
The resolution deserves interest primarily because it implements judicial control of the tax administration in proceedings where Art. 70 § 6 point 1 of the Tax Ordinance has been applied, according to which the limitation period for a tax liability does not start, and a started one is suspended on the date of initiation of proceedings in the case of a tax offense or a fiscal offense of which the taxpayer has been notified, if the suspicion of committing a crime or offense is related to the failure to fulfil this obligation.

The norm-forming value of this resolution is also significant, as in fact it created a kind of control scheme for the initiation of criminal proceedings by the financial investigation authority in terms of determining

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2 Consolidated text, DzU, 2022, item 2492 as amended; hereinafter referred to as: p.u.s.a.
3 Consolidated text, DzU, 2022, item 329 as amended; hereinafter referred to as: p.p.s.a.
4 Consolidated text, DzU, 2022, item 2651 as amended; hereinafter referred to as: Tax Ordinance.
whether the initiation of these proceedings was not only instrumental in order to suspend the limitation period of the tax liability.

The Supreme Administrative Court rightly emphasised in the commented resolution that the necessary prerequisite for the occurrence of the effect referred to in Art. 70 § 6 point 1 of the Tax Ordinance, the premise in the form of a procedural action of the preparatory proceeding body, undertaken on the basis of the provisions of criminal/fiscal criminal law, is closely related to the other prerequisites for the occurrence of this effect, which result directly from the regulations contained in the Tax Ordinance or in other provisions of tax law. Therefore, in this case, we are dealing with a tax law provision regulating the substantive legal situation of the taxpayer (suspension of the tax liability limitation period), in which legal constructions from another branch of law, in this case criminal law, were used as a building block. Already at this point, an observation comes to mind that since the above-mentioned suspension is a substantive legal institution, such a state of affairs resulted in the need to appropriately ‘adjust’ the tax procedure to the implementation of the standards of substantive law (including in particular as regards the determination of the facts) and the court-administrative procedure in order to guarantee full control of all procedural activities of the tax authority and the circumstances related to them, related to the formation and adoption of the decision. The legislator, when creating such an institution of tax law in which constructions of criminal law were used, had to take into account the fact that administrative courts (sooner or later) would include judicial control not only of the actions of public administration bodies undertaken as part of the tax procedure, but also, indirectly, financial bodies of preparatory proceedings, undertaken in the criminal procedure. This constitutional standard was not guaranteed by the legislator in the Tax Ordinance. The Supreme Administrative Court did so in the commented resolution — supplementing the legislator.

As follows from Art. 1 § 1 of the P.U.S.A., administrative courts administer justice by controlling the activities of public administration, including the tax administration. As part of this control, administrative courts control the application of legal provisions by these authorities, and such include in particular Art. 70 § 6 point 1 and Art. 70c of the Tax Ordinance. It does not matter that the first of the above-mentioned provisions is built with the use of constructions belonging to criminal law.

The Supreme Administrative Court then came to the conclusion that the analysis of whether all the prerequisites for the occurrence of the effect in the form of non-commencement or suspension of the limitation period of the tax liability under Art. 70 § 6 point 1 in connection with 70c of the Tax Ordinance is carried out by the tax authorities as part of the application of tax law when considering a tax case, and therefore belongs to the activities of public administration within the meaning of Art. 184 of the Constitution of the Republic of Poland\(^5\) and Art. 1 § 1 p.u.s.a. and Art. 1–3 p.p.s.a.

\(^5\) Constitution of the Republic of Poland of April 2, 1997 (DzU, No. 78, item 483 as amended); hereinafter referred to as: the Constitution of the Republic of Poland.
In connection with the above, in the first place, the tax authority conducting the tax proceedings, applying Art. 70 § 6 point 1 in connection with 70c of the Tax Ordinance, there is an obligation to analyse whether all the prerequisites for the occurrence of the effect in the form of non-commencement or suspension of the limitation period of the tax liability have occurred, including the circumstances of initiating proceedings in a tax offense or fiscal misdemeanour case. Moreover, as part of this analysis, the tax authorities were obliged to examine whether, against the background of the circumstances of a given tax case related to the existence of a tax liability, the initiation of proceedings in a case of a tax offense or a fiscal misdemeanor was not of a sham nature and was not only used to suspend the running of the deadline limitation of the tax liability. The Supreme Administrative Court directly indicated that ‘Such an assessment should be carried out in advance by the tax authority applying Art. 70 § 6 point 1 in connection with 70c of the Tax Ordinance when considering a tax case.

In the provisions of the tax law, and in particular in the regulations relating to the issue of suspension of the limitation period for a tax liability, there is no regulation obliging the tax authority to assess whether the initiation of proceedings in a case of a tax offense or a fiscal offense was not of a feigned nature and was not only used to suspend the expiry of the tax liability limitation period. Such a norm was constructed only by the Supreme Administrative Court in the commented resolution. The Supreme Administrative Court introduced a new standard in tax proceedings, which should be taken into account each time the tax authority applies Art. 70 § 6 point 1 in connection with 70c of the Tax Ordinance. It is a standard which in fact supplements the act which, pursuant to Art. 269 § 1 p.p.s.a., binds all administrative courts. If any panel of the administrative court examining the case does not share the position taken in the resolution of the panel of seven judges, the entire Chamber or in the resolution of the full bench of the Supreme Administrative Court, it submits the legal issue to the appropriate panel for resolution.

Taking into account the above considerations, there can be no doubt that the resolution in question is undoubtedly an example of the law-making (norm-making) role of the jurisprudence of administrative courts. The doctrine of tax law recognises the issue of the norm-forming role of the jurisprudence of administrative courts, in particular the resolutions of the Supreme Administrative Court and – as should be emphasised in particular – the law-making influence of this jurisprudence is allowed.\(^6\) It is indicated that the law-making activity of the administrative court is associated with replacing the legislator who acts defectively. Andrzej Gomułkowicz, answering the question of when it is possible for a judge to ‘correct’

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the law, emphasised that, as a rule, a judge faces the need to ‘correct’ the law when the legislator violates the standards of political and legal culture during the legislative process. The law then has qualified defects, and therefore the judge does not so much apply the law as rather helps to create it. Its role is therefore not limited to the simple application of legal provisions. However, this happens only in relation to particularly complicated, difficult, non-schematic cases and incidents. The more general, intricate, unclear, inconsistent, and burdened with qualified praxeological and logical gaps legal regulations are, the more a specific part of the law-making power actually passes from the parliament to the judge.\(^7\)

It is undisputed that leaving financial activities of the bodies of preparatory proceedings, which have measurable effects on the taxpayer’s material and legal situation, outside any judicial control, would in fact mean limiting the right to a court, and thus would directly lead to a violation of Art. 77 sec. 2 of the Constitution of the Republic of Poland, according to which the act may not prevent anyone from pursuing infringed freedoms or rights in court. It should be mentioned here, as pointed out by the Supreme Administrative Court in its resolution, that the penal/fiscal penal law does not provide for a judicial route that would make it possible to verify the correctness of initiating criminal proceedings at the time of its initiation, even though, in the tax law, the effect by operation of law in the form of non-commencement or suspension of the limitation period of the tax liability is associated with the date of initiation of such proceedings.

Therefore, it should be concluded that in the reality of the commented resolution, there was a possibility to ‘amend’ the law by the Supreme Administrative Court in such a way as to indirectly cover the financial activities of the bodies of preparatory proceedings under the control of this court, which have effects on the substantive legal situation of the taxpayer.

The Supreme Administrative Court also stated that the control of administrative courts, in the case of the initiation of proceedings in a case of a fiscal offense or a fiscal misdemeanour, cannot be aimed at a comprehensive and general assessment of the correctness of its initiation from the point of view of the provisions of the Code of Criminal Procedure\(^8\) or the Code of Penal Fiscal Law\(^9\) and objectives in the sphere of criminal law implemented by these acts. Such an assessment belongs to the authorities supervising the preparatory proceedings.

At the same time, it should be noted that only the imposition of the obligation on the tax authorities to verify the activities related to the initiation of proceedings in the case of a tax offense or a fiscal misdemeanour made it possible to control the administrative court in the above-mentioned range. Without the introduction of such a solution, administrative

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\(^7\) Gomułowicz A, Sędzia a „poprawianie” prawa — zasadnicze dylematy, Zeszyty Naukowe Sądownictwa Administracyjnego 2012, No. 1, p. 15.

\(^8\) Ustawa z 6 czerwca 1997 - Kodeks postępowania karnego (consolidated text, DzU, 2022, item 1375).

\(^9\) Ustawa z 10 września 1999 - Kodeks karny skarbowy (consolidated text, DzU, 2022, item 859).
courts would not have an instrument enabling indirect control of financial activities of the bodies of preparatory proceedings that have an effect in the sphere of the taxpayer’s material and legal situation. Therefore, in the first place, it is the tax authority applying Art. 70 § 6 point 1 in connection with 70c of the Tax Ordinance Act that is obliged – in fact – to control the financial activities of the preparatory proceeding body, which should be reflected in the justification of the tax decision, and then the administrative court controls the tax authority, and consequently – indirectly – also the financial pre-trial body. It does not matter whether the financial investigation authority is also a tax authority in the context of tax proceedings, or whether it is not such an authority.

Judicial-administrative control of the initiation of criminal proceedings by the financial investigation authority does not cover the entirety of the activities of this authority, but only the portion related to the initiation of criminal proceedings, including the circumstances that make it possible to assess whether the initiation had only instrumental significance in the form of suspending the limitation period of the tax liability. As part of this control, the administrative court controls the procedural activities of financial bodies of preparatory proceedings in a significantly limited manner. Moreover, this control, as already indicated, is only indirect. The administrative court is also unable to examine the criminal law effects of actions performed in fiscal penal proceedings by the financial authorities of the preparatory proceedings. Only the tax consequences are within the scope of interest of the court.

The control of the procedural activities of the financial investigation body is not independent, as it is carried out only on the occasion of the control of the tax decision, the issuance of which was related to the application of Art. 70 § 6 point 1 in connection with Art. 70c of the Tax Ordinance. The sole purpose of the administrative court bringing these activities under control is to guarantee a real and potentially effective control of the settlement in a tax case.

The administrative court cannot apply Art. 135 P.P.S.A., according to which the court applies the measures provided for by the law in order to remove the infringement of the law in relation to acts or actions issued or taken in all proceedings conducted within the limits of the case to which the complaint relates, if it is necessary for its final settlement. This is primarily due to the fact that the authoritative action of the administrative court (usually of a cassation nature) may be directed only with regard to acts or activities of administrative (tax) authorities, and not to acts or financial activities of preparatory proceedings bodies.

The above considerations lead to the conclusion that, on the one hand, administrative courts may indirectly control the activities of financial bodies of preparatory proceedings, which takes place as part of the control of the activities of tax authorities applying Art. 70 § 6 point 1 in connection with Art. 70c of the Tax Ordinance. On the other hand, the determination by the administrative court that the activities of the financial authorities of the preparatory proceedings were instrumental in bringing about the
effect of suspending the limitation period of the tax liability entails the need to eliminate from legal circulation only the tax decision, the issuance of which was related to the application of Art. 70 § 6 point 1 in connection with Art. 70c of the Tax Ordinance.

It seems that the administrative court should adopt Art. 2 of the Constitution of the Republic of Poland and Art. 121 of the Tax Ordinance, which regulates the principle of trust in tax authorities. This pattern should directly apply to the decision of the tax authority, and indirectly to the act of initiating criminal fiscal proceedings by the financial pre-trial authority.

Also particularly noteworthy is the reliability of the verification by the tax authority of the financial activities of the preparatory proceeding body related to the initiation of proceedings in a case for a tax offense or a fiscal misdemeanor. The failure of such control by the tax authority or its defectiveness, or possibly superficiality, are effectively the basis for eliminating the tax decision challenged in court from legal circulation.

In addition, the structure of indirect control of the financial activities of the bodies of preparatory proceedings, created by the Supreme Administrative Court in the resolution in question, means that the files of preparatory proceedings (or at least part of them) should currently be part of the files of tax proceedings, which entails the application of Art. 70 § 6 point 1 in connection with Art. 70c of the Tax Ordinance. Only in this case, the tax authority may reliably assess the activities related to the initiation of proceedings in the case of a tax offense or fiscal offence. The initiation of the above-mentioned criminal procedure and the circumstances related to this procedural act are significant facts that may affect the application of Art. 70 § 6 point 1 in connection with Art. 70c of the Tax Ordinance.

In the event that the financial authority of the preparatory proceedings refuses to make available the files of criminal proceedings for the purposes of tax proceedings in order to determine whether the initiation of proceedings in the case of a tax offense or a fiscal offense was of an instrumental nature, it means there is in fact no real possibility of the tax authority assessing the undertaking of these activities through financial authority preparatory proceedings. At the same time, this means that the tax authority is unable to fulfil the obligation imposed by the Supreme Administrative Court in the resolution, which in consequence should always end with the elimination from legal circulation of the tax decision issued in the proceedings which involved the application of Art. 70 § 6 point 1 in connection with Art. 70c of the Tax Ordinance, if there are any doubts as to the statute of limitations on the tax liability. In such a case, accepting the effect of suspending the limitation period of the tax liability will be groundless.

When summarising the considerations presented in the gloss, the first thing that comes to mind is that the structure of indirect control of specific financial activities of the bodies of preparatory proceedings in criminal proceedings, created by the Supreme Administrative Court in a resolution, is a simple and natural consequence of the substantive legal structure in
the tax law, which uses constructions in the field of another branch of law, namely criminal law.

The resolution guaranteed a comprehensive (complete) nature of the control of the administrative court over the activities of the tax authorities, including when specific substantive legal effects are caused by actions taken on the basis of criminal provisions by the financial authorities of the preparatory proceedings. As a consequence, the resolution enables the implementation of the standard contained in Art. 134 § 1 p.p.s.a., according to which the court decides within the limits of a given case, however, without being bound by the allegations and motions of the complaint and the legal basis invoked, subject to Art. 57a. The resolution also confirmed that the administrative court decides within the limits of a given administrative (tax) case, even if its boundaries are determined by the provisions of a branch of law other than administrative (tax) law. In this case, it does not constitute an obstacle to adjudication by the administrative court in a tax case, the boundaries of which are to some extent determined by criminal law.

The Supreme Administrative Court’s review of a tax decision issued in tax proceedings involving the application of Art. 70 § 6 point 1 in relation to 70c of the Tax Ordinance in fact removes the ‘leakage’ of the right to a court related to the issue of suspension of the tax liability limitation period and at the same time constitutes a guarantee of the right to a court, which results from Art. 45 sec. 1 of the Constitution of the Republic of Poland. Moreover, it confirms the position that, in principle, in every administrative (tax) case, the last word always belongs to the administrative court. Otherwise, in certain circumstances, an important (sometimes even the last) opinion on a tax case would be left to the financial authority of the preparatory proceedings, and one cannot agree with this.

References

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**Keywords:** tax law, court control of the tax administration, suspension of the tax liability limitation period, norm-setting nature of administrative judiciary

**Summary:** The commentary points out that in the commented resolution, the Supreme Administrative Court created a structure of indirect control of certain financial activities of the preparatory proceedings in fiscal criminal proceedings, which have effects on the substantive legal situation of the taxpayer. The resolution is undoubtedly an example of the law-making (norm-making) role of the jurisprudence of administrative courts. This judgement guaranteed the comprehensive (complete) nature of the control of the administrative court over the activities of the tax authorities, including when specific substantive legal effects are caused by activities undertaken on the basis of the provisions of criminal law by the financial authorities of the preparatory proceedings.

**Palabras clave:** legislación fiscal, control jurisdiccional de la administración fiscal, suspensión de la prescripción de una obligación tributaria, carácter normativo de la justicia administrativa

**Resumen:** En la glosa se señala que, en la resolución comentada el Tribunal Supremo Administrativo creó la construcción de un control indirecto de determinadas actuaciones financieras de los órganos de instrucción en los procedimientos penales fiscales, que producen efectos sobre la situación material y jurídica del contribuyente. La resolución es, sin duda, un ejemplo de la función legisladora (creadora de normas) de las sentencias de los tribunales administrativos. La sentencia garantizó el carácter integral (completo) del control del tribunal administrativo sobre la actuación de la administración tributaria, también cuando se desencadenan determinados efectos relacionados con el derecho sustantivo como consecuencia de las medidas adoptadas sobre la base de las disposiciones del derecho penal por las autoridades de investigación prejudicial financiera.