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mgr Agata Grzech

Studia Doktoranckie Nauk Prawnych

Katedra Prawa Karnego Materialnego

Wydział Prawa, Administracji i Ekonomii

Uniwersytetu Wrocławskiego

The question of criminal fiscal liability for tax fraud

Abstract

This study attempts to provide a comprehensive discussion of the question of criminal fiscal liability for tax fraud. Of the wide range of topics covered by fiscal penal law, special attention should be given to the question of tax fraud, i.e. offences stipulated in the Fiscal Penal Code, which is a legal construction analogous to the offence of fraud contained in Article 286 of the Penal Code. This question is important not only because of the disputes that still arise as to the nature of the offences belonging to the category of tax fraud or because they are the most common subject of fiscal criminal proceedings, but above all because of the theoretical and practical problems that have arisen to date in connection with their occurrence.

The aim of the study was not only to provide an overview of the indicated construction and the problems associated with its application, but also to propose a model of liability for the commission of offences known as tax fraud that would lead to the elimination of these difficulties and comply with the *ne bis in idem* principle. In addition, this study takes a closer look at the contemporary model of liability for committing tax fraud and points out the dualistic nature of tax fraud, which originates from administrative law while being part of criminal law *sensu largo*. An analysis of the consequences of framing these offences in this way is also included.

The discussion of the above issue begins with an introduction to the specifics of the Fiscal Penal Code of 10 September 1999, which includes the offences referred to as tax fraud. This issue is covered in the first chapter of the study, which provides an introduction to the

question of tax fraud by emphasising its relationship to tax law and discussing the resulting consequences. It emphasises the specific role of fiscal penal law aimed at sanctioning the norms of financial law and the related interdependence between the two fields of law, expressed in the blanket nature of criminal fiscal law norms referring to the regulations of tax laws. In view of the interdependence indicated, the chapter takes a closer look at the construction of the value added tax, the legal regulations derived from tax law and the basic conceptual nomenclature occurring in the field of tax law, knowledge of which is a prerequisite for the correct application of criminal fiscal law norms. In addition, the chapter discusses the historical development of tax law, including the value added tax, which allows for a better understanding of its assumptions and final form.

The study also takes a closer look at the problem of the conceptual scope of the term tax fraud and attempts to answer the question of what characterises the offences defined by this term and on the basis of which criteria they should be distinguished. At the same time, the study takes a critical look at other criteria for classifying the offences in question as tax fraud. In addition, the general construction of the fiscal offences and misdemeanours known as tax fraud is discussed using the methodology adopted in commentary studies to capture and highlight the key principles applicable in this area. This part of the study pays great attention to the jurisprudence of national courts, which has had an unquestionable impact on the interpretation and application of the above provisions. In this chapter, the question of fault and limitation periods are dealt with in an extended way, which makes the considerations indicated not only orderly, but also focused on practical problems arising in the application of these legal regulations.

The main part of the study consisted of identifying and discussing the problems associated with the application of the provisions relating to each type of tax fraud by extending in detail the general considerations in relation to each of the offences referred to as tax fraud. The study also takes a closer look at the problems that arise in the application of the provisions analysed and attempts to answer how they should be resolved. In addition, it discusses the legal and tax consequences foreseen for the commission of the indicated offences and the impact of European case law on the development of the above regulations.

The main research problem of the study is addressed in the fourth chapter, which attempts to answer the question of whether the current model of liability for tax fraud is optimal and, if not, what changes should be made. The chapter begins with a historical analysis of the formation of liability for tax offences and a discussion of the current model of liability for the offences analysed. This is followed by a wide-ranging discussion of the

question of administrative liability for the commission of the offence known as tax fraud. These considerations have been supported by a number of Constitutional Court, the European Court of Human Rights and the Court of Justice of the European Union judgements regarding the compatibility of current solutions with the *ne bis in idem* principle. At present, there is a two-pronged model of liability for the commission of the offence defined as tax fraud, i.e. tax liability and criminal liability involving the application of the Fiscal Penal Code and, in special cases, also criminal or misdemeanour liability using a ideal concurrence construction. The above raises the fundamental question, which is the main research problem of this study, whether the current model of liability for tax fraud is optimal, whether it should be amended and, if so, to what extent. In addition, the study attempts to answer the question of whether the currently adopted solution is compatible with the *ne bis in idem* principle and with international legal instruments which the Republic of Poland is obliged to comply with.

This study attempts to critically analyse the existing legal regulations on tax fraud and how to solve the problems occurring in the application of the analysed regulations. The study also addresses one of the most contentious issues, namely the ideal concurrence construction occurring under criminal fiscal law.

Then the study takes a closer look at the question of criminal liability and the jurisprudence of national courts on the interdependence of the provisions of Article 76 of the Fiscal Penal Code and Article 286 of the Penal Code. The chapter also presents the question of ideal concurrence in the light of the *ne bis in idem* principle and attempts to answer the question of whether the possibility of applying tax liability, criminal fiscal liability and, in some cases, criminal or misdemeanour liability using the ideal concurrence construction for the commission of the same tax fraud is a valid, necessary and lawful solution.

The subject of tax fraud is expanded to include an analysis of why it occurs and a discussion of the forms and ways in which tax fraud is perpetrated, pointing out the variety of fraud. At the same time, it shows the evolution of new forms of committing tax fraud resulting from changing legal and economic realities and discusses the differences between legitimate actions constituting tax optimisation and tax avoidance and unlawful tax evasion.

The sixth chapter of the study considers national and international legal solutions introduced to counter tax fraud and analyses their effectiveness based on statistical data on the tax gap in the country and in the European Union over the years. The chapter also outlines the problems associated with cooperation between the tax authorities and the public prosecutor's office in the course of criminal fiscal proceedings, resulting from the granting of complementary competences to both authorities in this respect. The chapter also attempts

to answer the question of whether the legal solutions introduced make it possible to achieve the goal of reducing the tax gap and whether the cooperation of tax authorities and the public prosecutor's office in the course of criminal fiscal proceedings expressed in the granting of overlapping competences in this area is, from a practical point of view, the right solution.

The theoretical considerations in this study were supplemented by an indication of the statistical picture on the basis of an analysis of statistical data concerning fiscal offences and misdemeanours, referred to as tax fraud, i.e. criminal acts typified in Article 54 of the Penal Code, Article 55 of the Penal Code, Article 56 of the Penal Code and Article 76 of the Penal Code, which were conducted in the years 2013-2023 in the Zielona Góra District Prosecutor's Office. The analysis of this data allows an assessment to be made of the effectiveness of the solutions introduced to counteract the commission of tax fraud and to demonstrate the problems associated with the conduct of criminal fiscal proceedings. These data also allow an assessment to be formulated of the way in which they are conducted by the units of the prosecutor's office the Zielona Góra district. This chapter contains *de lege lata* and *de lege ferenda* conclusions .

An in-depth analysis of the question of the criminal fiscal fraud leads to the question, which constitutes another research problem, namely how the adopted solutions affect the practical aspect of conducting criminal fiscal proceedings concerning tax fraud and whether it is reasonable to introduce changes in this respect. In addition, it is important to consider whether the legal solutions introduced to combat tax crime are effective and whether, if the above measures are found to be effective, the continuation of the current model of liability for committing tax fraud is justified.

The assumptions made make this study have both theoretical and practical value. This is particularly important in view of the fact that tax fraud is the most common subject of criminal fiscal proceedings conducted in the units of the prosecutor's office, and their conduct raises many difficulties due to the shape of the fiscal legislation and the specificity of these proceedings.

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Agata Gmach.....

podpis Wnioskodawcy