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Tax Sanctions as the Institutions Conditioning Efficiency of Collecting Tax Information – Limits of Legal Regulations

Sankcje podatkowe jako instytucje warunkujące skuteczność gromadzenia informacji podatkowych – granice regulacji prawnych

SUMMARY

The subject of the study is to outline the boundaries within the legislator may sanction the obligations to provide information to tax authorities using tax sanctions. The author analyzes tax sanctions as instruments guaranteeing the effectiveness of legal norms related to information obligations in the light of the protection of the taxpayer's rights. In the author's opinion, there is a clear outline of the possible shape of the sanction, which limits the legislator in excessive interference with the rights of taxpayers. These limits, both in national and international law, are determined primarily by the principle of proportionality, which is decisive for the degree of discomfort associated with the application of sanctions. It should be indicated that the shape limits of these sanctions, characterized in this study, guarantee, in turn, the protection of the rights of these entities. At the same time, it should be emphasized that tax sanctions are, in principle, a complementary element of the system of the guarantees of the law effectiveness and the legislator deciding on their wider use should properly balance the degree of "saturation" of tax law with sanctions taking into account its nature.

Keywords: tax sanctions; legal border of sanction; tax information; obligation to provide tax information; protection of taxpayer's rights

INTRODUCTION

The catalog of measures guaranteeing the fulfillment of obligations under tax law is diverse, with administrative law institutions related to tax arrears and tax penal regulations being of fundamental importance. The use of different means

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to ensure the effectiveness of law should be simultaneously assessed as justified in the light of the doctrine's claims that compliance with tax law depends on the right proportion of all factors influenced by the legislator[1]. In order to guarantee the effectiveness of law, tax law also uses institutions arising solely from its standards that are under construction similar to administrative sanctions, referred to as tax sanctions, but they are not the basic institution guaranteeing the effectiveness of the law. These institutions are currently an interesting subject of dogmatic and legal research, as since 2009 a clear increase in the number and variety of such sanctions can be observed, especially over the last four years[2].

The increase of legislator's interest in taxation law sanctions is obviously due to the recognition of the necessity of equipping tax administration with instruments enabling effective implementation of obligation imposed on obliged entities, and it is characteristic that the sanctions established are increasingly not related to the payment of tax, but relate to instrumental obligations consisting of providing information. The introduction of subsequent sanctions into the tax system should be combined with the current process of the growing number of informing obligations imposed on both taxpayers and other entities. It should be noted that although the specificity of tax law has always required obtaining information on primarily the subject and grounds of taxation, the essence of legal instruments associated with their collection has been relatively stable so far. Over the past few years, however, there have been dynamic changes in tax law regarding the scale of gathering the information by tax authorities in connection with the extensive use of IT technologies[3]. This is primarily due to the assumption of "sealing" the tax system, among others by increasing the scope of information obligations, expanding the catalog of entities obliged to provide information and using the IT technologies as the new tools for collecting and analyzing information. Thus, it is justified to conduct analyzes in the field of using tax sanctions as instruments guaranteeing the effectiveness of legal norms related to information obligations, including examination of interference through these sanctions in the taxpayer's rights.

The purpose of this study is to outline the boundaries within which the legislator may sanction the obligations to provide information to tax authorities using tax sanctions. A significant problem arises as to the shape of the sanctions so that they do not interfere excessively with taxpayers' rights. As a side note, it should be noted that there is a lack of broad and multi-faceted research on the issue of

[1] See K. Devos, *Penalties and Sanctions for Taxation Offences in Selected Anglo-Saxon Countries: Implications for Taxpayer Compliance and Policy*, "Revenue Law Journal" 2004, no. 14, p. 85.

[2] In 2009, the provisions anticipated 16 tax penalties, while in 2016 there were 21. There were over 30 institutions qualified as tax penalties as of 1 January 2020.

[3] This direction is characteristic for the development of tax administration in most countries. See *Tax Administration 2017: Comparative Information on OECD and Other Advanced and Emerging Economies*, 7th edition, OECD Publishing, p. 32, 88.

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sanctions in tax law in this respect, the results of which could be used by the legislator. The present study is assumed to be part of this research, and the conclusions resulting from the analysis may contribute to further discussions on the directions of changes in legal regulations.

CONCEPTS OF TAX INFORMATION AND THEIR COLLECTION

Due to the fact that the concept of information obligations does not have a normative definition, and in turn the statutory definition of tax information is not universal[4], the understanding of these terms needs to be established for the purposes of the analysis.

Tax information should be understood as information provided on tax authorities about taxable phenomena[5] that are used by the tax administration to monitor the compliance of taxpayers' behavior with the law[6]. Tax information is related to the activities to which they are subject, referred to as information processes, which include collecting them[7]. The collection of tax information is a process involving registration of taxpayers for the purpose of their registration and identification as well as the collection and aggregation of information by the tax administration on taxable phenomena for the purpose of their processing, use and transfer[8]. The collection of tax information may take place as part of broadly understood tax procedures (jurisdiction proceedings, verification activities as well as tax and customs-tax audits), as well as outside them, and for the purposes of this study the issue of the type of procedure in which information obligations are breached will be omitted.

Attention should be paid to the emphasis currently placed by the Polish legislator on increasing scope of information collection. Although these changes are partly justified by obligations under international law, some go beyond the requirements imposed on national legislators[9]. In addition, we can see the automatism in imposing by the act of obligated entities additional information obligations, in a situation

[4] See e.g. concepts of tax information resulting from Article 82 § 1, Article 84 § 1 and Article 299 § 1 of the Act of 29 August 1997 – Tax Code (consolidated text Journal of Laws 2020, item 1325 as amended), hereinafter: ATC, and Article 2 point 2 of the Act of 9 March 2017 on the Exchange of Tax Information with Other Countries (consolidated text Journal of Laws 2020, item 343).

[5] B. Brzeziński, *Informacje i dokumentacja w prawie podatkowym*, [in:] *Prawo podatkowe. Teoria, instytucje, funkcjonowanie*, ed. B. Brzeziński, Toruń 2009, p. 296.

[6] Idem, *Informacje podatkowe*, [in:] *Wielka encyklopedia prawa*, vol. 9: *Prawo finansowe*, eds. B. Brzeziński, H. Litwińczuk, Z. Ofiarski, Warszawa 2017, p. 205.

[7] See J. Oleński, *Ekonomika informacji. Metody*, Warszawa 2003, p. 39 ff.

[8] B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Toruń 2017, pp. 553–554.

[9] For example, the mandatory scope of information adopted in Polish law, including reporting on tax patterns, is broader than that resulting from the solutions of Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of in-

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where the tax authorities encounter difficulties in obtaining information using existing measures[10]. By introducing further obligations in the scope of providing tax information, the legislator also faces the choice of measures guaranteeing the effectiveness of standards, including the possibility of using tax penalties.

THE CONCEPT AND TYPES OF TAX SANCTION

Due to the fact that a tax sanction is not defined institution in the content of legal regulations, and the scope of the concept presented in the doctrine are different[11], further analysis requires the adoption of a definition allowing to distinguish a uniform group of institutions qualified as this type of sanction.

In theory of law, the sanction is defined as an announcement of a reaction (normative approach) or a reaction from the state (real approach) for a behavior contrary to a legal norm, resulting in negative consequences (ailments) for the infringer[12]. Taking into account the above theoretical and legal approach as tax penalties, the consequences of violation of the substantive norms of this law by its addressee who is a passive entity (usually the obligated entity in relation to tax law) should be determined, which from the point of view of his economic interest cause a disadvantageous legal or factual situation in relation to the situation that would arise if the addressee did not violate the norm and in the opinion of the legislator are treated as a penalty for violation of law[13]. Tax penalties understood in this way result from tax law regulations and are based on warranty liability and imposed by authorities competent for applying tax law under the tax procedure,

formation in the field of taxation in relation to reporting cross-border arrangements (OJ EU L 139/1, 4.06.2018).

[10] For example, on 2 January 2019 Article 45 (1) of the Act of 16 November 2016 on the National Tax Administration (consolidated text Journal of Laws 2020, item 505), adding to this provision point 10 extending the competences of the National Tax Administration authorities to request information from entities other than the taxpayer in the course of their analytical activities, which was associated with the need to collect information about entities achieving income from trading, the so-called cryptocurrencies.

[11] For example, see B. Brzeziński, *Prawo podatkowe…*, pp. 458–460; M. Duda, *Pojęcie i charakter sankcji podatkowych*, „Prawo – Administracja – Kościół" 2002, no. 2–3, p. 60 ff.; H. Dzwonkowski, *Konstytucyjność sankcji podatkowych*, „Monitor Podatkowy" 1999, no. 3, pp. 22–23; A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Warszawa 2011, pp. 237–238.

[12] See M. Borucka-Arctowa, J. Woleński, *Wstęp do prawoznawstwa*, Kraków 1997, p. 76; W. Dziedziak, *Sankcje prawne i moralne. Studium teoretycznoprawne*, Lublin 1999 (unpublished doctoral dissertation), p. 44; M. Smołka, *Pojęcie i rodzaje sankcji prawnych*, Lublin 1979 (unpublished doctoral dissertation), p. 285.

[13] P. Majka, *Sankcje w prawie podatkowym*, Warszawa 2011, p. 60 ff.

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but they are not taxes[14]. The nature of these sanctions, which is one of the means guaranteeing compliance with the law, brings them closer to institutions that serve to secure or enforce the implementation of a tax claim as the main one and are therefore imposed for non-fiscal purposes[15].

From the point of view of obligations that the addressee of the tax norm did not perform, tax sanctions can be divided into those concerning the basic obligation, which is payment of the tax, and instrumental obligations, including primarily those related to the obligation to provide information to tax authorities.

For the conducted considerations, it is also important to divide tax sanctions based on the criterion of effects for the infringer associated with the specification of adverse situations in which he is put. This criterion allows, first of all, to distinguish sanctions where the amount of tax liability is increased due to the increase in the tax base or tax rate. The situation of the infringer can also be changed to an unfavorable one through sanction of imposing additional obligations (usually, it is an additional tax liability). The last type of sanctions is those whereby the infringer loses the benefits of the rights granted[16].

CATALOG OF TAX PENALTIES PROVIDED FOR BREACH OF INFORMATION OBLIGATIONS

Based on the definition of sanctions adopted above, eight institutions can currently be identified, which should be classified as tax sanctions imposed in connection with breach of information obligations. These are:

1) an additional tax obligation determined by the tax authority on the basis of the provisions of Chapter 6a of Section III ATC in connection with the issuing of a decision on the payer's liability pursuant to Article 30 § 1 ATC in a situation where the statement referred to in Article 41 (15) or (21) of the Act of 26 July 1991 on Personal Income Tax[17] or the declaration referred to in Article 26 (7a) or (7g) of the Act of 15 February 1992 on Corporate Income Tax[18] (statements on the possession of documents required for the application of the tax rate or exemption or non-collection of tax resulting from special provisions or agreements on the avoidance of double taxation or lack of knowledge justifying the supposition, that there are circumstances

[14] A. Hanusz, *Charakter prawny dodatkowego zobowiązania podatkowego*, „Przegląd Podatkowy" 2000, no. 4, p. 6.

[15] Cf. *ibidem*; I. Mirek, *Daniny publiczne w prawie niemieckim*, Warszawa 1999, p. 176.

[16] P. Majka, *op. cit*., pp. 66–67.

[17] Consolidated text Journal of Laws 2020, item 1426 as amended, hereinafter: APIT.

[18] Consolidated text Journal of Laws 2020, item 1406 as amended, hereinafter: ACIT.

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excluding the possibility of applying the tax rate, exemption or non-collection), it was not true, the payer did not carry out the required verification or the verification undertaken by the payer was not adequate to the nature and scale of the payer's activity (Article 58a § 1 point 5 ATC),

2) doubling the rates of additional tax obligation in a situation where a party has not submitted to the tax authority the tax documentation referred to in the provisions of Chapter 4b of Branch 3 APIT or Chapter 1a of Branch 3 ACIT (related to transfer pricing documentation) – within this part of the basis for determining the additional tax obligation that results from the application of the provisions specified in Article 58a § 1 point 4 ATC and concerns transaction for which no tax documentation has been submitted (Article 58c § 1 point 3 ATC),
3) loss of the right to settle VAT for a period of 36 months on the terms set out in Article 33a (1) of the Act of 11 March 2004 on Tax on Goods and Services[19] (i.e. settlement of tax due on the import of goods under a declaration submitted for the period in which the obligation on account of importation appeared) by a taxpayer who fails to comply with the 4-month deadline to present documents to the customs authority confirming the settlement of the amount of tax due on import of goods in a tax declaration (Article 33a (10) ATGS),
4) deletion of a taxpayer from the EU VAT Taxpayers Register *ex officio* if for three consecutive months he did not submit aggregated information on completed intra-Community transactions ("summary information"), despite the existence of such an obligation (Article 97 (15a) ATGS),
5) an additional tax obligation in the amount corresponding to 30% of the amount of input tax on the purchase of goods and services in the event of no record of turnover and amounts of tax due using cash registers (Article 111 (2) ATGS),
6) taxation with the maximum lump sums on recorded revenues in the situation of a taxpayer conducting business activity taxed with various rates, who keeps records of revenues in a manner that makes it impossible to determine revenues from each type of activity (Article 12 (3) of the Act of 20 November 1998 on Lump Sum Income Tax on Certain Revenues Generated by Natural Persons[20]),
7) application of an increased rate of five times of the lump sum rate on recorded revenues (no more than 75%) in the event of failure to keep records of revenues or keeping them not in accordance with the conditions required to recognize it as evidence in tax proceedings (Article 17 (1), (2) and (3) of the

[19] Consolidated text Journal of Laws 2020, item 106 as amended, hereinafter: ATGS.
[20] Consolidated text Journal of Laws 2019, item 43 as amended.

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Act on Lump Sum Income Tax on Certain Revenues Generated by Natural Persons),

8) loss of the right to enter into the register of intermediary tobacco entities for a period of three years the entity against which the decision was taken to remove the office of the tax office *ex officio* in the situation where the intermediary tobacco entity or entity representing a foreign entrepreneur conducts business contrary to the provisions of tax law or a decision on making an entry in the register of intermediary tobacco entities, in particular by unreliable performance of information obligations (Article 20h (2) of the Act of 6 December 2008 on Excise Tax[21]).

The analysis of current tax sanctions leads to the conclusion that in the last ten years the catalog of sanctions related to the obligation to provide tax information has increased, while among all sanctions they are still a minority. At the same time, it seems reasonable to conclude that the current lawmaking policy regarding the use of tax sanctions in relation to information obligations will not change and the number of these sanctions will continue to increase, which is primarily indicated by the increase in the scope of information obligations. We can also notice a gradual increase in the variety of such sanctions, while the level of their ailments does not decrease. Therefore, it is important to analyze the boundaries arising from the regulations of both national and international law, in which the legislator can create and shape sanctions that guarantee the fulfillment of information obligations.

LIMITS OF SANCTIONS ARISING FROM THE PROVISIONS OF NATIONAL LAW

The permissible limits for shaping tax sanctions related to information obligations in the field of national law result from the provisions of the Constitution of the Republic of Poland of 4 April 1997[22]. It should also be noted that the scale of gathering tax information is limited due to the principles arising from the Polish Constitution, and the protection of the right to privacy is the fundamental one (Articles 47, 49 and 51 of the Polish Constitution). When assessing the scope of information obligations covered by the analyzed sanctions, it should be considered that in all cases they include the provision of information necessary for determining the tax base and checking their regularity without going beyond the constitutional standards of privacy protection.

[21] Consolidated text Journal of Laws of 2020, item 722 as amended.

[22] Journal of Laws of 1997, no. 78, item 483 as amended, hereinafter: the Polish Constitution. English translation of the Constitution at: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [access: 10.09.2020].

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In the Polish Constitution, the limits on the creation and shape of tax penalties related to information obligations determine primarily the principles of proportionality and specificity. At the same time, these principles are universal in relation to all legal regulations and therefore relate directly to all types of tax sanctions.

The principle of proportionality requires that in order to achieve the objectives pursued by the legislator, measures should be used which are not too burdensome or costly for the taxpayer[23]. This rule results from Article 31 (3) of the Polish Constitution, according to which restrictions on the use of constitutional freedoms and rights may be established only by statute and only if they are necessary in a democratic state for its security or public order or for the protection of the environment, public health and morality, or freedom and the rights of others, and do not violate the essence of these freedoms and rights. Pursuant to the rulings of the Constitutional Tribunal, which were based on tribute law, the principle of proportionality requires from the legislator to assess to what extent the restriction of certain rights is justified by the necessity to protect the public interest, ensures the achievement of the assumed goal and maintains an appropriate proportion between the effect achieved and the burden for the citizens[24]. Therefore, measures that comply with the principle of proportionality are these which: can lead to achievement of the intended goal in terms of protecting public interest, are necessary to achieve this goal, and finally will produce effects proportional to the burdens imposed on the taxpayer (the so-called constitutional test based on the statement: usefulness, necessity, proportionality *sensu stricto* of the measure used)[25]. It is also possible to control complying by the legislator with the principle of proportionality in the light of Article 2 of the Polish Constitution, according to which the Republic of Poland is a democratic state ruled by law, implementing the principles of social justice. This provision provides for the rule of law, requiring examination of the legislator's interference irrespectively of a specific constitutional right or freedom[26]. Violation of the principle of proportionality occurs when the purpose of the regulation is unreasonable and irrationally gross or if the means to be used to achieve the goal are inappropriate and ineffective (useless, inefficient) or excessively distressing (oppressive)[27].

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[23] B. Brzeziński, *Prawo podatkowe…*, p. 298.

[24] Cf. A. Gomułowicz, *Zasada sprawiedliwości podatkowej w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2003, p. 64; J. Oniszczuk, *Podatki i inne daniny w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2001, pp. 158–167; judgement of the Constitutional Tribunal of 20 November 2002, K 41/02, OTK 2002, no. 6, item 83.

[25] Judgement of the Constitutional Tribunal of 26 April 1995, K 11/94, OTK 1995, no. 1, item 12. More broadly, see P. Selera, *Zasada proporcjonalności w orzecznictwie podatkowym Trybunału Konstytucyjnego*, „Państwo i Prawo" 2014, no. 4, p. 48 ff.

[26] Judgement of the Constitutional Tribunal of 11 February 2014, P 24/12, OTK 2014, no. 2, item 9; judgement of the Constitutional Tribunal of 31 January 2013, K 14/11, OTK 2013, no. 1, item 7.

[27] Judgement of the Constitutional Tribunal of 9 July 2012, P 8/10, OTK 2012, no. 7, item 75.

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From the content of Article 31 (3) of the Polish Constitution, there is also the principle of specificity requiring that the powers of public administration bodies to enter the sphere of civil rights and freedoms have clearly defined boundaries that are precisely defined in tax laws[28]. The jurisprudence of the Constitutional Tribunal has repeatedly emphasized that especially in the case of tax regulations, which are intrusive by nature, the legislator should be required to make the provisions clear and communicative[29]. The requirement of high legislative standards of typical tax regulations should be even more related to tax sanctions, as institutions usually interfering more deeply than taxes in constitutionally protected values.

The sanctions being the subject of the analysis are therefore subject to control in the light of the criteria resulting from the above principles, but a separate detailed assessment of each of them would exceed the framework of this study. At the same time, it seems that despite existing interpretation problems[30], the regulations in force providing for sanctions for breach of disclosure obligations do not exceed the limits arising from the above-mentioned constitutional principles. In particular, in respect of all types of sanctions, one cannot see that the limits of proportionality have been exceeded due to their ailment. There is also no doubt that, by implementing the preventive purpose, these sanctions will lead to lawful behavior in the area of fulfilling information obligations. At the same time, it should be signaled that the assessment of the necessity in achieving the assumed objectives related to obtaining information may be a problem. This issue requires broader analysis in the assessment of individual sanctions, in particular regarding those related to value added tax.

LIMITS OF SANCTIONS RESULTING FROM INTERNATIONAL LAW

Restrictions on the sanctioning of information obligations in tax law under international law arise primarily from the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950[31] as an instrument to counteract excessive State interference in the sphere of freedom and

[28] B. Brzeziński, *Wstęp do nauki prawa podatkowego*, Toruń 2007, p. 142.

[29] See judgement of the Constitutional Tribunal of 13 February 1999, K 19/99, OTK 2001, no. 1, item 30; judgement of the Constitutional Tribunal of 22 May 2002, K 6/02, OTK 2002, no. 3, item 33.

[30] See e.g. resolution of the Supreme Administrative Court of 16 October 2017 (II FPS 4/18, CBOSA), regarding the limitation period for the tax authority's right to issue a decision on an increased lump sum on unrecorded income pursuant to Article 17 (1) in conjunction with para. 2 of the Act on Lump Sum Income Tax on Certain Revenues Generated by Natural Persons.

[31] Journal of Laws 2003, no. 61, item 284 as amended, hereinafter: ECHR.

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taxpayer's rights[32]. In the light of the provisions of the ECHR, for norms constituting information obligations, at the same time, Article 8 ("The right to respect for private and family life"), according to which everyone has the right to respect for his private and family life, his home and his correspondence. Based on Article 8 (2) ECHR, interference by public authorities in exercising these rights is possible only in justified cases provided for by statutes.

The legislator establishing tax sanctions guaranteeing the fulfillment of disclosure obligations is limited primarily by the content of Article 6 ECHR ("The right to a fair trial"). In accordance with Article 6 (1) first sentence of the ECHR, everyone has the right to a fair and public consideration of his case within a reasonable time by an independent and impartial court established by statute when deciding on his rights and obligations of a civil nature or on the merits of any charge in a criminal case against him. In accordance with the judicature of the European Court of Human Rights (ECtHR), this regulation, in addition to the right to appeal against a decision imposing sanctions, also results, among others, the right to remain silent (no obligation to self-indictment), equality of "arms" in the course of proceedings and the right to public hearing[33]. The problem is whether Article 6 ECHR includes tax sanctions in connection with the recognition that, in principle, this regulation does not include taxes[34]. The analysis of the ECtHR's judicature also leads to the conclusion that as regards sanctions related to fines and additional tax obligations in connection with violation of law, it should be considered that matters related to their dimension fall under the concept of "criminal cases" if the following criteria are met: sanctions include all taxpayers; sanction was not intended as damages but as a disincentive to break the law again; sanctions were imposed on the basis of a general rule both for deterrence and punishment; ailment related to the dimension of the sanction should be considered as significant[35]. Thus, in the light of the ECtHR's judicature, it should be considered that from the analyzed sanctions only these consisting of imposing an additional tax liability can be considered as falling

[32] See A. Leszczyńska, *Europejska Konwencja o Ochronie Praw Człowieka oraz Podstawowych Wolności jako instrument ochrony praw podatnika*, „Kwartalnik Prawa Podatkowego" 2004, no. 1–2, pp. 9 ff.

[33] See judgement of the ECtHR of 23 November 2006, case 73053/01, *Jussila v. Finland*.

[34] See judgement of the ECtHR of 12 July 2001, case 44759/98, *Ferrazzini v. Italy*. See also the criticism of this ruling in the doctrine cited in C. Endresen, *Taxation and the European Convention for the Protection of Human Rights: Substantive Issues. No Tax, No Society*, "Intertax" 2017, no. 45, p. 516; N. Lee, *Time for Ferrazzini be Reviewed?*, "British Tax Review" 2010, no. 6, p. 590.

[35] For example, judgement of the ECtHR of 23 November 2006, case 73053/01, *Jussila v. Finland*. See also an analysis of ECtHR's judgements in: M. Richardson, *The EU and ECHR Rights of the Defence Principles in Matters of Taxation, Punitive Tax Surcharges and Prosecution of Tax Offences*, "European Community Tax Review" 2017, no. 6, p. 332; L. Sabbi, *The Reasonable Time of Tax Proceedings in the Italian Legal System*, "Intertax" 2018, no. 46, pp. 586–587.

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within the scope of Article 6 ECHR[36]. On the other hand, proceedings related to tax sanctions involving the increase of rates and loss of rights will, as a rule, not be covered by the protection provided for in the content of the ECHR regarding the right to a fair trial. When analyzing the judicature of the ECtHR, it should be stated at the same time that the standards arising from Article 6 (1) ECHR shall be deemed to be preserved when administrative and criminal sanctions are applied, if the exercise of the right to a court is ensured by the possibility of an effective appeal to the court decisions of administrative bodies imposing sanctions[37]. There is no doubt that in the case of all analyzed tax sanctions, the obligated party has the right to appeal against the decision imposing sanctions to the administrative court. Therefore, regardless of the recognition of individual sanctions as "criminal", in the case of all Polish tax sanctions related to information obligations, the general standard arising from Article 6 (1) ECHR should be considered observed.

Since the effect of the application of tax penalties is the transfer of ownership of financial means to the tax creditor, when establishing sanctions or changing their shape, should be taken in consideration the provisions of Article 1 of Protocol no. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms drown up at Paris on 20 March 1952[38], according to which every natural and legal person has the right to respect for his or her property. No one may be deprived of his or her property, except in the public interest and under the conditions provided for by law and in accordance with the general principles of international law. In accordance with Article 1 third sentence of Protocol no. 1, however, the above provisions shall not in any way affect the right of the State to apply such acts as it deems necessary to regulate the use of property in accordance with the general interest or to secure the payment of taxes or other debts or fines. In the judicature of the ECtHR, it is not disputed that, although the payment of taxes, public benefits and fines, including their forced execution, causes the loss of property by the taxpayer, in the light of Article 1 of Protocol no. 1 is an admissible interference[39]. In the context of permissible interference with property rights as a result of the application of the sanctions, the ECtHR, on the other hand, considers that a high penalty complies with the principle of proportionality only to the extent necessary to enforce the law and prevent the violation of law, taking into account the gravity of the violation, whereas in its latest judgements, the ECtHR pointed out the need

[36] For example, see judgement of the ECtHR of 25 November 2014, case 51269/07, *Pakozdip v. Hungary*, in which an additional criminal liability was recognized in the personal income tax, the rate of which was 50% without an upper limit.

[37] See, among others, judgement of the ECtHR of 21 February 1984, case 8544/79, *Öztürk v. Germany*.

[38] Journal of Laws 1995, no. 36, item 175, hereinafter: Protocol no. 1.

[39] See I. Nakielska, *Prawo do własności w świetle Europejskiej Konwencji Praw Człowieka*, Gdańsk 2002, pp. 148–152, 178–179.

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to apply a more stringent standard allowing for deprivation of property than was the case in previous case law[40]. The confiscation of imported goods in violation of VAT or customs duties is indicated as an example of permissible interference with property rights, in the event of which the ECtHR sanctioned that a balance should be found between the interest of the community on the one hand, and the fundamental rights of the individual on the other, in particular possible confiscation must be proportional to the breach committed and the taxpayer's financial situation[41]. The Polish doctrine indicates that the ECtHR's judicature analysis leads to the conclusion that the violation of the equilibrium principle occurs when the "reasonable ratio of proportionality" of the means to the goal is questioned, i.e. a significant disproportion of means and purpose, devoid of rational basis[42]. When assessing Polish tax sanctions related to information obligations in the light of the limits on permissible interference with property rights described above, it should be stated that the degree of ailments of these sanctions does not violate the standards arising from Article 1 of Protocol no. 1.

When characterizing the limits of the admissibility of using tax sanctions to comply with disclosure obligations, we should also refer to Article 4 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up at Strasbourg on 22 November 1984[43], according to which no one may be tried or punished again in proceedings before a court of the same state for a crime for which he was previously convicted by legally valid judgement or acquitted in accordance with the law and rules of criminal proceedings of that state (*ne bis in idem*). As in the case of other regulations, there is a problem of assessing whether the cited provision related to "punishment" includes tax sanctions. It is important to determine whether, in the event of a coincidence of a criminal penalty and a tax penalty, in the light of the above-mentioned provision, it is permissible to penalize the same act at the same time using both institutions.

The analysis of the ECtHR's judicature based on compliance with the *ne bis in idem* principle in its application to cases related to the sanction's extent (in tax matters, the judgements concerned the sanction of additional tax liability and administrative fines) shows that when assessing compliance with the standards,

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[40] G. Maisto, *The Impact of the European Convention on Human Rights on Tax Procedures and Sanctions with Special Reference to Tax Treaties and the EU Arbitration Convention*, [in:] *Human Rights and Taxation in Europe and the World*, eds. G.W. Kofler, M. Poiares Maduro, P. Pistone, IBFD 2011 (Online Books).

[41] *Ibidem* and the judgements of the ECtHR cited therein: of 6 November 2008, case 30352/03, *Ismayilov v. Russia*; of 10 December 2009, case 28336/02, *Grifhorst v. France*; of 24 February 1994, case 12547/86, *Bendenoun v. France*; of 9 January 2007, case 803/02, *Intersplav v. Ukraine*.

[42] C. Mik, *Prawo własności w europejskiej konwencji praw człowieka*, „Państwo i Prawo" 1993, no. 5, p. 33.

[43] Journal of Laws 2003, no. 42, item 364, hereinafter: Protocol no. 7.

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material relationship assessment was taken into account between tax and criminal proceedings, as well as various sanctions, assessing: whether they fulfill complementary objectives related to the response to taxpayers' failure to comply with their obligations and thus related specifically to various aspects of the socially prohibited act concerned; whether double proceedings are a foreseeable consequence of the same prohibited behavior; whether the proceedings are conducted in a way allowing, as far as possible, to avoid repetition in the collection and assessment of evidence, by appropriate interaction between the various competent authorities so that the findings of fact made in one proceeding are also used in the other proceeding; whether the sanction imposed in the proceedings which will become legally binding first is taken into account in the proceedings which will become legally binding last in order to prevent the final imposition of an excessive burden on the person concerned, whereas the least probability of such risk is when the balancing mechanism was introduced, aimed at ensuring that the overall ailment of the sanctions imposed is proportionate[44]. It should be emphasized that in the light of Article 4 of Protocol no. 7, it is impossible to assess Polish sanctions regarding information obligations in a general way. Therefore, the assessment of whether the principle *ne bis in idem* applies to the acccumulation of each of the analyzed tax and criminal penalties requires separate considerations in the light of the possibility of their application including criminal penalties, which would exceed the scope of this study.

LIMITS OF SANCTIONS UNDER EU LAW

Since the European Union tax law enjoys priority over national law and is directly applicable, it is necessary to consider its role in shaping the limits of tax sanctions. Pursuant to the case law of the Court of Justice of the European Union (CJEU), EU law is based on general principles of law, including, among others, the principle of proportionality, which, in connection with the implementation of treaty freedoms, requires the use of internal law measures commensurate with the intended effect. In the area of protection of treaty freedoms, any potential tax sanctions guaranteeing the fulfillment of information obligations may not therefore infringe the principle of proportionality. This principle determines the scope of the admissibility of limiting rights under EU law by requiring national regulations to be proportional

[44] Judgement of the ECtHR of 15 November 2016, case 24130/11, *AIB v. Norway*; judgement of the ECtHR of 18 May 2017, case 22007/11, *Johanneson and Others v. Iceland*. See also an analysis of ECtHR's judgements in: B. Bahçeci, S. Ovalıoğlu, *The Controversial Application of the ne bis in idem Rule by the European Court of Human Rights in Respect of Tax Penalties*, "European Taxation" 2018, no. 11, pp. 411–418; P. Baker, *Some Recent Decisions of the European Court of Human Rights on Tax Matters (and Related Decisions of the European Court of Justice*), "European Taxation" 2016, no. 8, pp. 342–346.

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(adequate) to the intended and achievable effects. In this assessment, the CJEU applies the following tests: suitability (the measure is suitable for achieving the goal), necessity (the measure is necessary to achieve the goal), proportionality in the strict sense (*sensu stricto*; the measure does not impose excessive burdens for the intended goal, balancing treaty freedoms, taxpayer interest and state interest)[45]. At the same time, due to the fact that the scope of EU law regulations concerns treaty freedoms, the principle of proportionality will apply primarily to sanctions regarding the tax on goods and services and excise duty.

The boundaries of shaping tax sanctions in EU law also result from the regulations of the Charter of Fundamental Rights of the European Union[46], in particular from Article 17 ("Property right"), Article 47 ("Right to an effective remedy and access to an impartial court") and Article 50 ("Prohibition of re-trialing or re-punishing in criminal proceedings for the same offence under penalty of punishment"). The above regulations set limits on the sanctioning of information obligations in a scope similar to the regulations of the ECHR, being its supplement in the scope of protection of individual rights, while they concern the sphere of treaty freedoms[47]. At the same time, the scope of the boundaries they set coincides with that created by the regulations of the ECHR described above. It should also be emphasized that in the scope of the right to court, Article 47 of the Charter of Fundamental Rights provides that anyone whose rights and freedoms guaranteed by EU law have been violated has the right to an effective judicial remedy in accordance with the conditions provided for in this Article. This regulation also provides that everyone has the right to a fair and public hearing of his or her case within a reasonable time by an independent and impartial court previously established by law. The above provisions of the Charter of Fundamental Rights, unlike the ECHR make it clear without any doubts that the guarantee of the right to a court covers application of all types of tax penalties[48].

When delineating the limits of tax sanctions, the content of Article 47 § 3 of the Charter of Fundamental Rights, according to which penalties may not be disproportionately severe in relation to the criminal offence should be considered. At this point, the doubt arises as to whether the principle of proportionality of the penalty applied applies to tax penalties. Referring to the judicature, it should be stated that Article 47 § 1 of the Charter of Fundamental Rights applies to tax sanctions, which is confirmed, for example, by the CJEU's recognition as a "penalty" of a sanction

[45] See P. Mikuła, *Zasada proporcjonalności w podatku od wartości dodanej – analiza orzecznictwa TSUE*, „Toruński Rocznik Podatkowy" 2014, p. 8 ff.

[46] OJ EU C 83, 30.03.2010.

[47] B. Brzeziński, *Prawo podatkowe*..., p. 578.

[48] See J. Frey, A. Jupp, F.M. Schwarz, *The CJEU's Berlioz Judgment: A New Milestone on Procedural Rights in EU Audits*, "Tax Notes International" 2017, no. 8, p. 680.

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consisting in 100% of the amount of tax not refunded on time, whereas it was also considered that the amount of this sanction in this amount does not result in a breach of principle of neutrality in goods and services tax[49].

In the scope of the regulation of secondary law of the European Union, regulations on the tax on goods and services, i.e. norms of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, are of fundamental importance for forming sanctions[50]. The Directive 2006/112/EC introduces numerous restrictions in connection with the construction of a VAT tax, whereas the principle of neutrality of the VAT tax being the most important for the shape of tax penalties related to breach of information obligations. The effect of the application of sanctions cannot be the unjustified deprivation the taxpayer of the right to deduct input tax, which guarantees tax neutrality.

On the other hand, as regards taxes other than on goods and services, secondary law of the European Union generally limits the shape of sanctions related to information obligations. Only with respect to tax sanctions imposed on taxpayers in the event of breach of the documentation obligations in the field of transaction prices there was their limitation in the Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD)[51]. In accordance with para. 7 of the Resolution, Member States should not apply sanctions regarding documentations where taxpayers comply in good faith, in a reasonable manner and in a timely manner with the requirements of standardized and consistent documentation as set out in the Annex or national documentation requirements in a Member State and correctly apply this documentation to determine their transfer prices according to the market price principle. An analysis of Polish regulations allows to state that this standard is currently maintained.

CONCLUSION

The increase in information obligations imposed on obliged entities in tax relations results in the need to use tools that will guarantee their proper performance. Among all measures guaranteeing the fulfillment of information obligations arising from tax law standards, tax sanctions are becoming increasingly important today.

[49] See an analysis of the CJEU's judgement of 20 July 2013, case C-259/12, *Rhodopipo* in: E. Poelmann, *Some Fiscal Issues of the Charter of Fundamental Rights of the European Union*, "Intertax" 2015, no. 43, p. 177.

[50] OJ EC 2006 L 347/1, 11.12.2006.

[51] OJ EC 2006, C 176/1, 28.07.2006.

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The analysis of the boundaries in which the legislator may sanction information obligations indicates that there is a clear outline of the possible shape of the sanction, which limits the legislator in excessive interference with the rights of taxpayers and other obliged entities. At the same time, these are the same boundaries for tax sanctions regarding both information obligations and payment of tax. These limits, both in national and international law, are determined primarily by the principle of proportionality, which is decisive for the degree of discomfort associated with the application of sanctions. However, it should be postulated that liability under sanctions depends on the type of breach. In this respect, the opinion that sanctions related to information obligations should be less severe than those related to non-payment of tax should be supported[52]. In turn, the limit for regulating sanction procedures at the level of international and EU law is the obligation to guarantee the right to a fair trial and although the sanctions are within an acceptable framework, the ECHR does not cover all types of tax sanctions in this respect and sets standards at a lower level than the Charter of Fundamental Rights. International regulations also prohibit double punishment for the same act (*ne bis in idem*), and because the regulations do not cover all types of tax sanctions, there will be phenomenon of sanctions accumulation, consisting in the fact that one behavior involving the violation of one norm may be punished with tax sanction consisting in increasing the rate or loss of entitlements, followed by a criminal penalty. However, it should be postulated that when deciding to sanctioning information obligations, the legislator should consider the possibility of only one sanction, i.e. either tax or criminal, without restricting the prohibition of confluence to the selected type of tax sanctions.

The analysis of acceptable limits of shaping tax sanctions leads to the conclusion that the legislator has relatively wide possibility in the area of sanctioning. It is important that taking into account the boundaries set out above, tax sanctions due to their construction and mode of application constitute a flexible instrument and convenient from the perspective of tax authorities, and provided that they exclude criminal liability and their degree of ailment would not exceed the repressiveness of criminal penalties, they would also be preferred by entities obliged to provide information. The shape limits of these sanctions, characterized in this study, guarantee, in turn, the protection of the rights of these entities. At the same time, it should be emphasized that tax sanctions are, in principle, a complementary element of the system of the guarantees of the law effectiveness and the legislator deciding on their wider use should properly balance the degree of "saturation" of tax law with sanctions taking into account its nature.

[52] See T. Dębowska-Romanowska, *Następstwa karno-skarbowe nieujawnienia podatku a obowiązki państwa wobec podatników*, „Państwo i Prawo" 2007, no. 9, pp. 22 ff.

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STRESZCZENIE

Przedmiotem opracowania jest nakreślenie granic, w ramach których ustawodawca może sankcjonować obowiązek informowania organów podatkowych za pomocą sankcji podatkowych. Autor analizuje sankcje podatkowe jako instrumenty gwarantujące skuteczność norm prawnych związanych z obowiązkami informacyjnymi w świetle ochrony praw podatnika. Zdaniem autora granice możliwego kształtu sankcji podatkowych mają istotne znaczenie z uwagi na konieczność ochrony podatników przed nadmierną ingerencją w ich prawa. Ograniczenia te, zarówno w prawie krajowym, jak i międzynarodowym, wyznacza przede wszystkim zasada proporcjonalności, która decyduje o stopniu dolegliwości związanej z zastosowaniem sankcji. Należy wskazać, że scharakteryzowane w niniejszym opracowaniu granice kształtu tych sankcji gwarantują z kolei ochronę praw tych podmiotów. Jednocześnie należy podkreślić, że sankcje podatkowe są co do zasady elementem uzupełniającym systemu gwarancji skuteczności prawa, a ustawodawca – decydując się na ich szersze zastosowanie – powinien odpowiednio zrównoważyć stopień „nasycenia" prawa podatkowego sankcjami, uwzględniając jego charakter.

Słowa kluczowe: sankcje podatkowe; prawne granice sankcji; informacje podatkowe; obowiązki informacyjne podatnika; ochrona praw podatnika