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Wojciech Białogłowski
Jan Długosz University in Częstochowa, Poland
w.bialoglowski@ujd.edu.pl
ORCID ID: https://orcid.org/0000–0003-3356–8949

Dominika Łukawska-Białogłowska
University of Łódź, Poland
dlukawska@wpia.uni.lodz.pl
ORCID ID: https://orcid.org/0000–0001-6243–7118

Bogusław Przywora
Jan Długosz University in Częstochowa, Poland
bprzywora@op.pl
ORCID ID: https://orcid.org/0000–0002-8809–3971

Suspendium ad Kalendas Graecas? The Problem of the Constitutionality of Suspending the Statute of Limitations for Fiscal Offences during the State of the Epidemic or the State of the Epidemic Threat as the Example of Broadly Understood 'Fiscal Repression' of the State against the Individual[1]*

Abstract: One of the basic principles defining the relationship between individuals (including entrepreneurs) and the state is the principle of protecting the citizen's trust in the state and the law enacted by it. This principle is based on legal certainty, understood in the jurisprudence of the Constitutional Tribunal of the Republic of Poland as a certain set of features inherent in the law which ensure legal security for the individual; the individual then has the possibility of full knowledge of the reasons for the operation of state authorities and the legal consequences that his or her actions may entail. An individual should be able both to determine the consequences of behaviours and events on the basis of

1 * This article presents only the personal views of the authors.

the legal status in force at a given moment, and to expect that the legislator will not change it arbitrarily. On 22 June 2021, Article 15zzr[1] was added to the Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and crisis situations caused by them; the article stipulates that during the state of epidemic threat or state of the epidemic, as announced due to COVID-19, and in the period of six months after their cancellation, there is no statute of limitations for the criminality of the act and no statute of limitations for the execution of a penalty in cases of crimes and fiscal crimes (paragraph 1); the periods referred to above are counted from 14 March 2020 – in the event of an epidemic threat, and from 20 March 2020 – in the event of an epidemic (paragraph 2). The subject of this paper is an attempt to answer the question of whether the indicated provision – interfering with the current model of the relationship between penal fiscal law and tax law – meets constitutional standards.
Keywords: penal fiscal law, statute of limitations, the Constitutional Tribunal, the Constitution

Introduction

With effect since 22 June 2021, under Article 4(2) of the Act of 20 April 2021 amending the Act – Penal Code and Certain Other Acts (hereinafter: the April Amendment), Article 15zzr[1] was added to the Act of 2 March 2020 on Special Solutions Related to the Prevention, Counteraction and Combating of COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them (hereinafter: the March Act). According to this provision:

- during the period in which the state of epidemic threat or state of epidemic declared due to COVID-19 is in force and for a period of six months after their revocation, the statute of limitations for the punishment of the act and the statute of limitations for the execution of the sentence in criminal and fiscal offence cases is not effective (paragraph 1);
- the periods referred to above shall be counted from 14 March 2020 – in the case of the epidemic threat, and from 20 March 2020 – in the case of the state of the epidemic (paragraph 2).

In our opinion, the consequences of Article 15zzr[1] of the March Act are part of a 'broader' trend of instrumental application of the law in state–citizen relations by tax authorities. It suffices to mention that, pursuant to Article 70 § 6(1) of the Act of 29 August 1997 – Tax Ordinance (hereinafter: the Tax Ordinance),[2] the period of limitation for a tax liability does not commence, and the one commenced is suspended, with the date of commencement of proceedings for a fiscal offence or fiscal misdemeanour, of which the taxpayer has been notified, if the suspicion of an offence or misdemeanour is connected with failure to fulfil this liability, and the institution of initiating proceedings for a fiscal offence is used by tax authorities to circumvent the general provisions on the statute of limitations of a tax liability, as illustrated by the

2 With regard to the interpretation of Article 70 of the Tax Ordinance, see Dzwonkowski & Kurzac (2020, pp. 556 ff.).

judicial practice of the Constitutional Tribunal,[3] the pleadings initiating subsequent proceedings before that authority,[4] as well as the judicial decisions of the Supreme Administrative Court.[5]

One of the basic principles defining the relations between an individual (including an entrepreneur) and the state is the principle of protection of the citizen's confidence in the state and the law made by it.[6] This principle is based on the certainty of the law, understood in the jurisprudence of the Constitutional Tribunal as a certain set of features vested in the law which ensure legal security for the individual; the individual is then guaranteed the possibility of full knowledge of the premises of state bodies' actions and the legal consequences that their actions may entail. The individual should be able both to determine the consequences of particular behaviours and events on the basis of the legal state in force at a given moment, as well as to expect that the legislator will not change them in an arbitrary manner.

There is no doubt that the action of a taxpayer (including an entrepreneur), the purpose of which is to unlawfully evade his tax obligation, should be subject to an appropriate response from the state, not excluding a criminal sanction. At the same time, it should be noted that the issue of the statute of limitations for fiscal penal offences is essentially regulated in Article 44 of the Act of 10 September 1999 – Fiscal Penal Code (hereinafter: the Fiscal Penal Code). Pursuant to § 1 of this provision, the punishability of a fiscal offence ceases if five years have passed since it was committed – when the act constitutes a fiscal offence which is punishable by a fine, restriction of liberty or imprisonment for a term not exceeding three years (point 1), and if ten years have passed, when the act constitutes a fiscal offence which is punishable by imprisonment for a term exceeding three years (point 2). The punishability of a fiscal offence consisting in the reduction or exposure to the reduction of public-law liabilities also ceases when the statute of limitations for that liability has expired (Article 44 § 2 of the Fiscal Penal Code). Pursuant to the first sentence of Article 44 § 3 of the Fiscal Penal Code, the commencement of the period of limitation for a fiscal offence involving the reduction or exposure to reduction of a public-law liability shall commence at the end of the year in which the deadline for payment of that liability has expired.

3 See *inter alia* the judgment of the Constitutional Tribunal 2012 (P 30/11).

4 See e.g. the application of the Ombudsman of the Republic of Poland 2014 and the letter of the Ombudsman for Small and Medium-Sized Entrepreneurs 2021.

5 Cf. Resolution of the Supreme Administrative Court 2021 (I FPS 1/21).

6 On the subject – derived from Article 2 of the Constitution – of the principle of protection of the citizen's confidence in the state and the law made by it, see more in particular: the judgments of the Constitutional Tribunal: 1999 (SK 19/99), 2000 (SK 21/99), 2001 (SK 11/00), 2003 (SK 12/03), 2012 (P 30/11), 2014 (SK 22/11) and 2020 (SK 26/16). See also Banaszak (2004, pp. 214 ff.); Banaszak (2010, pp. 300 ff.); Banaszak (2012, pp. 17 ff.); Dowgier (2010, pp. 101 ff.); Florczak-Wątor (2019, pp. 27 ff.); Krasuski (2020, pp. 267 ff.); Morawska (2004); Sokolewicz & Zubik (2016, pp. 94 ff.); Tuleja (2016, pp. 216 ff.); Wróblewska (2010, pp. 82 ff.); Wyrzykowski (2006, pp. 233 ff.).

In turn, the extension of the limitation period depends on the initiation of proceedings, which is regulated by Article 44 § 5 of the Fiscal Penal Code, according to which if, during the period provided for in Article 44 § 1 or 2 of the Fiscal Penal Code, proceedings have been instituted against the offender, the punishability of the fiscal offence committed by the offender referred to in Article 44 § 1(1) shall cease with the efflux of five years, and of the fiscal offence referred to in Article 44 § 1(2) of the Fiscal Penal Code with the efflux of ten years from the end of that period.

The subject of this study is an attempt to answer the question of whether the regulation of Article 15zzr[1] of the March Act – especially as it interferes with the current model of the relationship between the penal fiscal law and the tax law – corresponds to constitutional standards.

1. The position of the Constitutional Tribunal on the statute of limitations in criminal law and tax law

1.1. The statute of limitations in criminal law (including penal fiscal law)

The statute of limitations in criminal law (including penal fiscal law) is a common and long-standing institution in criminal legislation (excluding in countries of the Anglo-Saxon world). It means the exclusion or limitation of criminal reaction due to the passing of time (Cieślak, 1994, pp. 482 ff.; Gardocki, 2005, pp. 202 ff.; Marek, 2005, pp. 377 ff.; Warylewski, 2004, pp. 431 ff.; Wilk, 2006, pp. 372 ff.). Despite the universality of this institution, it still arouses serious controversy in the science of law, which searches for a proper justification for its existence. In the literature (e.g. Marszał, 1972, pp. 50–60), the institution of the criminal statute of limitations is justified on the basis of:

- extra-legal theories, most often finding justification for the statute of limitations in the mitigating power of time;
- theories based on elements of procedural criminal law, *inter alia*, theories pointing to evidentiary difficulties occurring after a considerable period of time has elapsed or based on the assumption that the statute of limitations is a reaction to the tardiness of the prosecution and a means of mobilising it to act efficiently;
- theories based on the premises of substantive criminal law, such as the theory based on blurred memory and on general prevention or the theory of enhancement;
- substantive-process theories, combining elements of views based on considerations of procedural law and substantive criminal law.

It has been acknowledged in the jurisprudence of the Constitutional Tribunal that the statute of limitations of a criminal offence – although this may be a structural

element of the substantive criminal law norm referred to in Article 42(1) of the Constitution – always means a peculiar severance of the link between the offence and the punishment. Assuming that in Article 42(1) of the Constitution the legislator of the constitutional system formulated the principles that criminal liability is imposed only on the one who has committed an act prohibited under penalty by the law in force at the time of it being committed, and – a consequence of the norm thus defined – that the one who has committed such a defined act bears the consequences (liability) stipulated by the law, it should be concluded that the legislator of the constitutional system could not assume that the liability for committing a crime and the prescription of such liability are equivalent values. For the reason that under criminal law, the institution of the statute of limitations is an element of the criminal law order – albeit by its universality – it is treated as an element of a certain penal policy and not as a constitutionally protected right of a citizen (Judgment of the Constitutional Tribunal 2004, SK 44/03).

At the same time, in the opinion of the Tribunal, the individual has the right to expect to be subject to criminal liability under the principles set out in Article 42(1) of the Constitution. On the other hand, he or she cannot expect the benefits that could result for him or her from violating the law due to this and not that penal policy, since this policy – depending on the nature of the risks associated with specific offences – may be subject to modifications and changes. In this sense, an individual cannot assume, prior to sentencing or even prior to the initiation of criminal proceedings, that those elements of the legal norm (legal order) related to the punishability of acts that do not constitute a constitutionally protected right will not change. Therefore, when they commit a criminal offence (if, of course, the act was considered a criminal offence at the time it was committed), the statute of limitations cannot be prejudged. A different approach to the institution of the statute of limitations would lead to a kind of bonus for those criminals who persevere in their efforts to avoid responsibility. Hence, with regard to a statute of limitations that has not expired prior to a final judgment, the argument cannot be made that its extension aggravates the situation of the offender because, when committing the offence, he or she could not have foreseen that the statute of limitations would change (judgment of the Constitutional Tribunal 2004, SK 44/03).

The Tribunal also held that a change of the statute of limitations related to criminal liability should be linked first and foremost to penal policy, which is an element of criminal law, and not to axiological grounds derived from Article 42(1) of the Constitution. Indeed, a different understanding of the institution of the statute of limitations would oppose the axiological meaning of punishment and responsibility for acts that violate criminal law (crimes). Moreover, it would lead to the violation of a number of fundamental values, including the sense of justice, which is important from the point of view of the rule of law. This sense of justice encroaches on the dimensions of both

the common good and the individual good (combined with the due protection of citizens' rights) (Judgment of the Constitutional Tribunal 2004, SK 44/03).

At the same time, in the assessment of the Constitutional Tribunal, retroactive extension of the limitation periods is subject to assessment from the perspective of the rule of law; nevertheless, this is not related to the infringement of acquired rights or the protection of trust in the scope of regulations determining the punishability of a criminal act. For these reasons, they do not fall within the scope of application of the guarantee principle *lex severior poenali retro non agit*. On the other hand, a law introducing re-punishment of a prohibited act, despite the expiry of the limitation period, is inadmissible and violates the principle of the protection of trust and the resulting prohibition of retroactivity; it is a situation of retroactivity concerning 'closed facts', similar to the retroactive introduction of the punishability of certain conduct (Judgement of the Constitutional Tribunal 2008, P 32/06; Wróbel, 2003, p. 538).

1.2. The statute of limitations in tax law

With regard to the statute of limitations in tax law, the Tribunal found that the Constitution does not directly contain regulations relating to the issue of the statute of limitations of a tax liability, nor can a constitutional right to a statute of limitations, or even the expectancy of such a right, be derived from its content. The statute of limitations is not a subjective constitutional right, and even if the legislator had not provided for this institution, it could not be claimed that any constitutional rights or freedoms were thus violated (Judgment of the Constitutional Tribunal 2012, P 30/11).

In the absence of a constitutional regulation of the problem of the statute of limitations for tax liabilities, it should be considered that the introduction of this institution into the legal system, as well as giving it a specific shape (including the determination of the statute of limitations), is left to the discretion of the legislator, although – at the same time – the freedom of the legislator in this respect is not unlimited. This applies in particular to provisions constituting guarantees for the taxpayer. Provisions of this kind are those concerning the period of statute of limitation, the possibility of interrupting or suspending it and the length of the limitation period itself. Limitation periods that are too short would run counter to the principles of universality and tax justice. On the other hand, time limits that are too long would make the statute of limitations on a tax liability an apparent institution (Judgment of the Constitutional Tribunal 2012, P 30/11). Circumstances that should be taken into account by the legislator when setting the statute of limitations for tax liabilities include: the real possibility of enforcement of unpaid receivables by the tax authorities, periods of suspension when the statute of limitations does not run, and other circumstances, such as those related to the conduct of various types of tax audits, which do not suspend or interrupt the course of the statute of limitations. The legislator should also take into account the factual circumstances accompanying the enforcement of

tax dues, such as the behaviour of taxpayers evading tax or concealing assets from enforcement. Finally, the actual efficiency of the tax administration authorities is not without significance for the determination of the length of the limitation period, although the institutional weakness of the state cannot constitute a premise justifying the excessive extension of the limitation period *per se* (Judgment of the Constitutional Tribunal 2011, P 26/10).

At the same time, the Tribunal emphasised that the institution of the statute of limitations on tax liabilities serves to realise two important constitutional values:

– the need to maintain budgetary balance (as the statute of limitations on tax liabilities has a disciplining effect on the public creditor, requiring it to enforce tax debts within a strict timeframe);
– the stabilisation of social relations by extinguishing overdue tax liabilities (there is therefore no doubt that the statute of limitations on tax liabilities, although not *expressis verbis* regulated in the Constitution, finds support in constitutionally protected values) (Judgment of the Constitutional Tribunal 2012).

In view of the above, it should be stated that, although there is no constitutional right to a statute of limitations on a tax liability, or even an expectancy of this right, in the opinion of the Constitutional Tribunal, the legislator should shape the mechanisms of tax law in such a way that the expiry of a tax liability occurs within a reasonable period of time. Indeed, the enforcement of a tax debt and the accompanying uncertainty of the taxpayer as to the status of his or her tax liabilities cannot last indefinitely. Although the institution of the statute of limitations on tax liability may at times sanction a taxpayer's breach of the constitutional obligation to pay taxes, since it was introduced into the legal system, it must fulfil the tasks assigned to it. One of these is to stabilise social relations by extinguishing overdue tax liabilities (Judgment of the Constitutional Tribunal 2012).[7]

To sum up, there is no constitutional right to a statute of limitations *in toto*; however, by creating regulations on this subject, the legislative (irrespective of the area regulated) may not create the legal situation of individuals in contravention of the prohibition of retroactivity and in a manner that excludes the coherence and predictability of legal status.

7 In addition, with regard to the suspension of the limitation period for a tax liability in connection with the use of the tax institution of a compulsory mortgage, also see the judgment of the Constitutional Tribunal 2013 (SK 40/12); Białogłowski & Matarewicz (2013, pp. 44 ff.); Etel (2013, p. 532); Krawczyk (2009, pp. 13–17).

2. An attempt to evaluate Article 15zzr[1] of the March Act

Article 15zzr[1] of the March Act, which came into force – what needs to be highlighted – on 22 June 2021, contains in paragraph 1 a regulation on the suspension of the statute of limitations for, *inter alia*, acts in penal fiscal matters during the period of the state of the epidemic threat or the state of the epidemic declared due to COVID-19, and for a period of six months after their revocation; paragraph 2 of this article specifies that these periods are counted from 14 March 2020 – in the case of the epidemic threat, and from 20 March 2020 – in the case of state of the epidemic. In addition, the April Amendment provides in Article 7 that the statute of limitations, as amended by the April Amendment, is to apply to acts committed before the date of entry into force of this law and to penalties imposed before the date of entry into force of this law, unless the statute of limitations has already expired. Putting it figuratively: if the statute of limitations on the criminality of the relevant act was up to and including 21 June 2021, Article 15zzr[1] of the March Act does not apply; however, if the statute of limitations was 'scheduled' to run on 22 June 2021 or after that date, then its running shall be suspended *ex lege*.

As a reminder: the state of the epidemic threat due to SARS-CoV–2 virus infections was declared on 14 March 2020; the state was revoked on 20 March 2020 due to the declaration of the state of epidemic on the same day; that state was revoked on 16 May 2022. Since 16 May 2022, the state of the epidemic threat was in force till 1 July 2023, when it was revoked (§ 1 of the Regulation on the announcement of the state of the epidemic threat 2020; § 1 of the Regulation on cancelling the state of the epidemic threat 2020; § 1 of the Regulation on the announcement of the state of the epidemic 2020; § 1 of the Regulation on cancelling the state of the epidemic 2022; § 1 of the Regulation on the announcement of the state of the epidemic threat 2022; § 1 of the Regulation on the cancelling the state of the epidemic threat 2023). The legislative power has not indicated the date until which the suspension of the statute of limitations for, *inter alia*, penal fiscal offences will apply, nor has it specified a maximum time limit. Despite the fact that the state of the epidemic threat was first declared on 14 March 2020, that the state of epidemic was subsequently declared on 20 March 2020, and that the state of epidemic threat is again in force since 16 May 2022, it is still not possible to determine the time limits up to which the extension of the limitation periods will last. Thus, Article 15zzr[1] of the March Act in fact creates the institution of a suspension of the statute of limitations for an indefinite period of time, thereby undermining the principle of protection of confidence in the state and the law it enacts. This principle, as mentioned at the outset, is based on the assumption that the activities of public authorities should be characterised by loyalty and honesty towards each individual, stimulating in them a sense of legal security and stability. However, the statutory provision in question does not meet this requirement for the reasons set out below.

Firstly, this regulation was not introduced in March 2020, i.e. during the initial period of the pandemic (which disorganised public life in an unprecedented way), but only 15 months after the outbreak had occurred in Poland.[8]

Secondly, it introduces (probably unintentionally?) a dissonance with the regulation of Article 44 § 2 of the Fiscal Penal Code, which means that – despite the statute of limitations for a public debt – it still maintains the punishability of the related offence; thus, a situation arises which the legislator did not plan for when creating the Fiscal Penal Code.[9]

Thirdly, the suspension of the statute of limitations for punishment of an act *ad Kalendas Graecas* (despite even the expiry of the limitation period for a public liability) has the effect of exposing those concerned to legal consequences that could not have been foreseen previously, while at the same time calming down the epidemic situation (which is a notoriousness); new laws enacted by the legislator cannot surprise their addressees as to the further conduct of the public authorities.

It should also be noted that Article 15zzr[1] of the March Act imposes additional obligations on businesses to store documentation showing the dimensions of their tax liabilities and mutual settlements with business counterparties. This implies further financial and organisational costs for businesses and is of an indefinite and perpetual nature, which makes rational decisions on data archiving difficult. This burden not only applies to situations where criminal proceedings have already been initiated and criminal charges have been brought against certain entities; in principle, it affects all participants in economic transactions, as the suspension of the statute of limitations in the light of Article 15zzr[1] of the March Act also occurs in situations where no proceedings are pending and there is only a hypothetical possibility that they may be initiated in the unspecified future (*sic!*).

The legislative power – in principle – is free to shape the institution of the statute of limitations. Nevertheless, the lack of specification of a maximum duration for the suspension due to the state of epidemic threat or the state of epidemic results in the fact that the suspension of the statute of limitations may last for an indefinite period of time (several months or even several years); this is regardless of the actual impact of sanitary strictures on the ability of the procedural authorities to undertake actions efficiently. Importantly, the legal status created by Article 15zzr[1] of the March Act, which interferes with the rights of the individual, depends on the decision of the executive authority, i.e. the minister responsible for health, who decides on the subject of the state of the epidemic threat and the state of the epidemic on the basis of Article 46(2) of the Act on preventing and combating infectious diseases in humans 2008.

8 Cf. Order of the Constitutional Tribunal 2021 (Ts 111/20).

9 On the interpretation of Article 44 of the Fiscal Penal Code, see especially Konarska-Wrzosek (2021, pp. 289 ff.); Kotowski & Kurzępa (2007, pp. 213); Skowronek (2020, pp. 109 ff.); Wilk (2016, pp. 194 ff.).

Leaving aside the problems which occurred in March and April 2020 with the effective functioning of the procedural authorities responsible for detecting, prosecuting and judging crimes, despite the COVID-19 pandemic, criminal proceedings have generally continued throughout its entire duration to date. There is no public record that the delays occurring as a result of the quarantine or isolation of judges, prosecutors, police officers, witnesses or defendants have significantly affected the course of criminal or penal fiscal prosecution proceedings. Hence, the introduction of such a far-reaching legal norm – 15 months after the declaration of an epidemic threat and then a state of epidemic – which directly suspends the institution of the statute of limitations in penal fiscal law must be considered disproportionate and contrary to the standard of Article 2 of the Constitution; it should be noted that the suspension of the course of procedural and judicial deadlines (Article 15zzs of the March Act) was in force only from 31 March 2020 until 23 May 2020.[10]

Conclusions

It is a constitutional principle that one must pay the public and legal liabilities prescribed by law, not to avoid payment in anticipation of the statute of limitations (Białogłowski & Matarewicz, 2013, p. 52) and consequently to also evade the penal fiscal liability related thereto. At the same time, it follows from the jurisprudence of the Constitutional Tribunal that the principle of a democratic state of law encompasses the prohibition on granting state bodies the possibility to abuse their position towards citizens (Judgment of the Constitutional Tribunal 2008). The regulation of Article 15zzr[1] of the March Act may deprive procedural bodies of the motivation to conduct criminal fiscal proceedings (and, as a consequence, also tax proceedings) in a fast and effective manner, which may become a reason for tardiness in conducting the relevant proceedings. In our opinion, the regulation in question, which lacks any rational justification, fosters the institutional weakness of the state and, moreover, undermines trust in it, as essentially repressive regulations (suspension of the statute of limitations) have been introduced to a certain extent (through Article 7 of the April Amendment), with retroactive effect and with a nullifying effect in relation to the relevant legal situations regulated by the Fiscal Penal Code. Article 15zzr[1] of the March Act violates Article 2 of the Constitution in regard to the principle of protection of confidence in the state and the law created by it.

10 See: Article 1(14) in connection with Article 101 *in principio* of the March Act and Article 46(20) in connection with Article 76 *in principio* and Article 68(7) of the Act amending certain acts in the field of protective measures in connection with the spread of the SARS-Cov-2 Virus 2020.

Post Scriptum

After accepting this paper for publication, on 13 December 2023 the Constitutional Tribunal in case P 12/22 ruled that Article 15zzr[1] of the March Act is inconsistent with Article 2 of the Constitution.

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