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Burden of Proof or the Principle of Cooperation in Granting Tax Relief? Commentary on the Judgment of the Supreme Administrative Court of the Republic of Poland of 14 September 2022, III FSK 538/22

Abstract: The purpose of this commentary on the judgment of the Supreme Administrative Court (SAC) mentioned in the title is to present the relationship between the tax authority and the taxpayer seeking relief from a tax liability. The literature and court rulings, the most recent example of which is the SAC ruling under review, indicate that it is the taxpayer who bears the burden of proving that the prerequisites for granting tax relief are present, namely an important interest of the taxpayer or the public interest. The institution of the burden of proof, characteristic of civil proceedings, should not be transferred to tax proceedings, where it is the statutory duty of the tax authority to clarify all the circumstances of the case. This does not mean that the taxpayer should not point out to the tax authority all the circumstances supporting the granting of relief. However, this does not follow from the fact that the taxpayer, as the applicant, bears the burden (obligation) of proving the existence of the prerequisites. There are and should be no provisions in the Tax Code imposing such an obligation. The taxpayer should submit any evidence justifying the relief in compliance with the principle of cooperation between the taxpayer and the tax authority. This is one of the general principles of tax law found in the literature and court decisions and boils down to the fact that the taxpayer is obliged to cooperate with the authority in charge of the procedure for granting the tax relief requested by the taxpayer. This principle, like many other general principles of tax law, should be inscribed in the current Tax Code, as has long been advocated in the literature.

Keywords: burden of proof, principle of cooperation, tax relief

Thesis

In cases involving discretionary relief and exemptions granted under Article 67(a) of the Tax Code (TC), the burden of proving the circumstances relied upon by the applicant in his/her application rests with the applicant him/herself. This is because it is the applicant, pointing at obstacles to the ability to pay the tax, who most often has the relevant evidence that can confirm certain facts. Also, for fiscal reasons (the costs incurred by the administration), there is no reason why the burden of proof, i.e. confirming or disputing the situation described by the applicant, must be placed solely on the tax authorities.

1. Important taxpayer's interest and public interest v. the taxpayer's request for relief

In the judgment under review, the court addressed the process of determining the prerequisites for granting relief from tax liabilities that are set forth in Article 67(a) of the TC, namely 'important public interest' and 'public interest'. According to Article 67(a)(1), the tax authority, at the request of the taxpayer, subject to Article 67(b), in cases justified by an important interest of the taxpayer or by public interest, may: 1) defer the date of payment of a tax or divide the tax payments into instalments; 2) postpone the payment of tax arrears or divide it into instalments, with interest for delays or on tax advances not paid on time; 3) write off tax arrears, interest on the arrears, or a prolongation fee in whole or in part.

As a rule, a taxpayer requesting relief presents all the circumstances known to him/her that justify the granting of the relief. However, the tax authority cannot limit its actions to merely analysing the arguments raised by the taxpayer in the application, especially when the case is not self-evident. It is incumbent on the authority to establish all the relevant facts, including the prerequisites for granting the tax relief. This follows directly from Article 122 of the TC, which provides that the tax authority is obliged to establish all relevant facts determining whether the taxpayer's important interest or the public interest supports the granting of relief. In contrast, there is nothing in the aforementioned Article 67(a) of the TC and other provisions thereof about any related obligations incumbent on the taxpayer. So can the taxpayer's activity in the proceedings be limited to writing an application for relief? This is the issue that the judgment in question addresses. It can be argued that, strictly adhering to the literal wording of Article 67(a) of the TC in conjunction with its Article 122, it is the tax authority, and not the taxpayer, that is obliged to determine the existence of the prerequisites for granting (or refusing) a tax relief. Therefore, according to this understanding of the analysed provision, the taxpayer's activity may be limited to filing an application that meets the formal requirements set forth in Article 168 of the TC, with virtually no justification provided. In such a case, the authority has no

grounds to refuse to initiate proceedings (Article 165(a) of the TC) nor to call upon the taxpayer under Article 169 of the TC to remedy any deficiencies of the application within seven days with the instruction that failure to fulfil this condition will result in the application being left unprocessed. This is because the provision of an adequate justification for the application is not a formal requirement under Article 168. Nor is the tax authority allowed to discontinue proceedings initiated at the taxpayer's request on the basis that they are groundless (Article 208). Importantly, it may not refuse to grant relief by pointing out that the taxpayer has not presented circumstances justifying the grounds for the relief; this is not a premise for denying relief.

2. The basis for granting relief by the tax authority

What action should the authority take when the taxpayer has not sufficiently substantiated his/her application for relief? The proceeding is initiated at the request of the taxpayer, and within the framework of the proceeding, the tax authority should demand, pursuant to Article 155 of the TC, that the taxpayer present arguments and evidence in support of granting the relief. The taxpayer should, in his/her own interest, comply with the demand to provide the missing evidence. The demand may not indicate the possibility of a disciplinary penalty, since Article 262 of the Civil Code does not provide for this, which undoubtedly weakens the taxpayer's interest in complying with the tax authority's demand.

The tax authority may also require the taxpayer to complete a statement about property that may be subject to a mortgage or a tax lien (Article 39 of the TC). If the tax authority finds in the course of the proceedings that there is a reasonable fear of a failure to fulfil the tax obligation, it must demand that the taxpayer submit such a statement (on the ORD-HZ form). This provision is structured in such a way that it obliges the tax authority to make such a demand in the case of an application for tax payment relief where it is the taxpayer who indicates that he/she cannot meet the obligation to pay the tax. However, its wording also implies that the taxpayer may refuse to submit such a statement. This also does not encourage the taxpayer to provide arguments in support of the tax relief.

A demand that the taxpayer indicate the facts justifying the application for relief does not relieve the tax authority from the requirement to establish the relevant facts using other means of evidence and information known to it *ex officio*. Pursuant to Article 187(1) of the TC, it is the responsibility of the tax authority to gather and exhaustively consider all the evidence. However, the tax authority's options are severely limited in this regard, as it is the taxpayer who knows best what the reasons for applying for the relief are. In most cases, without the taxpayer's cooperation with the tax authority, the latter is really unable to determine the facts that support the granting of tax relief.

If a taxpayer complies with the tax authority's demand and presents arguments justifying, in his/her opinion, the granting of relief, or if the tax authority makes the relevant determinations on its own, all that remains is to issue a decision ending the proceedings. But what if the taxpayer does not respond to the tax authority's demand? This is another issue that was the subject of the judgment under review. The SAC rightly noted that 'the burden of proving the circumstances relied upon by the applicant in his application rests with the applicant himself'. For a long time, the literature has pointed out the need to implement the principle that the burden of proving the existence of the prerequisites of an important interest of the taxpayer or the public interest rests with the entity that requests relief (Brolik, 2012, p. 8). This trend is also evident in court rulings. One can already speak of an established jurisprudence, which is manifested, among others, in the judgment under review. The court rightly pointed out that in cases involving discretionary reliefs and exemptions granted under Article 67(a) of the TC, the burden of proving the circumstances relied upon by the applicant in his/her application rests with the applicant him/herself. This is because it is the taxpayer who knows what reasons have caused the difficulty in paying the tax and can provide relevant evidence that can confirm certain facts. The Supreme Administrative Court gave similar rulings in its judgment of 21 April 2022, III FSK 471/21, LEX 3349194, and a judgment of 21 June 2022, III FSK 5054/21, LEX 3371089.

This is definitely a rational approach to the problem in question. If a taxpayer applies for a relief, he/she should present the supporting circumstances. However, a taxpayer called upon to present these circumstances may ask about the legal basis for such a demand. Unfortunately, no such basis is explicitly stated in the TC, which also says nothing about the distribution of the 'burden of proof' when granting relief in the payment of tax (Nita, 2016, p. 273). This concept is 'borrowed' from civil law, where it is regulated in Article 6 of the Civil Code and the corresponding Article 232 of the Code of Civil Procedure. These institutions cannot be applied in tax proceedings, because they are not provided for in the TC (Brzeziński & Masternak, 2004, p. 57). Nor does it seem that it would be a good solution to include them in the TC, because they are characteristic of adversarial proceedings, such as civil proceedings (Etel & Strzelec, 2021, p. 19). According to the principle of adversariality, the parties to a process are in dispute and it is incumbent on them to prove their case, with the court playing the role of an arbiter (Jamroży & Szmura, 2011, pp. 32–38). Tax proceedings are inquisitorial, where the authority that conducts it (and at the same time which represents the revenue service) has the duty to clarify all the facts. In inquisitorial proceedings, it is the tax authority conducting them that has the duty to collect evidence and clarify all the circumstances of the case, which does not exclude the use of evidence presented by the taxpayer. The principle of active participation of a party in tax proceedings arising from Article 123 of the TC allows the taxpayer to present evidence, but does not obligate him/her to do so (Strzelec, 2014, p. 551). In our view,

therefore, there is no justification for introducing rules on the distribution of the burden of proof into these proceedings.

3. The principle of cooperation or the burden of proof?

So is the court's opinion expressed in the judgment under review unfounded? As has already been stated, the presented position of the court deserves to be accepted, but with a slightly different rationale. The aforementioned rulings actually indicated the need to apply the principle, present in literature and jurisprudence, of cooperation between the taxpayer and the tax authority in granting relief in the payment of tax obligations (Etel et al., 2017, p. 81). This requires the taxpayer to cooperate with the tax authority in determining the facts relevant to the subject matter of the proceedings. This principle is formulated in various ways, but its meaning boils down to imposing an obligation on the taxpayer to cooperate with the authority conducting the proceedings because of his/her interest, but also because of the need to protect the public interest. In the draft of the new Tax Code prepared by the General Tax Law Codification Committee, this principle is enshrined in Article 17 '[t]o the extent arising from the provisions of the tax law, obliged person (taxpayer, payer, collector, third party, legal successor) has to cooperate with the tax authorities' (Etel et al., 2017, p. 81). It is clear that the implementation of that principle brings certain benefits to the taxpayer applying for relief, but also, which is not so obvious, to the tax authority conducting the proceedings. As the court rightly pointed out in the judgment under review, the taxpayer's cooperation with the tax authority brings tangible benefits to the tax administration by reducing the costs of the proceedings. In the court's opinion, 'also, for fiscal reasons (the costs incurred by the administration), there is no reason why the burden of proving, i.e. confirming or disputing, the situation described by the applicant must be placed solely on the tax authorities'.

The court's reasoning reasonably and rationally justifies the taxpayer's duties in proceedings concerning relief in the payment of tax obligations pursuant to the general principle of cooperation. However, it is important to consider whether the application of this principle has legal grounds. The SAC does not address this issue in the reasons for its judgment. In our opinion, it is difficult to point to provisions in the current TC that could be the basis for the formulation of this principle. Practice shows that this is an undeniable shortcoming of the current legislation. Therefore, courts try to compensate for the shortcomings of the TC by deciding individual taxpayer cases. This sometimes leads to the formulation of 'jurisprudential' principles of tax law, which are respected not only by courts, but also by tax authorities applying tax law. Over time, or rather, incidentally, these principles become normative principles provided for in the TC. A good example is the principle of the resolution of legal doubts in favour of the taxpayer (Article 2(a) of the TC), which took shape in

jurisprudence long before its rather accidental and unfortunate articulation in the TC (Gomułowicz, 2015, p. 5). In our view, the principle of cooperation between the taxpayer and the tax authority is one of the many general principles of tax law that have been applied in judicial decisions, and should be included into the TC. Making it normative would help to popularize the rightful claim that a taxpayer seeking tax relief is obliged to provide the authority with all information indicating the existence of grounds for the relief. And if he/she fails to do so – as in the cases reviewed by courts – the authority may not have any grounds for granting the relief requested.

In our opinion, it makes no sense to propound that only the principle of cooperation should be inscribed in the TC (e.g. in Article 2(b)). One of the main shortcomings of the current TC is the lack of a catalogue of general principles of tax law. This shortcoming can only be eliminated by comprehensively codifying these principles in a new TC. Proposals in this regard have been prepared by the General Tax Law Codification Committee (Etel et al., 2017, p. 72). Until it is implemented, discussion will continue as to the need for and effect of the application of the general principles of tax law by courts. It will also still be difficult for taxpayers to identify the legal basis for the demands placed upon them by tax authorities.

Conclusions

In conclusion, it should be noted that in the judgment under review, the court rightly stated that the taxpayer was obliged to indicate the factual circumstances justifying his application for relief in the payment of tax liabilities. This is one of the judgments that make up an established jurisprudence. The basis for this obligation, in our opinion, is the principle of cooperation between the taxpayer and the tax authorities that has been applied in court rulings, although under a different name. Indeed, courts point out that the burden of proving the existence of grounds for applying for relief in the payment of tax liabilities rests with the taxpayer. The use in the TC of the concept of ‘burden of proof’ (which is present in civil law) is not acceptable, due to the completely different nature of tax proceedings. In the latter, there are no equal parties, and the rules governing the distribution of the burden of proof must be indicated. The principle of cooperation involves the taxpayer’s obligation to cooperate with the authority conducting the proceedings, the purpose of which is to establish the existence of important interests of the taxpayer and of the public interest. The taxpayer’s inactivity in this regard (e.g. failure to respond to the authority’s demands) may result in a refusal to grant the relief. This principle, which is widely accepted in jurisprudence, should be explicitly provided for in the Tax Code, together with other general principles of tax law present in jurisprudence and doctrine.

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