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ARTICLE 199A OF THE TAX ORDINANCE ACT IN POLISH LEGAL REGIME

Abstract

The regulatory function of Article 199a [Tax Ordinance Act, hereinafter: T.O.] is to supplement tax authoritiescompetences deriving from other regulations of evidence proceeding to establish the facts. Determination of a transaction hidden under apparently correct fiscal and legal state of affairs results in consequences that can be seen in private law, tax law and, ultimately, penal fiscal law. The purpose of the paper is to point out to inter-dependencies that relate to final decisions and to the whole process of decision taking in the above-mentioned aspects of application of law.

Key words: apparent legal transaction, declaratory action, tax evasion, penal fiscal liability.

JEL Classification: K34

1. Introduction

The issue of independence of tax law from other branches of law has been discussed in Polish legal doctrine since the interwar period [Rosmarin 1939: 136 and next]. For the purposes of the following considerations let's confine to stating, following in Stefan Rosmarin (elder statesman of polish tax doctrine) footsteps, that civil law constructions are

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the starting point for determining the fiscal state of affairs in situations when the Tax Act adopts terms taken from civil law – the content of the declaration of intent, and, consequently, the content of the legal transaction and its civil law effects constitute the elements determining the effects of tax law transactions.

Article 199a of T.O. states that while establishing the content of a legal transaction, the tax authority shall take into account the unanimous intention of the parties and the aim of the action, instead of only considering the literal wording of declarations of intent submitted by the parties (§ 1) and the regulation according to which: if, under the pretext of performing the legal action, another legal action is performed, the fiscal results will be derived from the concealed legal action (§ 2); and, if according to the evidence collected in the course of the proceedings, there are doubts about the existence or non-existence of a legal relationship or right, especially a party's testimony, then, unless the party refuses to testify, a tax authority will file a declaratory action to a common court to establish the existence or non-existence of the legal relationship or right (§ 3). The three paragraphs of article 199a of T.O. offer an accurate consolidation of content that allows to determine the consequences of apparent legal transactions in the fiscal and legal state of affairs.

2. Apparent legal transaction

On the basis of the Polish Civil Code (hereinafter: C.C), an apparent legal act takes place, first of all, when a given declaration of intent is made for appearances,

secondly, when the statement is handed to the other party, and thirdly, the statement is handed to the other party who consents to it. One can distinguish two different situations: first, the parties perform a legal transaction without the intention to produce legal effects, and second, when under the guise of a performed (simulated) legal transaction the parties intend to perform another (dissimulated) transaction. The subject matter of article 199a § 2 of T.O. refers to the second situation mentioned above when, under the guise of performing an evident transaction, the taxpayer intends to perform a hidden transaction whose purpose is not tax-relevant. A legal transaction is apparent when the addressee of the declaration of intent agrees to make it only for keeping up appearances, which means that the parties are in agreement as how to perform this transaction [Lewaszkiewicz-Petrykowska 1973: 59].

The apparent transaction is absolutely invalid, and the legal effects are derived from the hidden transaction, also when it comes to legal tax consequences, while the validity of the hidden transaction should be assessed in accordance with article 83 § 1 sentence 2 of the

C.C., i.e. according to the characteristics of this transaction. In a situation where the parties used an apparent legal transaction within the meaning of article 83 of the C.C., in order to conceal another legal transaction, only the hidden act bears tax consequences, the simulated act does not.

3. Invalidity of the simulated transaction

When assessing whether a transaction is apparent, tax authorities should establish what were the true motives of the party; whether the act executed by the parties was real i.e. whether the parties accepted all its consequences. It is necessary for the non-existent will of the parties to be disguised in such a way that the outside world could believe that the legal transaction was actually made. The declaration in question should be submitted to the other contractor who agrees to make an apparent transaction, and thus, the contractor must be an active participant in the creation of the apparent state of affairs. The appearance of the transaction can be of relevance in the process of determining the tax state of affairs, therefore it can be proved with all evidence admitted in the provisions of the Tax Ordinance Act. Article 199a § 2 of T.O. obliges tax authorities in the process of establishing if the situation referred to in article 83 of the C.C. occurred, to calculate the tax based on a hidden, and not on the apparent activity, which is invalid. An act that is considered invalid under civil law must be regarded as such also in tax proceedings.

4. Declaratory action

The premise for the tax authority to file a declaratory action to a common court in the light of article 199a § 3 of the T.O., is to demonstrate doubts as to the existence or non-existence of a legal relationship arising from evidence gathered in the proceedings (in particular the testimony of the involved party)[1]. A declaratory action seeks to verify whether a specific law or legal relationship exists or not. The judicial decision is declarative as the court ruling does not modify the legal relations between the parties of the trial [Jodłowski, Resich, Lapierre, Misiuk-Jodłowska, Weitz 2007: 448; Piasecki 1981: 147–160; Siedlecki, Świeboda 2003: 262]. The provision which contains the substantive basis for taking a declaratory action can be found in article 189 of the Code of Civil Procedure (hereinafter: C.P.C.). It expresses the general principle that the plaintiff may require the

[1] The *ratio legis* of this regulation was rightly evaluated by the jurisprudence, emphasizing that its function is to relieve tax authorities from single-handedly resolving difficult civil law issues arising in the course of tax proceedings [WSA in Gdańsk, 6 March 2008, I SA/Gd 1028/07].

court to establish the existence or the lack thereof of a legal relationship or law, when it has a legal interest in doing so. Tax authorities, as entities without legal personality, have the ability to be a party in the process (judicial capacity) only if a special provision allows it to (such a provision is contained in article 189 (1) of the C.P.C.). Article 189 of the C.P.C. makes filing a lawsuit conditional upon demonstration of legal interest.

Some representatives of the doctrine [e.g. Telenga 2019] state that the introduction of article 189 (1) of the C.P.C. authorizing the authorities to file a declaratory action, equips the authorities with attributes that allow initiating and participating in proceedings. The court ruling is a tool used to resolve a tax case - the competent authority retains the attributes of a legal relationship subject to the administrative law. The premise for filing a declaratory action is the existence of a legal interest of the organs. The legislator's purpose here was as follows: for a proper assessment of tax consequences related to the law or legal relationship being the subject of a trial, the *sine qua non* condition is the issuing of a ruling [Żyznowski 2013]. Thanks to article 199a § 3 of the T.O., the authority's doubts as to the nature of the legal relationship (not constituting a civil case in material terms) may be resolved by a court in a civil trial, becoming a civil case in formal terms [Franusz, Goettel 2012: 85]. Articles 199a § 3 of the T.O. and Article 189 (1) of the C.P.C. are not competing with each other due to their failure to maintain an adequate level in the legislative process. This leads to the reasonable conclusion that these provisions are complementary [Brzeziński, Kalinowski, Olesińska, Masternak, Orłowski 2007: 341].

5. Apparent transaction and tax avoidance

As already mentioned above, the constitutive feature of an apparent transaction is the lack of will to achieve legal effects by its parties, to which effects this transaction usually leads. The behavior involves hiding the transaction actually performed (dissimulated transaction) and pretending that another transaction was performed (simulated transaction). As one of the representatives of the doctrine states: "tax authorities and tax inspection bodies frequently apply Article 199a § 2 (...) of the T.O. as a kind of general anti-tax avoidance clause (in reference to tax periods for which the application of Articles 119a and next of T.O. is impossible)". He quotes the same statement to justify his further considerations regarding the inadequacy of this provision to counteract tax avoidance. His point of view is shared by some other authors who conclude that article 199a § 2 of the T.O. may be applied only if the tax authority finds that an apparent legal transaction exists on the market, and not because the transaction was carried out in order to obtain an undue tax

advantage. Although this thesis is correct, the problem of combating tax evasion by disclosing apparent transactions is recognized as the research problem, and this train of thought dates back to the times when the issue of "circumventing tax law" was first mentioned, it was continued throughout the period of validity of Article 199a, and it still appears now and then during validity of the Tax Avoidance Clause.

As indicated in literature, Article 199a of the T.O. does not contain substantive general clause against tax avoidance [Pietrasz 2009: 866] because this provision does not lead to the effect typical of the clause i.e. breaking the link between the hypothesis and the disposition of the relevant norm of substantive tax law and replacing this disposition with another consequence[2]. In order to examine the possible appearance of taxpayer's actions constituting tax avoidance, first of all it is necessary to determine the real nature of this taxpayer's transactions and their effects i.e. a dissimulated activity. Undoubtedly, tax avoidance will always be a part of behavior of some individuals whose goal is to obtain an undue tax advantage. Therefore, the taxpayer's implied classification is the purpose of his behavior [Kalinowski, Pakulska 2005: 22]. In the scope that is being considered, taxpayer's actions should be analyzed either through the prism of tax avoidance or through patterns for determining the actual nature of civil law transactions performed by the taxpayer. Thus, there are two related but separate issues: minimizing the tax burden in a specific normative form and evidence proceedings to assess the scope of taxpayer's liabilies. Combating tax avoidance focuses on preventing the use of economic constructions to unacceptably avoid the tax liability. The wider problem which still remains concerns the correct assessment of the facts which due to their external features can hide transactions actually made by the parties [Olesiak, Pajor 2018: 110]. In order to investigate the possible appearance of taxpayer's actions, it is first necessary to establish the actual nature of the transactions performed by him and their effects. Only after the application of the directives under article 199a of the tax ordinance, examining whether tax evasion occured can start. In this instance, GAAR does not affect the application of article 199a of the tax ordinance. If prerequisites of appearance are found, the application of article 199a of the tax ordinance is prioritized [Olesiak, Pajor 2018: 112].

[2] A. Olesińska draws attention to breaking the link between the hypothesis and the disposition of the law norm in the case of the general clause [Olesińska 2013: 248].

6. Apparent transaction and tax evasion

Tax evasion consists of reducing one's tax burden in an illegal manner [Lyons 1992: 92]. Pursuant to the non-binding directive of the European Economic Community of 19 December 1977, the essence of tax evasion consists in deliberate failure to disclose to the tax authority the state of affairs to which the tax obligation is related, or to deliberately disclose a false state of affairs [Council Directive 77/799/EEC]. Performing an apparent transaction is nothing else than not revealing (hiding) true state of affairs or providing a false one. The legal consequences of such a transaction in the fiscal state of affairs should therefore be transferred from sterile discussions about the anti-abusive nature of Article 199a § 2 of the T. O. to the provisions of the Fiscal Penal Code, in which the tax evasion offense is included.

The fulfillment of tax obligation in the part regarding payment of tax requires prior specification of this obligation and this specification is included in the content of tax liability [Brzeziński 2003: 38]. The specification of tax obligation requires determination of the elements of tax liability: the subject of tax liability (the taxpayer); the amount of tax cut; the tax payment deadline and the place of tax payment [Brzeziński 2003: 38]. Tax liability is a tax law relationship that arises through the application of the law and is expressed in the form of a rule of due behavior contained in the tax decision or the obligation to pay expressed in the declaration [Dzwonkowski 2003: 21–24]. The content of legal relationship of tax liability is the right of the tax authority to demand specific behavior in the form of payment to be made by the obligatory entity of that relationship [Mastalski 1985: 214]. The tax liability is the subject of an executive act in case of tax fraud.

Tax sovereignty assumes that taxpayers will correctly and lawfully perform self-calculation of tax or that they will provide accurate data on the basis on which tax will be calculated in a manner that is consistent with the actual state of affairs. Violating the obligation to reliably report data such as the tax base or the subject of taxation to the tax authority and, thus, making tax liability inconsistent with the actual state of affairs, has a criminal law relevance and determines the existence of tax fraud. Thus, tax liability is the subject of executive act [Buchała, Zoll 1997: 153; Bojarski 2006: 107]. Apart from the substantive reasons, the crime of tax fraud should possess the feature of intentionality, which must be proven by the tax authorities. An apparent legal transaction is solely of deliberate nature and should the appearance of such behavior be demonstrated, the form of intention is a consequence of this demonstration.

In colloquial language, fraud is understood as knowingly misleading or exploiting someone's mistake for one's own benefit [Szymczak 1994: 563; Skorupka, Auderska, Łempicka 1968: 523]. Generally, a mistake is a misconception of reality. The basic feature of tax fraud is the behavior of the perpetrator which involves misleading the tax authorities by providing false data about the subject of taxation or inaccurate tax base or failure to provide such data even though the law requires so. The taxpayer exploits the error of tax authorities related to the tax liability. In this case, the 'mistake' means that the authorities have incorrect information or have no information about the facts affecting the amount of taxation. As a result of tax fraud, the tax amount received by that authority is lower than the amount that should have been received had the tax fraud not been committed [Wardak 2014: 62].

Tax evasion consists of performing actions prohibited by tax law which lead to minimization of tax burdens or their total elimination [Gomułowicz, Małecki 2008: 251]. Tax evasion (concealment of material facts) is characterized in Article 54 of the Fiscal Penal Code. The executive act de facto involves three types of behavior. The first two consist of tax evasion by non-disclosure (i.e. concealment) to the tax authority: the subject of taxation and the tax base; the third form of an executive action is failure to submit the tax declaration. The condition for assigning accountability for all of these actions to the perpetrator will be an addition of the specific danger of financial damage as a result of non-payment or non-declaration of payment of tax by the obligated person, which means that the occurrence of financial damage is highly probable, although it does not have to occur. The sign of exposure to tax depletion must occur along with one of the variants of the perpetrator's behavior.

Gaining tax benefit is not a premise for establishing the appearance of a civil law transaction, but in case of tax fraud in the form of tax evasion, this condition must be met, and if taxpayers perform apparent transactions, it is to ensure that the transaction is not taxed at all or that the tax burden is reduced. Tax evasion consists of not disclosing the actual or legal state of affairs to the tax authority [Bernal 2008: 126]. Criminal responsibility under article 54 of the Fiscal Penal Code is subject only to the taxpayer, hence the fraud is individual.

7. Comparative digression

At this point, it is worth "looking" into the practice of Anglo-Saxon countries. Although it does not strengthen the weight of the arguments cited in favour of adopting universal

jurisdiction in cases of apparent legal transactions (sham transactions) in tax law, Anglo-Saxon practice is interesting as an alternative construct. The breakdown of tax reduction activities into tax planning, tax avoidance and tax evasion in common law is decisive [Seiler 2016: 10-12]. While tax planning is accepted by tax authorities as a legal method of reducing the tax burden, "...the difference between tax avoidance and tax evasion is the thickness of the prison wall" as stated by Denis Healy, a former British Chancellor of the Exchequer. In Great Britain- a country which is a model system of common law due to the longest traditions and being its "homeland", before the introduction of the General Anti-Abuse Rule in 2013, there were jurisprudence doctrines on tax avoidance [Seiler 2016: 68 and next]. One of these doctrines is the sham transaction doctrine: it allows for the non-recognition of the effectiveness of sham transactions under tax law. The essence of these transactions is reflected in the speech of Lord Diplock in the case of Snoock v. London and West Riding Investments Ltd (1967). He stated, inter alia, that appearance means making legal acts or drafting documents by the parties in order to create an impression on third parties or courts that there are legal relations between the parties of a different shape than those they actually intended to create. The sine qua non condition for considering a transaction to be apparent is that the parties who carry it out have the intention of making it apparent, and are aware that it does not create rights and obligations which it apparently expresses [Titley 1987: p. 195-196]. The introduction of GAAR in Great Britain does not change the nature of sham transactions in tax law, but changes the basis for negating their effectiveness. Evasion involves a blameworthy act or omission- and it results in a penal sanction [Thuronyi 2003: 154; Templeman 1997: 1].

8. Iudex actionis iudex exceptionis

The norms of polish criminal (penal fiscal) jurisdiction are based on the principle contained in the following maxim: *iudex actionis iudex exceptionis*. The maxim expresses the idea that if criminal jurisdiction has the mandate to punish crimes, it should naturally extend its control upon all the constitutive elements of the crime. The existing judgment under civil law is not binding to the criminal court, which may resolve the civil issue *incidenter tantum* as a premise for its adjudication about guilt — such approach is completely different from the approach taken by civil courts. The literature states that, in connection with declaratory decisions, criminal court may use a civil judgment as the basis for its decision if there are no objections to the correctness of the civil judgment. [Makowski 1938-1939: 346 and next]. In the vast majority of cases, the criminal court will accept the findings of

the civil court and consider them correct but it will have the right to question their compliance with facts, should some doubts arise [Piasecki 1966: 36]. The criminal court is bound by the civil judgment when it is constitutive and when it creates a new legal status.

It is important to highlight here the judicature that acknowledges that courts adjudicating in cases related to tax offences are bound by administrative decisions issued in these cases by tax authorities. For example, the Court of Appeal in Kraków in its judgment of 20 April 2000 [SA in Kraków, II AKa 32/00] stated that: "Judicial independence of the criminal court (Article 8 § 1 of the Code of Criminal Procedure, hereinafter: C.C.P.) does not entitle to make any arrangements regarding tax liability. Since determining the existence of this obligation (or lack thereof) and the amount of tax fall within the competence of the tax authorities under the control of the administrative court, decisions taken in the relevant proceedings should be treated as decisions "shaping the legal relationship (Article 8 § 2 of the C.C.P.) and recognized as binding in the criminal proceedings". The Court of Appeal in Lublin also confirms this thesis in the decision of 17 June 2009 [SA in Lublin, II AKz 334/09]: "Since the decisions of tax authorities are decisive for determining the existence of tax liability or its amount, the decisions generate specific financial effects for the taxpayer, they are adopted in the form of separate provisions which provide them with control, including an extraordinary appeal. These decisions should be considered as 'shaping the legal relationship' within the meaning of article 8 § 2 of the C.C.P.". The Supreme Court in a judgment of 1 December 1998 [Supreme Court, IV KKN 492/97] also pointed to a similarly expansive interpretation of the exceptions to the judicial independence of courts in favor of administrative decisions.

9. Conclusion

The civil court ruling issued in the declaratory action initiated by the tax authority has a preliminary ruling character, as a result of which the resolution of a tax case must take into account the final judgment. In the doctrine, this situation is referred to as close interdependence of legal relations [Warzocha 1982: 133]. Since such a ruling binds the authority in tax proceedings, despite the declarative nature, the binding force of the civil judgment is transmitted to criminal tax proceedings. Thus, the final civil judgment issued in a lawsuit pursuant to Article 189 (1) of the C.P.C., is binding for the criminal court. However, for the purposes of tax proceedings, as stated by the Supreme Court in its judgment of 13 June 2002 [NSA, III RN 108/01]: "tax authorities are not only entitled but obliged to assess both the actual content of civil law transactions (contracts) and the

compliance with the form of these activities. Tax authorities do not have the power to declare invalidity of civil law transactions but after establishing the existence of premises for the absolute invalidity of a civil law transaction, they may consider that the transaction does not lead to the intended consequences in the sphere of tax law. The principle of the autonomy of tax law cannot, however, go so far that a legal dispute arising in this context in the course of tax proceedings cannot be resolved through a civil trial".

The cited court ruling seems to confirm the position (with all its consequences) that "if binding determination of meaning of phrases contained in the legal norms is present in legal system, then the appropriate phrases should be used in this meaning, unless the phrase must be used in a different meaning from the established one" [Wróblewski 1959: 246]. Therefore, the definitions of terms regulating the constitutional structural elements of taxes indicated in article 217 of the Constitution of the Republic of Poland (the basic constructional elements of taxes must be expressed in the act- without specifying that it must be a tax act), should be taken into account when interpreting the tax act, if such legal definition is present in the legal system and there is no such definition in the relevant tax act [Halasz 2018: 131-132]. The autonomy of tax law is related to the autonomy of the its legislator in creating this law, and not in the context of its application [Mastalski 2003: 15; Nykiel 1999: 399]. When apparent legal transactions arise in the state of affairs of a tax case, despite the aforementioned rights of the host of the proceedings (the tax authority), in order to protect the taxpayer against unjustified fiscal penal liability it seems necessary to apply guarantees arising not only from the mechanisms of criminal proceedings, but also, primarily, of civil proceedings.

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SN [Supreme Court] ruling of 1st December 1998, IV KKN 492/97, Orzecznictwo Sądów Polskich [Jurisprudence of the Polish Courts] 1999, no. 7-8, ruling no. 150.
SN [Supreme Court] ruling of 13th June 2002, III RN 108/01, LEX 53660.
WSA [Provincional Administrative Court] in Gdańsk ruling of 6th March 2008, I SA/Gd 1028/07, LEX no 361897.
WSA [Provincional Administrative Court] in Lublin ruling of 17th June 2009, II AKz 334/09, LEX no 513121.
WSA [Provincional Administrative Court] in Kraków ruling of 20th April 2020, II AKa 32/00, LEX no 41738.
Snook v London and West Riding Investments Ltd [1967] 2 Q.B. 786 (17th January 1967).