

ECONOMIC BURDEN OF TAX INCURRED AS PREREQUISITE TO DETERMINATION OF OVERPAYMENT

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Abstract in original language

Podatek zapłacony nienależnie lub w kwocie większej od należnej stanowi nadpłatę. W Ordynacji podatkowej z 1997 r. unormowano tryb jej stwierdzenia, zwrotu i oprocentowania. Nie zaliczono tu do przesłanek stwierdzenia nadpłaty poniesienia ciężaru podatku przez podmiot składający takie żądanie. Przesłankę taką przyjmuje się w praktyce administracji i orzecznictwie sądowym. Na gruncie spójności systemu podatkowego i konstytucyjnych zasad opodatkowania założenie takie budzi istotne wątpliwości.

Key words in original language

Ekonomiczny ciężar opodatkowania; nadpłata podatku; zwrot nadpłaty; przesłanki stwierdzenia nadpłaty.

Abstract

Undue tax paid or paid in an amount exceeding the tax due constitutes overpaid tax. Act of 1997 – Tax Ordinance regulates its determination, refund and accrual of interest. In determining overpayment of tax, the Act does not require that the requesting entity actually incur the tax burden. However, such requirement is commonly assumed in the practice of administration and by the courts. Doubts arise over its reasonableness in view of the consistency of the tax system and compliance with constitutional tax principles.

Key words

Economic burden of taxation; overpaid tax; overpaid tax refund; requirements for determination of overpayment.

1. TAX OVERPAYMENT IN POLISH TAX LAW. SUBJECT OF STUDY

In the act of 29 August 1997 – Tax Ordinance (hereinafter “TO”)¹ among other tax-law constructions, the institution of overpayment of tax was regulated. Under art. 72 sections 1 and 2 of this Act, the following are deemed tax overpaid: 1) the amount of tax overpaid or not due, 2) the amount of tax unduly deducted by a tax remitter or deducted in an amount higher than that the amount due, 3) the amount

¹ Act of 29.08.1997 – Tax Ordinance (uniform text Journal of Laws 03.07.2012, item 749.).

of a tax liability² paid by a remitter or collector, where in the decision establishing their liability the amount of tax was determined unduly or in an amount higher than that due, 4) the amount of a tax liability paid by a so-called third party or an heir, where in the decision establishing the testator's liability the amounts of tax were determined unduly or in an amount higher than that due. In all such cases, where any tax arrears were paid, then the part of payment on account of default interest will be treated on a par with tax overpaid.

The above enumeration of instances of tax overpayment is not exhaustive with others being set out in other provisions of Chapter 9, Division III of the TO. However, certain forms of payment of excess tax or tax undue have not been included at all, which requires a flexible approach to the provisions concerning tax overpayment and application of analogy in order to remove such a legal loophole³. Under the Act, tax overpayment is always an amount paid unduly according to tax law⁴, generally – an amount higher than that due or without legal grounds. In practice, the grounds for both situations may overlap.

An analysis of the construction of tax overpayment in the TO has enabled the jurisprudence to hold the view that a determination of whether it arises is dependent on factors of subjective character. For it may arise even outside a tax-law relationship, as it is always essential that the entity in question be convinced that by incurring a given duty, he discharges his fiscal obligation⁵. And despite the current regulations being broad and of a casuistic nature⁶, various issues relating to their application are only settled through practice.

Over recent years, the judicial decisions have been ambivalent as to whether a determination of tax overpayment must be related to

² The Polish term 'zobowiązanie podatkowe' meaning 'tax due' is rendered herein as 'tax liability', whereas the term 'obowiązek podatkowy' meaning a general, statutory tax duty is rendered as 'tax obligation', which choice seems natural in English with the noun 'liability', as countable, normally referring to a specific amount due.

³ Brzeziński, B., Kalinowski, M., Olesińska, A., Masternak, M., Orłowski, J.: *Ordynacja podatkowa. Komentarz*, Volume I, Toruń, TNOiK, 2007, p. 551.

⁴ Cf. judgment of Wojewódzki Sąd Administracyjny [Voivodship Administrative Court, hereinafter: „WSA”] in Olsztyn of 12.01.2012, I SA/OI 685/11, SIP Lex (System Informacji Prawnej): WoltersKluwer, 2012, no. 1109640; judgment of WSA in Gliwice of 24.02.2012, III SA/GI 908/11, SIP Lex no. 1146039 and judgment of Sąd Najwyższy [hereinafter: „SN”] of 18.04.2002, III RN 29/01, OSNP 2003, no. 2, item 27.

⁵ Brzeziński, B. *et. al.*, *op. cit.*, p. 552; Zubrzycki, J., [in:] Adamiak, B., Borkowski, J., Mastalski, R., Zubrzycki, J.: *Ordynacja podatkowa. Komentarz 2004*, Wrocław, Unimex, 2004, p. 312.

⁶ Formerly overpayment was regulated very narrowly: cf. art. 125 and art. 126 Tax Ordinance of 15.03.1934 (uniform text Journal of Laws RP of 1936 No. 14, item 134 as amended); art. 34 of decree of 16.05.1946 on tax liabilities (Journal of Laws No. 27, item 173 as amended); art. 32 of decree of 26.10.1950 on tax liabilities (Journal of Laws No. 49, item 452 as amended); art. 29 of the Act of 19.12.1980 on tax liabilities (uniform text Journal of Laws of 1993 No. 108, item 486 as amended).

actually incurring the economic burden of the tax? Does it follow from the current regulations that a detriment to the estate of the entity making payment is a condition for a determination of overpayment? For there is no provision in the Polish tax law that would set forth such a condition. An analysis of this issue, including the legal nature of overpayment, is the subject of this study.

2. LEGAL NATURE OF TAX OVERPAYMENT

Mandatory public duties may not be enforced without a proper legal basis or in violation of the law (*iniuria causa*); this would negate the very foundation of the state and the trust in its authorities, but also the nature of tax, which, pursuant to the constitutional principles, is to be collected on the basis of statutory provisions⁷.

The regulation of the procedure for removing the effects of an undue payment of tax determines the legal nature of tax overpayment. The regulation of overpayment will be influenced by the principle of generality of taxation and the manner in which the respective tax obligations are performed by taxpayers, remitters and other entities, as well as tax authorities.

The payment of an undue amount of tax may result from a variety of events and motivations of entities while performing their tax obligations. Thus, a relationship between overpayment and such an obligation will be important – particularly for the purposes of regulation and assessment in practice of the conditions for determination of overpayment and its refund. Apparently, the conditions for determination of overpayment set forth in TO go beyond the contents of a tax obligation; however the regulation of its refund are tightly related to such contents. By way of comparison, one may indicate that under the German tax rules a claim for a refund of overpayment derives from a public-law relationship, being its reverse. The right to claim a refund of overpayment is vested with the entity whose debt was paid off according to the will of the payer⁸. Also under the Austrian federal taxation rules, a claim for tax overpayment belongs to the tax-law sphere⁹. Whereas under the Spanish general tax

⁷ Cf. art. 84 and art. 217 Constitution of the Republic of Poland of 02.04.1997 (Journal of Laws No. 78, item 483, corr.: Journal of Laws of 2001, No. 28, item 319) and art. 6 Tax Ordinance. Cf. also: Krzywoń, A.: *Podatki i inne daniny publiczne w Konstytucji Rzeczypospolitej Polskiej*, Warszawa, Wydawnictwo Sejmowe, 2011, p. 75–78 and 196–214; *idem*: *Konstytucyjne aspekty nadpłaty podatkowej*, Przegląd Legislacyjny, 2010, no 4, p. 87–88, 92; Bień-Kacała, A.: *Zasada władztwa daninowego w Konstytucji RP z 1997*, Toruń, Dom Organizatora, 2005, p. 159–164 and: Szczurek, B.: *Koncepcja ochrony praw podatnika*, Warszawa, C.H. Beck, 2008, p. 212–218.

⁸ § 37 (2) Abgabenordnung of 16.03.1976, BGBl. I S. 613 as amended; Brockmeyer, H.B., [in:] Klein, T., Orlopp, G. *et al.*: *Abgabenordnung*, München, C.H. Beck Verlagsbuchhandlung, 1998, p. 183–184; cf. also: Jakob, W.: *Abgabenordnung*, München, Verlag C.H. Beck, 4. Auflage, 2006, p. 200–205.

⁹ § 2 (2) with respect to of § 3 ust. 1 Bundesabgabenordnung of 28.06.1961, BGBl 1961, no. 194 as amended.

law, tax overpayment may be refunded to an entity which made a payment in discharging its tax law obligations¹⁰.

Following the Tax Ordinance entering into force (i.e. 01.01.1998), a view was expressed that overpayment – as undue financial benefit – is of civil-law character¹¹. For, given that the tax obligation consists in payment of a tax, the payment of an amount in excess of that due falls outside its scope. Overpayment is benefit given on occasion of discharging one's tax obligation and as such is of civil-law nature¹².

In a ruling of 6 March 2002, the Constitutional Tribunal recognised in overpayment "(...) elements similar in nature and essence to *undue benefit set forth in art. art. 405–410 of the Civil Code* [underline: J.O.] (...). While recognising the independence of the Tax Ordinance one cannot negate the fact that civil law plays the role of so-called "common law", which justifies an appeal to certain basic notions established therein. A point of departure for a construction of tax overpayment must be an assumption that basic notions having bearing on the entire law system must be apprehended in an essentially equal manner"¹³.

Overpayment is benefit given in violation of tax law and hence undue. However, it is the Tax Ordinance that regulated the manner in which it is determined and refunded, and so without a reference to civil law¹⁴. Nevertheless, a possibility of gaining an undue benefit for the purposes of civil law was deemed a negative condition for a refund of overpayment¹⁵. Thus, the right to claim a refund was only to be vested in the entity which has suffered a detriment as a result of collection of tax¹⁶.

It appears that in these views, the civil-law elements of tax overpayment have been related to legal consequences of surrendering an undue benefit; however, doing so by going beyond the conditions of its determination as set forth in the TO. Clearly, tax may only be

¹⁰ Art. 30–33 and art. 34 (1) (b) Ley 58/2003, de 17 diciembre. Ley general tributaria (BOE núm. 302, de 18 diciembre).

¹¹ Kalinowski, M.: Nadpłata w świetle przepisów Ordynacji podatkowej, [in:] Księga pamiątkowa ku czci Docenta Eligiusza Drgasa. Studia z zakresu Ordynacji podatkowej, Toruń, TNOIK, 1998, p. 76 and therein quoted judgment of SN of 21.03.1996, III AZP 39/95, OSNIAPUS 1996, no. 19, item 280.

¹² Kalinowski, M.: Nadpłata w świetle..., p. 76–77.

¹³ Docket No. P 7/00, OTK–A 2002, no. 2, item 13, section 6 of the grounds for decision.

¹⁴ Cf. ruling of SN of 19.02.2003, V CKN 378/01, SIP Lex 77086; judgment of SN of 07.11.2005, V CK 229/05, SIP Lex no. 156442.

¹⁵ Judgment of Naczelny Sąd Administracyjny w Warszawie [Supreme Administrative Court in Warsaw, hereinafter: „NSA”] of 21.12.2010, I GSK 54/10, SIP Lex no. 819202; judgment of NSA of 04.12.2008, I FSK 1392/07, SIP Lex no. 515606.

¹⁶ Cf. e.g. judgment of NSA of 22.07.2005, I FSK 83/05, SIP Lex no. 173046.

overpaid by entities whose obligations are covered by the TO, and only such entities will be entitled to possible refund of tax overpaid.

The view of a civil-law character of tax overpayment has not enjoyed wider support neither in jurisprudence¹⁷ nor in the courts¹⁸. Thus, the public-law nature of tax overpayment is currently being justified *inter alia* by the fact that “its source is a mistaken belief of a given entity (including a tax authority) concerning the existence of an obligation resulting from a public-law relationship rather than a civil-law one”¹⁹. The role of the payment being made in favour of a tax authority is evident²⁰. In any case, a lack of a so-called real, i.e. statutory, definition of tax overpayment (which would set down its elements)²¹, a rather inconsistent formulation, including an enumeration of the grounds for its determination and the rules for its refunding result in this legal institution being in a sense “open” in nature. For a payment of undue tax is usually a result of an error on the part of the taxpayer or remitter, or of a mistaken tax decision. If it occurs in situations not covered by art. 73 section 2 and art. 74 of the TO, then its level is determined by the tax authority in accordance with art. 74a of the Act. A request for a determination of tax overpayment under the TO is only inadmissible where a given payment is not covered by the Act²², where it is not performance of any obligations under tax law²³ or where such a claim is raised by an entity which effected such payment on behalf of the debtor on the grounds of a contract with such debtor²⁴. In such cases, the amounts

¹⁷ Zubrzycki, J., *op. cit.*: p. 311–312; Rusek, J.: Instytucja płatnika w prawie polskim, Warszawa, C.H. Beck, 2007, p. 96–98 and therein cited bibliography.

¹⁸ Cf. e.g. resolution of SN of 26.11.2003, III CZP 84/03, OSNC 2005, no. 1, item 5.

¹⁹ Gruszczyński, B. [in:] Babiarz, S., Dauter, B., Gruszczyński, B., Hauser, R., Kabat, A., Niezgódka-Medek, M.: Ordynacja podatkowa. Komentarz, Warszawa, LexisNexis, 2006, 3 ed., p. 330; Bartosiewicz, A., Kubacki, R.: Odmowa zastosowania prawa krajowego przez organ administracji, Glosa, 2007, no. 1, p. 141.

Cf. also judgment of NSA of 15.02.2001, III SA 2842/99, SIP Lex 46965 and judgment of SN of 18.04.2002, III RN 170/01, SIP Lex no. 563153.

²⁰ Popławski, M.: Uprawnienia podatkowe stanowiące podstawę dochodzenia należności od podmiotów publicznych, [in:] System prawa finansowego. Tom III. Prawo daninowe, [ed.:] Etel, L.: Warszawa, Oficyna Wolters Kluwer business, 2010, p. 629.

²¹ Gruszczyński, B., *op. cit.*: p. 329.

²² Resolution of SN of 16.05.2007, III CZP 35/07, OSNC 2008, no. 7–8, item 72, SIP Lex no. 258519.

²³ Judgment of SN of 22.10.1998, III RN 69/98, OSNP 1999, no. 13, item 412, SIP Lex no. 36573.

²⁴ Judgment of NSA of 09.07.2010, I FSK 1073/09, SIP Lex no. 593496; Reiwer-Kaliszewska, A.: Nadpłata podatku dochodowego jako przedmiot cesji (glosa do uchwały SN z 26.11.2003, III CZP 84/03), Gdańskie Studia Prawnicze – Przegląd Orzecznictwa, 2005, no. 1–2, p. 101 et seq.

unduly paid may be refunded on the basis of civil law²⁵, or specific law provisions.

Notably, a determination, and consequently refund, of a tax overpayment may not result in a cancellation of a properly structured tax liability or liability of another tax-law entity. Therefore, an overpayment unduly refunded will constitute tax arrears with all the consequences thereof (art. 52 section 1 (1) and (4) and section 2 and art. 53, but subject to art. 75 section 5 TO) and is subject to compulsory enforcement (execution).

3. CONDITIONS FOR DETERMINATION OF TAX OVERPAYMENT

Under art. 72 to art. 74 of the TO, an entity having paid excessive or undue tax may request that tax overpayment be determined. Such a request may be made where such overpayment has not resulted from applicable tax regulations or improper activities of tax authorities, but rather results from an error or a mistaken action of the taxpayer, remitter or collector²⁶.

Upon filing such a request, the taxpayer must correct his tax return (or declaration), while where the deduction of tax by a remitter is challenged or where the taxpayer was under no obligation to file a tax return (or declaration) – then he should evidence the undue payment. Similar requirements in respect of return correction apply to the remitter, collector and partners upon a dissolution of a civil-law partnership (which acted as a taxpayer or remitter).

Where no doubts arise as to the correction of the tax return (or declaration) in question, the tax authority will refund the tax overpaid without issuing a decision on its determination (art. 75 section 4 of the TO). However, where the undue payment was made based on a tax decision – addressed to any of the above mentioned entities, heirs to a taxpayer or any third parties incurring tax liability, a determination of tax overpayment requires that such a decision be amended or set aside. And finally – art. 74 of the TO sets down the necessary elements of a request for a determination of tax overpayment as a result of a ruling of the Constitutional Tribunal or the Court of Justice of the EU.

The negative conditions for a determination of tax overpayment are set down in art. 79 and art. 80 of the TO. Proceedings in this respect may not be initiated during the course of tax proceedings, fiscal control and within the period between the end of a fiscal control and the instigation of a relevant proceeding – as regards tax liabilities in respect of which such proceeding or control proceeding is conducted. The right to file a request for a determination of tax overpayment expires upon the expiration of the tax liability (i.e. 5 years). The right to refund of tax overpaid expires after 5 years counted from the end of the calendar year in which the term for its

²⁵ Cf. judgment of SN of 10.03.2004, IV CK 113/03, SIP Lex 182070 and of 27.02.2004, V CK 293/03, SIP Lex no. 125519, and judgment of Court of Appeals in Poznań of 18.01.2011 r, I ACa 1011/10, SIP Lex 898626.

²⁶ Brzeziński, B.: *Pozycja prawna płatnika w świetle przepisów Ordynacji podatkowej*, [in:] *Księga pamiątkowa ku czci Docenta Eligiusza Drgasa. Studia z zakresu Ordynacji podatkowej*, Toruń, TNOiK, 1998, p. 37.

refund expired (art. 76c, art. 77 of the TO). The filing of a request for a determination of tax overpayment interrupts the lapse of the term for its refund, as a result of which the term is renewed.

An evident condition for a determination of tax overpayment is that excessive or undue tax actually be paid (art. 73 section 1 of the TO). The TO does not specify any specific criteria – such as mistake or negligence of the payer, payment of the questionable amount of tax, or a public interest justifying the refunding of overpaid tax. However, an assessment of the actual reasons for overpayment must not infringe the guarantees of taxpayer's rights, grounded in the axiology of the tax system following from the constitution²⁷.

Payment of tax undue or in an excessive amount obviously results in the tax-law entity's estate being diminished out of which the payment is made of the excessive or undue amount of tax. And since the essence of a tax obligation is that a certain compulsory pecuniary performance of public nature be incurred under a relevant tax statute (art. 4 of the TO), it should only detriment an entity being subject to such obligation under a relevant tax statute.

A possibility of a tax overpayment is influenced by the elements of the construction of a given tax, in particular the object of taxation. It is this that determines the specificity of tax declaration and collection – and hence mistakes related thereto. Such mistakes may be corrected either out of the initiative of the taxpayer or remitter, or as a result of a fiscal control or tax ruling.

In the light of the aforesaid, one ought to agree with the jurisprudential view that tax may be overpaid through a “fault”, in a sense, on the part of the taxpayer, tax authority, remitter or collector (so called incidental overpayment of tax), or that it may arise as a result of certain fiscal instruments, events having bearing on the expiration of a fiscal obligation or reduction in the level of a tax liability (so called constructive tax overpayment)²⁸. In the latter case, the overpaid tax may be determined in a decision issued in the course of tax determination proceedings²⁹.

4. ECONOMIC BURDEN OF TAX INCURRED IN THE RULINGS OF COURTS AND TRIBUNALS

It is the practice of tax authorities and courts that assumed that a criterion for a determination of tax overpayment may be *actually incurring the economic burden of tax*, even though the TO does not expressly provide so. *The economic aspect of tax* under such an assumption only refers to the assets of the entity liable for its payment, excluding any so-called instrumental obligations (declaring, documenting, calculation, collection and payment). This requirement entails that a determination of tax overpayment – and consequently its refund or offsetting against other liabilities – should not lead to an undue increase (benefit) in the assets of the entity which has not

²⁷ Cf. judgment of NSA of 20.11.2011, I FSK 481/11; SIP Lex no. 1111985.

²⁸ Popławski, M., *op. cit.*: p. 629–630 and therein cited bibliography; Ślifirczyk, M.: *Nadpłata podatku*, Kraków, Zakamycze, 2005, p. 26–28, 206–212.

²⁹ Brzeziński, B. *et al.*: *Ordynacja podatkowa...*, p. 563.

actually incurred a detriment from its own assets on account of a tax liability.

Where the tax overpayment results from mistaken decisions of tax authorities (art. 72 section 1 subsections 2–4, art. 77 section 1 of the TO), then eligible for a refund will be that entity which paid the amount of tax unduly determined or determined in an amount higher than that due. More complicated situations arise where the tax overpayment is due to a correction in the return (declaration) submitted by a taxpayer or due to a collection of tax by a remitter or tax collector. *The economic burden of tax* need not be attributable to the performance of such entities.

The issue of tax overpayment being dependent on the actual economic burden being incurred in Polish law is mainly related to excise duty and income taxes. This issue is of a lesser importance in taxes on owning, acquiring and selling assets³⁰ or on gambling – since as a rule the tax is declared and paid by the taxpayer (also where it is determined by a tax decision); payments by a remitter or collector are rare in such taxes.

Tax on goods and services (VAT) is normally transferred upon the consumer, hence the issue of detriment to the taxpayer assets as a result of payment of such a tax is of particular character and has considerable bearing on the area of civil-law obligations³¹. However, a tax overpayment *sensu stricto* must also be assessed in the light of the TO³².

In view of a different nature of the grounds for determination of tax overpayment herein discussed, the issues of excise duty should be distinguished from income taxes.

a) Over the recent years, certain disputes over the overpayment of excise duty have led to the condition of *economic burden of tax being actually incurred* (based, incidentally, on justice-related criteria) being considered as relevant in determining whether the claims from taxpayers are justified³³.

A determination of tax overpayment has been requested by *inter alia* importers of goods subjected to excise duty³⁴ and energy companies. Some of the grounds specified by the latter for the claims have been non-compliance of Polish excise duty regulations with the community law, as confirmed in a ruling of the EU Court of Justice³⁵. Under the EU law, since 1 January 2006, it is the distributor or redistributor of

³⁰ Judgment of NSA of 06.05.2011, II FSK 2168/09, SIP Lex no. 792556.

³¹ Cf. judgments of SN: of 22.03.2002, I CKN 1344/99, OSNC 2003, no. 4, item 52; of 27.02.2004, V CK 293/03, SIP Lex no. 125519.

³² Judgment of NSA of 01.06.2011, I FSK 1085/10, SIP Lex no. 989831.

³³ Cf. judgment of NSA: of 09.09.2004, I FSK 425/04, SIP Lex no. 552029; of 09.05.2006, I FSK 1034/05, SIP Lex no. 282615; of 11.01.2007, I FSK 464/06, SIP Lex no. 285047; of 28.02.2008, I FSK 208/07, SIP Lex no. 462899.

³⁴ Cf. judgment of NSA of 20.01.2009, I FSK 1947/08, <http://orzeczenia.nsa.gov.pl/cbo/query>

³⁵ Judgment of the Court of Justice of the EU of 12.02.2009, C-475/07, *European Commission v. Poland*.

electricity, not the producer thereof, that has been to be the excise taxpayer. For this reason, producers of electricity, under the Polish law required to declare and pay such tax, claimed a determination of tax overpayment. What turned out disputable was that the amount of tax had actually been transferred to the buyers, included in the price of electricity. Thus, it was *the buyers that actually incurred the economic burden of the tax*, and this constituted a valid argument for holding the tax authorities' decisions denying determination of overpayment as being in compliance with the law. Whereas the jurisprudence firmly maintained that the transfer of such *burden* was neutral from the tax-law point of view³⁶, as it did not specify such a condition as obstacle to determination of overpayment. Considerable amounts of possible excise overpayments, of relevance to the State Treasury which would be required to refund the same, increased the emotions involved in the position of the courts hearing appeals against such tax decisions.

And then, in a 7-judge panel resolution of 13 July 2009³⁷ the Supreme Administrative Court (NSA) held that art. 72 section 1 subsection 1 of the TO does not preclude the overpayment of excise duty from being refunded even though its burden was incurred by the purchaser of the taxable goods. The Court emphasized that a requirement of "depletion of a taxpayer's assets" is not introduced here as prerequisite to claiming a refund of overpaid tax. The only and essential requirement is that the tax undue or excess tax be paid. Moreover, the law does relate tax overpayment to or differentiate between specific types of tax.

Nevertheless, disputes over overpayment of excise duty lingered on. Therefore, one of panels of the NSA submitted a judicial question: whether the provisions of Division III of the TO, to the extent to which they do not relate the determination and refund of excise duty overpayment to the question who actually incurred the economic burden of the tax, are in compliance with art. 2 of the Constitution of the Republic of Poland? The Constitutional Tribunal, in a ruling of 29 November 2010³⁸ discontinued proceedings in this case. And even though the ruling does not settle the question on the merits, it contains valuable and pertinent remarks and conclusions. The Tribunal held that *indeed, the Tax on Rules for Taxation does not provide that the economic burden of tax incurred be prerequisite to the refunding of its overpayment*. This does not entail a so-called statutory omission, but rather that the Polish legal system adopts a relevant mechanism for determination of tax overpayment

Whereas the complete panel of the Economic Chamber of the NSA in Warsaw held, in a resolution of 22 June 2011, that under art. 72 section 1 subsection 1 of the TO "the amount of excise duty paid on

³⁶ Olesińska, A.: Stwierdzenie nadpłaty a zwrot nadpłaty podatku akcyzowego (sposrożeń na tle pytania prawnego skierowanego do TK), *Przegląd Orzecznictwa Podatkowego*, 2010, no. 6, p. 523 et seq. Lasiński-Sulecki, K., Morawski, W.: Zwrot podatku konsumpcyjnego pobranego niezgodnie z prawem wspólnotowym, *Państwo i Prawo*, 2010, no. 2, p. 83 et seq.

³⁷ Docket no. I FPS 4/09, ONSAiWSA 2009, no. 6, item 102.

³⁸ Docket no. P 45/09, OTK-A 2010, no. 9, item 125.

the sale of electric energy will not be deemed overpayment where the entity which paid it did not incur a detriment to its assets”³⁹. The resolution was passed with over 1/3 of dissenting voices of judges sitting on the panel arguing that the actual economic burden of tax is not prerequisite to a determination of tax overpayment under the Tax Ordinance. The resolution was severely criticised by the jurisprudence raising convincing arguments⁴⁰.

In giving grounds for the above view, the NSA indicated that the payment of a tax which later proves undue results in a claim on the part of an individual for restitution (i.e. of the balance in his assets disturbed by such payment). Furthermore, such individual has a compensatory claim, i.e. for the compensation of any detriment (whether to his assets or otherwise) caused by the payment of undue tax. However, on the grounds of the Constitution of the Republic of Poland it is not justifiable to grant to a person who has paid undue tax a remedy enabling to recover such payment from the state which would not serve to cover any detriment to such person’s assets. An unduly paid, but refunded, tax must not benefit such a person. In the Court’s opinion, it is not necessary that all public-law claims of an individual resulting from a given legal event be settled in a single administrative or judicial proceeding. And thus a person harmed by a payment of undue tax may simultaneously bring an action for damages for an unlawful action of a public authority (under art. 417 and next of the Civil Code). *Thus, the court found that the taxpayer’s assets being depleted is prerequisite to the existence of a claim for refunding of tax overpayment.* And such situation may pertain to unduly paid excise duty which is calculated in the price of the goods being sold. For the taxpayer may gain a benefit if despite collecting excise duty in the price of the goods, he will receive its refund from the tax authority.

Interestingly, such line of argument differs widely from the position taken in the above mentioned 7-judge resolution of 13 July 2009, where it was held that the price calculation factors have no bearing on the issue of undue taxation. Also, the rulings of the EU Court of Justice (formerly ECJ) were construed differently here. However, it is the ruling of 22 June 2011 that is binding upon administrative courts as well as the trial panels of the NSA⁴¹.

³⁹ Docket no. I GPS 1/11, ONSAiWSA 2011, no. 5, item 93.

⁴⁰ Lasiński-Sulecki, K., Morawski, W.: Czy nadpłatę trzeba podatnikowi zwrócić? Głosa do uchwały Izby Gospodarczej NSA z dnia 22 czerwca 2011, I GPS 1/11, Przegląd Podatkowy, 2011, no. 10, p. 52 et seq.

⁴¹ Art. 269 § 1 of the act of 30.08.2002 – Law on proceedings before administrative courts (Prawo o postępowaniu przed sądami administracyjnymi) (Journal of Laws No. 153, item 1270 as amended). Cf. judgments of NSA: of 09.10.2012, I GSK 1634/11; of 09.10.2012, I GSK 1735/11; of 09.10.2012, I GSK 1733/11; all cited after: <http://orzeczenia.nsa.gov.pl/cbo/query>. Differently: judgment of WSA in Rzeszów of 09.10.2012, I SA/Rz 734/12, <http://orzeczenia.nsa.gov.pl/cbo/query>

Cf. also judgment of NSA in Warszawa of 14.09.2011, I GSK 11/10, SIP Lex no. 964644. Cf. however, judgment of WSA in Wrocław of 07.12.2011, I SA/Wr 1033/11, Przegląd Orzecznictwa Podatkowego, 2012, no. 2, item 21.

b) Of interest, in the view of interpretation of tax regulations, are disputes before administrative courts concerning income taxes. A determination of tax overpayment may be denied to remitters by tax authorities on the grounds of a rigorous interpretation of their rights under art. 75 section 2 subsection 2 (a) – (c) of the TO⁴². In particular, a determination of tax overpayment is denied to a remitter where it results from a payment made out of the funds collected from the taxpayer⁴³.

In view of their importance, the above mentioned provisions ought to be cited. Thus, the right to apply for a determination of tax overpayment, should the grounds for collection or its amount be challenged, is vested with the taxpayer, tax remitter or tax collector. However, tax remitter or collector, only where:

- a) in a tax return filed they indicated and paid the tax in an amount higher than that collected,
- b) in a tax return filed they indicated and paid the tax in an amount higher than that due,
- c) not being under an obligation to file a tax return, they paid the tax in an amount higher than that due.

In cases a) and b) a corrected tax return must be filed together with an application for determination of tax overpayment.

The legal qualification of the above instances where tax overpayment determination is claimed does not generally raise any doubts of the courts⁴⁴. It only should be noted that the TO fails to recognise the situation where the tax remitter has declared a proper amount, but subsequently paid an amount higher than that due; such amounts are covered by the general concept of tax overpayment under art. 72 of the TO⁴⁵.

It seems that an aggregate evaluation of the instances of tax overpayment under art. 75 section 2 (2) a)-c) TO may lead to mistaken conclusions. Admittedly, they share a common result, i.e. the payment of an amount of tax higher than that due. However, paragraphs b) and c) of this provision do not expressly refer to tax “collected” from the taxpayer, but rather to tax paid “in an amount higher than that due”. Whereas under art. 73 section 1 (4) TO tax overpayment arises upon the date on which the taxpayer or tax collector paid a tax in an amount higher than the tax collected. The comparison of the above mentioned provisions leads to a conclusion that the tax remitter may only apply

⁴² Cf. judgments of: WSA in Warszawa of 05.11.2010, III SA/Wa 820/10 and of 23.01.2012, III SA/Wa 1144/11; WSA in Łódź of 16.03.2012, I SA/Łd 1194/11; available at: <http://orzeczenia.nsa.gov.pl/cbo/query>

⁴³ Judgment of WSA in Gdańsk of 15.07.2010, I SA/Gd 452/10, <http://orzeczenia.nsa.gov.pl/cbo/query>

Cf. also: Krawczyk, I.: Legitymacja procesowa do złożenia wniosku o stwierdzenie nadpłaty podatku, *Prawo i Podatki*, 2009, no. 4, p. 15 et seq.

⁴⁴ Judgment of WSA in Warszawa of 11.02.2011, III SA/Wa 1338/10, SIP Lex no. 774492; judgment of NSA of 16.03.2007, II FSK 415/06, SIP Lex no. 517233; judgment of WSA in Kraków of 28.02.2011, I SA/Kr 1279/10, SIP Lex no. 990928.

⁴⁵ Brzeziński, B. *et al.*: *Ordynacja podatkowa...*, p. 567.

for a determination of tax overpayment where in performance of its obligations it paid to the tax authority an amount of tax higher than that collected or not collected, i.e. out of its own assets. In such cases, one may speak of the tax remitter incurring the economic burden of a tax as a result of mistaken performance of its obligations. Nevertheless, the above mentioned provisions do not provide for such a condition.

It should further be noted that art. 75 section 2 TO is silent as to the payment by remitter of *tax unduly collected* from the taxpayer, even though such situations frequently occur in practice. It may result from e.g. undue collection of income tax at source⁴⁶. The absence from regulations concerning rights of the remitter of a regulation concerning the payment of tax unduly collected constitutes a legal loophole; nevertheless, despite no “tax being paid” in such situations, the result of such a payment may still be analysed in view of tax overpayment⁴⁷. A conclusion is drawn from art. 72 section 1 (1) with reference to art. 75 section 1 TO that in such cases it is only the taxpayer that is entitled to claim a determination of overpayment⁴⁸, although art. 74a TO may form the grounds for a decision in a case concerning determination of overpayment, also in the event of claims under art. 75 section 2 TO⁴⁹.

Where the remitter has returned the tax collected in an amount higher than that due, the courts have accepted the reasonableness of its applying for a determination of tax overpayment in this respect⁵⁰. Such approach, however, does not entail an assessment of whether the remitter has actually suffered a detriment to its assets, but rather restitution of a structure of a tax-law relationship that would be in compliance with the law. This situation seems doubtful in the light of the nature of the legal regulation of tax overpayment.

The administrative courts have recently expressed a fair view that in the absence of grounds for determination of tax overpayment upon application from the taxpayer or tax remitter, the tax authority should invite the remaining entities being party to the case in question to take part in the proceedings⁵¹. Thus, disputes will be eliminated with the tax authorities concerning whether or not the economic

⁴⁶ Cf. Malinowski, D.M.: Problemy praktyczne związane z poborem podatku u źródła, *Przegląd Podatkowy*, 2012, no. 2, p. 3–4; judgment of WSA in Warszawa of 04.03.2010, III SA/Wa 1713/09, <http://orzeczenia.nsa.gov.pl/cbo/query>

⁴⁷ Cf. respectively judgment of WSA in Gliwice of 31.01.2008, III SA/GI 874/07, <http://orzeczenia.nsa.gov.pl/cbo/query>

⁴⁸ Cf. judgment of NSA of 02.02.2010, II FSK 1401/08, SIP Lex no. 580494.

⁴⁹ Judgment of WSA in Gliwice of 21.01.2011, III SA/GI 1923/10, <http://orzeczenia.nsa.gov.pl/cbo/query>

⁵⁰ Cf. judgment of WSA in Łódź of 06.05.2011, I SA/Łd 339/11, <http://orzeczenia.nsa.gov.pl/cbo/query>

Cf. also: Pogoński, M.: *Możliwość uzyskania zwrotu nadpłaty przez płatnika*, [in:] *Ordynacja podatkowa w praktyce*, Białystok, Temida2, 2007, p. 43–44.

⁵¹ Cf. judgment of NSA of 02.10.2012, II FSK 289/11, <http://orzeczenia.nsa.gov.pl/cbo/query>

burden of the tax has been incurred as a result of payment of undue tax or in an amount higher than that due. This will also allow to prevent possible civil-law disputes as regards mistaken settlements of tax between taxpayers and remitters.

5. SUMMARY

As the law stands at present, tax overpayment is not exhaustively regulated. On the other hand, however, various instances are covered where the payment of tax results in an undue benefit on the part of State Treasury or local government authorities. The institution of tax overpayment has a wide scope of application. Tax will be overpaid even where there was no fiscal obligation, but the payer's role is one of an entity set out in art. 72 et seq. of the Tax Ordinance.

A lack of a statutory definition of tax overpayment that would not be questioned by the courts and the jurisprudence is not of primary importance for the practice. More importantly, the provisions concerning tax overpayment refer to the elements of a fiscal obligation. It should be emphasized that the actual economic burden of tax, meaning a detriment to the assets of the entity actually making a relevant payment, is not indicated here as a prerequisite to the determination of tax overpayment. Such an argument may be raised in cases concerning determination of overpayment on the basis of a wide scope of application of tax overpayment under the Tax Ordinance.

The payment of an amount of tax undue or higher than that due will always lead to a detriment to the assets of the entity which has made such payment, but one must determine the degree to which this was in relation to a tax obligation. An evaluation of this financial aspect of overpayment ought not to be based on the condition indicated in the title of this study since it does not appear in the provisions of the Tax Ordinance. A lack thereof should not, therefore, directly affect the decisions of tax authorities or rulings of administrative courts. Consequently, there are no grounds for arguments of equitable or economic nature in matters entailing determination of tax overpayment which would refer to whether or not the economic burden of tax was actually incurred.

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