń 2017: 109-110]. However, it is indisputable that the allegation should relate to specific tax liability. Furthermore, the taxpayer should be informed about it before the expiry of the five-year limitation period, indicating that the period has been effectively suspended [NSA, II FSK 2801/15].

The content of the notification also remains essential. It should contain at least information on the exact daily date of suspension of the limitation period for the taxpayer's tax liability for the reason indicated in art. 70 § 6 point 1 of the Tax Ordinance; the tax period concerned; and the type of tax [Zagórski 2020]. There is also no doubt that there is a need for a relationship between the act that is the subject of fiscal criminal proceedings and the tax liability - although they do not have to be the same. The regulations do not specify what nature of the relationship is required. Therefore it should be considered that it should be a normal causal relationship between a tax tort and a tax liability that a reliable taxpayer could have foreseen. It will be associated primarily with irregularities in the amount of the tax liability caused by the party's intentional actions but failed to comply with tax obligations or deliberate efforts to limit this liability [Dudek 2014: 73-75; NSA, I FSK 1125/20; NSA, I FSK 772/13]. The doctrine also expresses a different position. The necessity of a subject-object relationship is emphasized and establishing a relationship based on a description of a prohibited act and its classification is indicated as a particular problem [Charkiewicz, Daszczuk 2012: 31].

In the science of Polish tax law, the issue of suspending the limitation period for a tax liability due to the premise specified in art. 70 § 6 point 1 of the Tax Ordinance raises considerable controversy. They concern, among other things, the time at which the tax proceedings are to be suspended. It is disputed whether it should be considered sufficient to initiate proceedings for a tax offense or misdemeanor in the *in rem* phase (i.e., in the case) [Rudowski 2019; Gref-Drejer, Pietrasz 2009: 70-71; Banaszak 2011], or is it necessary to proceed to the *in personam* phase (i.e., against a person) [Etel 2021; Chorążewska, Wilk 2016: 139]. These phases are separated by issuing an order to bring charges against a specific person, and it is only when such a decision is made that the taxpayer becomes a suspect as a party to fiscal penal proceedings. From that moment, he also has the opportunity to take defensive actions against the suspect, and he is also entitled to procedural guarantees provided for by the relevant provisions - including the possibility of getting acquainted with the evidence collected in the case, based on which he can determine whether there is a relationship between this procedure and a specific tax liability which is to be suspended.

The Constitutional Tribunal, in its judgment of July 17, 2012, file ref. act P 30/11, took a position on the discussed case. It stated that although the failure to notify the taxpayer of the suspension of the limitation period before its expiry was a breach of the principle of protection of trust in the state and the law it enacted - and therefore, it was a solution inconsistent with art. 2 of the Constitution; this does not mean that proceedings in a case for a tax offense or misdemeanor should be open to the taxpayer, or even that it should be notified of the initiation of proceedings in the *in rem* phase. It would be contrary to the principle of secrecy at this stage of the preparatory proceedings. In the opinion of the Constitutional Tribunal, the breach of the principle of protection of the citizen's trust in the state and the law does not consist in the fact that the taxpayer is not informed about the initiation of proceedings in a case involving a tax crime or misdemeanor. It concerns only the obligation to notify him before the expiry of the limitation period that it is not due because its course has been suspended in connection with the initiation of penal fiscal proceedings.

However, the view of the Constitutional Tribunal in this respect met with strong criticism from representatives of Polish tax law researchers. First of all, it is accused of failing to analyze the relationship between tax law and criminal fiscal law. The mere initiation of penal fiscal proceedings should be considered inappropriate when the tax proceedings have not yet been completed - so there is even no certainty as to whether there is a tax liability of the taxpayer against whom the criminal proceedings are to be pending. Since, in

the opinion of the Constitutional Tribunal, the proceedings suspending the running of the limitation period may be pending in the *in rem* phase – as follows, when there is no reasonable suspicion that a specific person committed the crime - doubts arise about the subject to which the notification about the fact that the proceedings are to be conducted is rolling. A taxpayer is a natural person or legal person subject to tax liability, i.e., a person known by name and having existing tax obligations. Meanwhile, it is not yet sure who the proceedings are against in the *in rem* phase. The main objections to the judgment in question boil down to the fact that if the content of the tax obligation is not known when it arose or what is the due date of the tax liability, the limitation period should not be suspended in connection with the proceedings that are pending at the *in rem* [Dzwonkowski, Kurzac 2020].

For the above reasons, in the authors' opinion, it is reasonable to assume that the suspension of the limitation period for the tax liability is referred to in art. 70 § 6 point 1 of the Tax Ordinance takes place at the moment of proceeding to the *in personam* phase because only at this moment is the time, place, and entity accused of the prohibited act concretized – so it is possible to verify whether the case concerns a specific tax liability which has not been executed. An unequivocal determination whether there is a connection between the tax arrears and the criminal proceedings, as required by art. 70 § 6 point 1 of the Tax Ordinance, is impossible in the *in rem* phase [Charkiewicz, Daszczuk 2012: 32-34]. It is also worth using the jurisprudence of administrative courts that relates to the issue in question. Supreme Administrative Court, in the judgment of July 30, 2020, file ref. act I FSK 42/20, proposed an intermediate solution. It stated that it was necessary to substantiate that the initiated proceedings in the *in rem* phase gave grounds for its transformation into *in personam* proceedings about the taxpayer - thus taking into account the condition of his guilt in committing a prohibited act.

## **2.2. Instrumental use of the law by tax authorities in order to suspend the limitation period for a tax liability**

Another significant problem related to the discussed premise for the suspension of the limitation period for tax liability is the instrumental use by tax authorities of the institution of instituting proceedings for a tax crime or misdemeanor – in order to extend the possibility of conducting tax proceedings and avoid ineffective expiry of the tax liability by way of limitation. Such a practice may result in unacceptable effects in a democratic state ruled by law and contrary to those expressed in art. 121 § 1 of the Tax Ordinance principle

of conducting proceedings in a manner that inspires confidence in the tax authorities and resulting from art. 125 § 1 of the Tax Ordinance principle of the speed and simplicity of tax proceedings - as it is, in fact, unfavorable for the taxpayer to avoid the consequences of its tardiness by the tax authorities [Strzelec 2020: 24-25].

It should be emphasized that the tax authority and the financial authority of the preparatory proceedings are often the same entity, i.e., the head of the tax office. This circumstance additionally facilitates the initiation of investigations or investigations in criminal fiscal cases and notifying taxpayers about them, which, in the opinion of the tax authorities, suspends the limitation period of the tax obligation under the law itself - and thus extends the possibility of their enforcement, evidence, and control proceedings [Łabuda 2011: 80].

In the doctrine and judicature, attention is also drawn to the possible violation of the principles resulting from art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, which guarantees the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law when deciding on the civil rights and obligations of the parties or the merits of any criminal charge against him. The taxpayer's uncertainty as to the existence of tax liability and the date of its expiry by the statute of limitations, as well as potential criminal liability related to the failure to meet it adequately, are inconsistent with the fair trial standards, which also include the pretrial. A procedural body accusing anyone of committing a crime (including a fiscal offense) is obliged to bring an indictment to the court or discontinue the proceedings in the circumstances and within the time limits provided for by law. Criticism should be given to the legal situation in which the suspect remains in uncertainty for an indefinite period as to the decision of the law enforcement authority as to the allegation made, which in turn directly affects the resolution of the tax case, which - after the suspension of the tax limitation period - may take place for an indefinite time [Krasnodębski 2016; NSA: I GSK 508/13].

Doubts are raised in particular by initiating fiscal penal proceedings in cases where the final amount of the tax liability has not yet arisen, as the tax proceedings aimed at determining or determining the tax assessment are still pending. It should be emphasized that the conduct of tax proceedings does not in itself indicate a culpable depletion of public law receivables. Therefore the initiation of fiscal penal proceedings should occur only when there is a justified suspicion of committing a prohibited act [Jendraszczyk 2020]. On the other hand, the practice of tax authorities indicates the initiation of criminal fiscal proceedings and notification of taxpayers to invoke the premise of art. 70 § 6 point 1 of

the Tax Ordinance and thus the suspension of the limitation period - which may be considered a circumvention of the law, since its purpose should be to determine whether a prohibited act has been committed and whether it is a criminal fiscal offense [Brzeziński 2014: 9-17]. This is confirmed by research suggesting that the overwhelming majority of instigating fiscal penal proceedings takes place shortly before the expiry of the limitation period, and most of them do not even bring an indictment to the court. Moreover, this phenomenon has intensified in recent years [Burczyński, Kudlek, Ladziński 2019: 36-43; Waśko 2017: 44-49].

In addition, the taxpayer's legal position is made even more uncertain under art. 114a of the Act of September 10, 1999, Fiscal Penal Code, which gives the possibility of suspending fiscal penal proceedings, which was the basis for the suspension of the limitation period for tax proceedings - if its conduct is significantly impeded due to tax control, customs and fiscal control or pending proceedings before tax authorities, customs authorities or administrative courts. This suspension may be made at any stage of the proceedings, including the preparatory proceedings. The administrative decision is considered to be critical evidence in the context of determining the amount of the reduced public law debt. It directly influences the penal fiscal proceedings, which use the findings made in the tax proceedings. However, this solution allows for practically unlimited extension of the limitation period for a tax liability, as the tax authorities may initiate penal fiscal proceedings and, as a result, refer to art. 70 § 6 point 1 of the Tax Ordinance - suspend the limitation period for a tax liability, and at the same time - referring to art. 114a of the Fiscal Penal Code - suspend these penal fiscal proceedings. The effect of such action by the authorities, which is unfavorable for the taxpayer, justified by the protection of the fiscal interests of the state - and often bearing the hallmarks of instrumental use of the law - takes place even when the penal fiscal proceedings are finally discontinued or the accused is acquitted by a final judgment [Bułat 2021; Gajewska-Kraczkowska 2012].

For these reasons, one should agree with the position expressed in the scientific literature that not every initiation of fiscal penal proceedings is a premise for suspending the limitation period for the tax liability. Administrative courts and even appeal tax bodies should individually consider each case in terms of instrumental use of the law, which would prevent ineffective expiry of the tax liability to the detriment of the taxpayer. In particular, it is necessary to verify whether the initiation of fiscal penal proceedings led to its further conduct and was aimed at its completion - to which the administrative courts are entitled because they review the legality of the actions of public administration bodies. Since the legislator has decided that the penal fiscal issue, which is the initiation of proceedings for a



tax crime or misdemeanor, is to constitute an element decisive for the possibility of suspending tax proceedings, it also becomes an element of the tax law institution. It is subject to examination by administrative courts [Mastalski 2021; Guściora 2020].

In connection with the practical problems described so far and the doubts expressed in the scientific literature and complaints directed to the Ombudsman concerning the compliance of art. 70 § 6 point 1 of the Tax Ordinance with Constitution, he submitted to the Constitutional Tribunal an application of October 22, 2014, the subject of which was, among other things, a declaration of non-compliance of art. 70 § 6 point 1 of the Tax Ordinance with art. 2 of the Constitution - to the extent that it provides that the limitation period for a tax liability does not start to run, but the other one is suspended, on the day of initiating the proceedings in the case, and not against the person. This position was supported by the *amicus curiae* opinion submitted by the Ombudsman for Small and Medium Enterprises, submitted after the letter of October 21, 2021. A different view, recognizing art. 70 § 6 point 1 of the Tax Ordinance and art. 114a of the Fiscal Penal Code as compliant with the Constitution was expressed in the extensive positions of the Parliament and the Public Prosecutor General, which were submitted in the course of the proceedings before the Constitutional Tribunal [Documents in the case conducted by the Constitutional Tribunal under the reference no. K 31/14]. As of the date of publication of this article, no decision has been made in this matter.

### **3. Application of art. 70 § 6 point 1 of the Tax Ordinance in the jurisprudence of administrative courts**

#### **3.1. Dominant lines of jurisprudence in the period before the Supreme Administrative Court adopts the resolution of May 24, 2021, file ref. act I FPS 1/21**

The examined problem has been repeatedly analyzed in the jurisprudence of administrative courts. Before adopting the resolution of May 24, 2021, by the Supreme Administrative Court, the judicature was dominated by two different lines of jurisprudence. The first, the earlier one, adopted the literal interpretation of the disputed provisions as the key, thus adopting a solution that was unfavorable for taxpayers, enabling the suspension of the limitation period already at the time of notification of the initiation of penal and fiscal proceedings in the *in rem phase*.

This view was presented mainly in the Provincial Administrative Courts in Gorzów Wielkopolski, Rzeszów, Kielce, Szczecin, and Gliwice, but also in the judgments of the

Supreme Administrative Court. However, it should be noted that the jurisprudence of the Supreme Administrative Court, until the resolution in question was adopted, was not uniform in this respect, which will be discussed later in the article.

In the justifications of the judgments of the above courts, it was repeatedly emphasized, referring to the judgment of the Constitutional Tribunal, that the very possibility of abuse of powers by a state authority by initiating fiscal penal proceedings just before the expiry of the five-year limitation period for a tax liability, the sole purpose of which is to suspend the limitation period for this obligation, it is not a sufficient basis for deeming a provision unconstitutional. Moreover, cases of instrumental use of provisions to suspend the running of the limitation period may constitute grounds for criminal liability of public officials in connection with incorrectly undertaken activities in tax proceedings, according to art. 231 of the Penal Code. What is more, it was found that allowing administrative courts' control over procedural decisions based on criminal and fiscal penal proceedings would go beyond the scope of jurisdiction of administrative courts. The Tax Ordinance refers to an objective event that takes place under the Fiscal Penal Code. The provision of art. 70 § 6 point 1 of the Tax Ordinance Act does not include the provisions of criminal proceedings in the tax proceedings, making the initiation of proceedings in a case of a fiscal offense or a fiscal offense as part of the tax proceedings. The legislator linked only a specific effect under the tax act, which is the suspension of the limitation period, with a procedural act in criminal proceedings, which is the initiation of criminal proceedings. In the absence of an explicit statutory regulation granting tax authorities such powers, their competence and jurisdiction of administrative courts cannot be considered to decide on the legality of actions undertaken based on penal and fiscal proceedings [NSA: I FSK 1024/16; NSA: I FSK 795/15; WSA: I SA/Go 175/20; WSA: I SA/Sz 177/20].

Another argument invoked in the judicature is going beyond the boundaries of tax and administrative court proceedings, determined by the legal issue presented for resolution, deciding on the instrumental use of fiscal penal proceedings in order to suspend the limitation period for tax obligations, as well as the impact of the content of the notification provided for in art. 70c of Tax Ordinance. It was considered essential to decide whether the information about the material reason for the suspension of the limitation period can be limited only to the return informing that the suspension of the limitation period was "as a result" of the condition under art. 70 § 6 point 1 of the Tax Ordinance. Proposed by the courts, the resolution of that problem assumes that from the moment the taxpayer is notified of the suspension of the limitation period, there is no longer a state of uncertainty as to whether his tax liability has expired; because once such notice is delivered, the

taxpayer's state of unconsciousness ceases to exist objectively [NSA: I FPS 1/18; WSA: I SA/Rz 235/20; WSA: I SA/Rz 482/20].

The Provincial Administrative Court in Gliwice expressed a curious view on the instrumental use of the law. He stated that although administrative courts and tax authorities are not entitled to decide on the legitimacy of initiating penal fiscal proceedings, they should carefully examine the facts in a specific case and the scope of activities undertaken in penal fiscal proceedings. It was found that the initiation of such proceedings based on an analysis of the evidence gathered in the course of the tax proceedings does not constitute an instrumental use of the right if, after its execution, the suspect was accused, questioned, and other procedural steps necessary to clarify the matter were taken [WSA: I SA/GI 1/20].

However, more recent jurisprudence notices a change in the approach of administrative courts to the issue of the possibility of examining the instrumental use of the law by fiscal control authorities. The judgment of the Provincial Administrative Court in Wrocław of July 22, 2019, file reference number I SA/Wr 365/19 and 366, in which it was emphasized that the preparatory body initiating penal and fiscal proceedings, cannot remain inactive, especially under a stage in which the taxpayer does not participate, and which allows for the suspension of the limitation period. As the constitutional grounds for such a view, art. 2 and art. 7 of the Constitution of the Republic of Poland and the resulting principles of citizens' trust in the state and the rule of law. It may be the subject of judicial and administrative control, as its essence is to protect the freedoms and rights of individuals in relations with public administration and build and consolidate the rule of law and standards derived from it. The administrative court is obliged to apply the so-called pro-constitutional interpretation of the law. According to its assumptions, when a given provision offers several possible interpretations, the direction of interpretation should be adopted, which most fully corresponds to constitutional norms, principles, and values. It is an obligation of the court, resulting from the principle of supremacy of the Constitution regulated in art. 8 sec 1 of the Constitution [CT: P 13/06]. In a democratic state ruled by law, it is unacceptable for tax authorities to use their powers in an instrumental manner, which may take the form of exceeding their powers. The role of the authority is to exercise the law, not to abuse it. Therefore, if the formal action of the tax authority in the form of the initiation of fiscal criminal proceedings does not pursue the objectives of this procedure but only suspends the running of the limitation period, the finding of such action should result in refusal to apply art. 70 par. 6 point 1 of Tax Ordinance. It follows from the above that administrative courts are not only entitled to examine in individual cases the

legitimacy of initiating criminal and penal fiscal proceedings, but it is their duty resulting from the constitutional principle of citizens' trust in the state and the law. Suppose an instrumental application of the law is found. In that case the court is entitled to recognize that the limitation period has not been effectively suspended - despite the initiation of penal and fiscal proceedings in the case of a fiscal offense or a fiscal offense about which the taxpayer has been notified if the suspicion of their commitment is related to failure to fulfill a tax obligation.

Apart from the judgment mentioned above, administrative courts in Białystok, Kraków, Łódź and Poznań were also inclined to similar conclusions. They emphasized the purpose of the penal and fiscal proceedings: to detect the perpetrator and gather evidence enabling him to be charged. Therefore, it cannot only seek to suspend the limitation period for a tax liability because it could constitute an instrumental use of the law. The judicature proposed that an abuse test be carried out, determining whether art. 70 § 6 point 1 of the Act, the tax authorities would initiate fiscal criminal proceedings. A negative answer proves that the tax authority abuses the law [WSA: I SA/Wr 365/19; WSA: I SA/Wr 366/19; WSA: I SA/Kr 1252/20].

There was a view in the jurisprudence that it is unacceptable for the court to refrain from reviewing the legality of actions taken by the tax and fiscal control authorities, as this would violate constitutional and EU standards regarding the right to an effective remedy and access to an impartial court within the meaning of art. 45 sec. 1 of the Constitution of Poland and art. 47 of the Charter of Fundamental Rights of the European Union. The legislator, including specific penal fiscal structures in the Tax Ordinance, made them an element of the tax law institution and, as such, are subject to examination by administrative courts [WSA: I SA/Bk 465/20].

In addition, the suspension of the limitation period for a tax liability results in maintaining the maturity of this liability for an indefinite time. It should be remembered that according to art. 114a of the Fiscal Penal Code, penal and fiscal proceedings may also be suspended, which gives an almost unlimited possibility of extending the limitation period. This undoubtedly affects the taxpayer's sense of security and is not conducive to respecting his dignity, which is required based on art. 30 of the Constitution of Poland [WSA: I SA/Łd 395/20; WSA: I SA/Łd 45/20].

The discussed judgments indicate that administrative courts may control whether art. 70 § 6 point 1 of the Tax Law, taking into account all the circumstances of the tax case, and in particular whether there has been a breach of the principle of trust in tax authorities (art.

121 of the Tax Authority) or derived from EU law and art. 2 of the Polish Constitution, the principle of legitimate expectations and trust in the state. Such an approach should be considered beneficial for the taxpayer. At the same time, it makes it pointless to institute criminal and fiscal proceedings solely to suspend the limitation period, as this condition will be subject to judicial and administrative control [WSA: I SA/Po 481/20; WSA: I SA/Po 440/20; WSA: I SA/Po 299/20].

### **3.2. The main theses of the resolution of the Supreme Administrative Court of May 24, 2021, file ref. act I FPS 1/21 and its practical consequences**

In connection with the above-described discrepancy in the jurisprudence, the Ombudsman for Small and Medium-sized Enterprises requested the Supreme Administrative Court to adopt a resolution explaining whether the assessment of the initiation of penal and fiscal proceedings from the point of view of possible instrumental use of the law in the purpose of suspending the limitation period for the tax obligation falls within the limits of the judicial review of the legality of the administrative decision. After considering it, the Supreme Administrative Court adopted a resolution of May 24, 2021, file ref. Act I FPS 1/21, in which he gave a positive answer to this question.

The Supreme Administrative Court analyzed the previous jurisprudence of administrative courts that dealt with the dispute in question. He inclined to the view expressed in the so-called more recent jurisprudence, recognizing that to analyze all the conditions for not commencing or suspending the limitation period resulting from art. 70 § 6 point 1 in connection an art. 70c of the Tax Ordinance, the tax authorities are entitled to apply the tax law provisions when considering a tax case. However, it was emphasized that control of the legality of the premise constituted by the initiation of proceedings for a tax offense or misdemeanor should not be focused on a comprehensive and general assessment of its correctness under penal provisions. It should focus on examining legal issues and verifying whether the initiation was not simulated and did not serve only to suspend the limitation period for the tax liability. As examples of premises that could indicate an abuse of the law, the Supreme Administrative Court indicated the initiation of penal and fiscal proceedings just before the expiry of the limitation period and the lack of actual activity of the authorities of the preparatory proceedings after the initiation of such proceedings.

However, the resolution stated that the position expressed does not mean that the tax authorities and administrative courts are entitled to assess the time or legitimacy of initiating penal-fiscal proceedings from the point of view of a fiscal penal case. This sphere

is entirely left outside the jurisdiction of administrative courts - even to the extent that initiation of penal and fiscal proceedings was included in the tax proceedings in art. 70 § 6 point 1 of the Tax Ordinance - would make an illusory guarantee function of limitation in tax law.

#### **4. Conclusions**

Taking into account the arguments of the doctrine and judicature presented above, in the opinion of the authors of this article, the direction of interpretation of the Tax Ordinance presented in the resolution of the Supreme Administrative Court of May 24, 2021, should be positively assessed. Tax authorities and administrative courts may not only examine the legitimacy of initiating proceedings in a case for a tax offense or a tax misdemeanor in the context of suspending the limitation period - but it is their legal obligation. It is supported by the pro-constitutional interpretation of the provisions relating to the rule of law principles, dignity, citizens' trust in the state, and the law it creates. The instrumental use of administrative and tax law and authority by the authorities conducting tax proceedings to avoid ineffective tax liability expiry should be deemed unacceptable. Due to the institution's inclusion of the initiation of penal fiscal proceedings into the tax law, appeal bodies and administrative courts should investigate the legitimacy and timing of its application. Moreover, given the protection of the taxpayer's rights, the authors consider the thesis that the effective suspension of the limitation period takes place only at the in personam stage, i.e., after the presentation of charges specifying the subject and subject of a criminal-fiscal case.

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