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Ne bis in idem in the tax process

Zasada *ne bis in idem* w sprawach podatkowych

Abstract. The article deals with the application of the *ne bis in idem* principle in the tax process. It focuses in particular on the nature of penalty payments under the Tax Code. The jurisprudence of the Supreme Courts of the Czech Republic and the European Court of Human Rights has recently raised more questions about it than gave answers. Therefore, the article focuses in particular on the analysis of their decisions and, on the basis of this, tries to define theoretical legal bases for the application of the *ne bis in idem* principle in relation to the imposition of a penalty payment by the tax administrator.

Keywords: *Ne bis in idem*; Penalty Payment; Sanction; Tax.

Streszczenie. Artykuł skupia się na analizie stosowania zasady *ne bis in idem* w sprawach podatkowych. Koncentruje się zatem przede wszystkim na zbadaniu natury okresowych kar pieniężnych, które zostały określone w czeskim prawie podatkowym. Wyroki czeskiego Sądu Najwyższego i Europejskiego Trybunału Praw Człowieka doprowadziły bowiem ostatnio do sytuacji, w której zaczęło pojawiać się więcej pytań niż odpowiedzi dotyczących kluczowych zagadnień będących przedmiotem analizy w tym artykule. Stąd też ta publikacja koncentruje

się w szczególności na analizie decyzji wydanych przez te sądy, co stanowić będzie podstawę do podstawie podjęcie próby zdefiniowania podstaw teoretycznych związanych ze stosowaniem zasady *ne bis in idem* w kontekście okresowych kar pieniężnych nakładanych przez administrację podatkową.

Słowa kluczowe: *Ne bis in idem*; okresowa kara pieniężna; kary; podatki.

1. Introduction

Recently, in the context of the Czech tax process, certain interpretative confusion in the application of the *ne bis in idem* principle have occurred in connection with the imposition of tax penalty payment on tax administrators during tax proceedings.

In general, the principle of *ne bis in idem*, has been known by law since time immemorial. Even from this point of view, it is surprising that today this simple principle causes interpretative difficulties. The relatively volatile development of the views of both the European Court of Human Rights and, in particular, the Czech Supreme Court confirms this hypothesis.

This principle is most often associated with criminal law, in general, with the issue of punishment and legal consequences. The basic purpose of this principle is that no one has been punished for the same act several times. Otherwise it would mean demotivation and violation of trust in law. Any consequence of having a positive influence on the addressee cannot be demotivating or liquidating. However, at this point we can see the first possible misunderstandings of interpretation.

The Czech Code of Criminal Procedure[1] expressly addresses only the situation where one and the same act (*idem*) fulfills the characteristics of a criminal offense and the criminal proceedings is conducted. This is not the only case. One and the same act may at the same time fulfill the fea-

[1] Act No 141/1961 Coll. [Sbirka zakonu – Collection of Laws, hereinafter: Coll.], On Criminal Procedure (Criminal Procedure Code) with subsequent amendments (hereinafter the "Criminal Procedure Code").

tures of a criminal offense, another administrative offense, or disciplinary offenses[2].

How to interpret this principle across different legal sectors?

This principle is not just a matter of criminal law, as the *ultima ratio*, but also of other legal sectors in which some sort of "punishment" is applied. It happens within administrative, financial, civil or labor law and others (for example, a contractual fine as flat-rate compensation).

However, each of these legal sectors performs a different social function and, therefore, the result of the interpretation and application of this principle across sectors may be different. Somewhere, it is sensible to motivate and secure the tax collection and the function of the system, else to punish in the true sense of the word.

And what about the interdisciplinary and the interdependence of the legal system as such: It has already been said that criminal law is at the top and often affects the same kind of action, except the precondition of social noxiousness. This protects society, not primarily the individual who has been attacked. This may be different in other systems of law.

The question is how to interpret the principle *ne bis in idem* in relation to substantive and procedural rules and system characteristics (e.g. cumulative / absorption / aspiration principle when imposing penalties).

It is therefore necessary to set the criteria for assessing the nature of the legal norm and whether "sanction" may be the penalty *in stricto sensu*. One of the problems is the perception and promiscuous use of terms such as: the consequences of violation / non-compliance with legal norms (which can be both positive and negative, although we will mostly associate them with negative sense); sanction (which evokes negative consequences that can be both objective and subjective), punishment (in the true sense of the word; in this case the individualization is important). The punishment should, on the one hand, discourage the offender, but of

[2] Štrejtová, K. *Zásada „ne bis in idem" pohledem Evropského soudu pro lidská práva a důsledky pro české trestní řízení ["Ne bis in idem" principle by the European Court of Human Rights and its consequences for Czech criminal proceedings]* [in:] "Právní proctor" [online], https://www.pravniprostor.cz/clanky/trestni-pravo/zasada-ne-bis-in-idem-pohledem-evropskeho-soudu-pro-lidska-prava-a-dusledky-pro-ceske-trestni-rizeni (access on-line: 29.07.2018).

course also prevent the society. So punishment can be a positive incentive for addressees of legal norms under certain circumstances. All this is, of course, not a sufficient analyzation of the interpretation of these or similar terms. The sense of this is to point out the issues that influence the interpretation of the penalties, regardless of how it will be marked (whether as a penalty, punishment, or benefit).

The European Court of Human Rights has attempted to set criteria for the assessment of the nature of the legal norm. The European Court of Human Rights in the case *Engel and Others v. The Netherlands*[3] outlined three criteria for assessing whether an offense under the Convention for the Protection of Human Rights and Fundamental Freedoms is a criminal offense[4]. The first criterion is the classification of an offense under the applicable national law, i.e. whether the provision defining the offense is a part of criminal law. The second criterion is the nature of the offense in terms of the protected interest (general or particular), the addressee of the standard (potentially all citizens or only a certain group of persons with special status) and the purpose of the sanction (deterrent and repressive or only reparative). The third criterion is the type and severity of the sanction. The second and third criteria are alternative rather than cumulative, so it is enough if one of them is fulfilled[5].

In the field of tax law both The Supreme Administrative Court of the Czech Republic (dated 24 November 2015, file No 4 Afs 210/2014) and the Supreme Court of the Czech Republic (dated 4 January 2017, file 15 Tdo 832/2016) have been recently discussed the principle *ne bis in idem* in relation to the penalty payment in accordance the Act No 280/2009 Coll., Tax Code, as amended (hereinafter referred to as the "Tax Code"). It should be emphasized that both decisions deviate from existing judicial practice.

[3] The European Court of Human Rights of 8 June 1976 in *Engel and Others v. The Netherlands*, No 5100/71.

[4] Published as No 209/1992 Coll.

[5] See Nejvyšší soud [The Supreme Court], 8 Tdo 397/2012.

In addition, it is worth mentioning the judgment of the European Court of Human Rights[6], in which the court somewhat deviated from the previous decision-making practice that "tax penalty payment" were considered as a criminal sanction within the meaning of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[7]. This judgment streamlined earlier decisions and details how the second sanction, even double proceedings are permissible and must not be perceived as a violation of the *ne bis in idem* principle.

2. *Ne bis in idem* in the Czech Law

The *ne bis in idem*[8] principle is based worldwide, but it is interpreted and applied differently[9].

In national law, this principle is constitutionally defined in Article 40 (5) of the Charter of Fundamental Rights and Freedoms[10] in such a way: "No one can be prosecuted for an act for which he has been finally convicted or acquitted. This principle does not exclude the application of extraordinary remedies in accordance with the law".

The identity of the person prosecuted in the original case and in the new matter, the same offense as in the original case and in the new case and the existence of the final decision of the court, prosecutor or other

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6 The European Court of Human Rights of 15 November 2016, in cases *A and B against Norway*, No 29758/11 and 24130/11.

7 See Ústavní soud [The Constitutional Court], II. ÚS 3803/11, Nejvyšší správní soud [The Supreme Administrative Court], 1 Afs 1/2011.

8 See D. Hendrych, J. Fiala, *Právnický slovník [Law Dictionary]-3rd ed.*, Prague 2009.

9 V. Štencel, *Uplatňování zásady ne bis in idem ve správním trestání na základě článku 54 Schengenské prováděcí úmluvy [Application of the ne bis in idem principle in administrative penalties under Article 54 of the Schengen Implementing Convention]* [in:] "Správní pravo", http://www.mvcr.cz/clanek/uplatnovani-zasady-ne-bis-in-idem-ve-spravnim-trestani-na-zaklade-clanku-54-schengenske-provadeci-umluvy.aspx (access on-line: 2.08.2018).

10 Resolution of the Bureau of the Czech National Council No 2/1993 Coll., On proclaiming the Charter of Fundamental Rights and Freedoms as part of the constitutional order of the Czech Republic, as amended.

competent authority in the original case, is a prerequisite for the exclusion of a new prosecution[11].

Section 264(13) of the Tax Code: "If the time limit for filing a tax claim has expired by the date of the entry into force of this Act, penalty payment shall be applied under the existing legislation."

"Section 37b of the Act No 337/1992 Coll., On the Administration of Taxes and Fees, as amended (hereinafter the "Tax and Fee Administration Act) – Penalty Payment: (1) A taxable person shall be liable to pay a penalty payment from the amount of the additional tax or the amount of the additionally reduced tax loss, as determined by the last known tax liability, at a) 20% if the tax is increased, (...) (c) 5% if the tax loss is reduced".

In particular, in assessing the nature of the tax penalty payment, it is necessary to approximate its provisions in Paragraph 251 of the Tax Code, which provides: "The taxable person shall be liable to pay a penalty payment of the amount of the tax as determined in relation to the last known tax at the rate of (a) 20% if the tax is increased, (...) (c) 1% if the tax loss is reduced".

The penalty payment itself contains an argument why this institute is not primarily a penalty, since it is established only in situations where the tax is imposed by the tax administrator in his own activity. If the taxpayer discovers deficiencies – although after the deadline, he/she will admit himself /herself later, the penalty payment will not be imposed. The legislator thus ensures that taxes are properly paid and motivates the taxpayer by the fact that, although the correct amount of late payment, i.e. in the case of voluntary replenishment, is not sanctioned[12]. It is then a question of whether compliance with obligations will be checked before the tax becomes aware of the mistake. This is, of course, based on various criteria, including the ability of the tax administrator to carry out random checks. However, the tax administrator is limited in time when looking for unrecognized revenues of the entities and also in the control of the infor-

[11] J. Jelínek et al. *Trestní právo procesní [Criminal procedural law], 5th ed.*, Prague 2018, p. 409.

[12] Of course, default interest will be set as compensation for the damage caused by the fact that public budgets could not have that amount.

mation in the statements, by the tax assessment period provided for in section 148 of the Tax Code (the basic length is 3 years for submitting a tax return). Therefore, the tax administrator has to try to motivate the taxpayer and cooperate with him because the tax administrator is objectively not administratively or economically able to arrange everything and collects taxes.

Of course, it is possible to agree with the view that the inclusion of penalty payment into the financial, respectively tax law cannot be taken as an argument for not having a criminal law character. The cases of unsystematically and non-systemic institutes or inappropriately or promiscuously named are well known.

However, the court, unfortunately, in argumentation, sometimes forgets about the specificity of the functioning of tax law, specific interpretative principles (which should be used primarily in interpreting the role and nature of this institute) and other characteristics of the tax system, including: self-application the basic objective of tax administration, which is not punishment (this is basically in stark contrast to the objectives of the Tax Code as this reduces the possibility of "tax revenue" from economically active entities). Excessive punishment, or even a threat of high sanctions, may lead to the disappearance of an entity, whether involuntary or often voluntary, as we can see in practice ("escape" from one legal entity and economic activity under another legal entity). In the case of individuals, their "economic concealment" and non-fulfillment of tax obligations can occur at all. The Supreme Court had, in particular, in earlier decisions, when it used systemic interpretation, to look not only at the whole system of law, but also on the relationship and continuity of individual proceedings in criminal proceedings, although it does not have the power to decide in criminal matters. In interpreting the concepts of tax law, more attention has to be given to the system of tax law and, in particular, to the use of specific interpretative principles.

The decision of the Supreme Court shows the difference of sanctions, respectively of the responsibility. The tax entity did not acknowledge a portion of the income and was taxed regardless the fault. Responsibility is built on the objective principle in tax proceedings. In addition, proceed-

ings for committing a crime of misinterpretation and tax cuts were conducted in the cited litigation. From the first act the court recognized the natural person guilty. In the case of an offense of tax cuts (which, in fact, will often be related to a misdemeanor, as this information is the basis for correct tax determination), the allegations were waived. The Court found that it could not be ruled out that the taxpayer knew that the tax return contained incorrect information as the taxpayer relied on the spouse and accountant. There was no proof of fault. However, this has no effect on the tax in the tax proceedings.

With regard to determining the nature of the tax penalty payment, perhaps the most fundamental provision is Section 135 (1) and (2) of the Tax Code, which provides:

"(1) A tax claim is required to be filed by any taxable person to whom the law so requires or by a taxable person who is required to do so by the tax administrator.

(2) The taxable person shall be obliged to quote the tax in his own tax statement and to provide the prescribed data as well as other circumstances decisive for the assessment of the tax".

These provisions standardize the course of tax proceedings and introduce a system of so-called self-application of legal norms, where the addressee of public law – addressee of administrative respectively financial norms are required, at regular intervals, even at random (in accordance with specific facts), without the prior request of the public authority, to provide the tax authorities with information on these legal facts and to comply with the relevant procedural obligations. Only in case of doubt the tax administrator or other information obtained during the search process the tax administrator calls for submission or addition. From the provisions of the first paragraph follows the sequence of processes, the first submission is done alone, then only upon the call of tax administrator. This procedure is further supported by the provision of Section 139 (1) of the Tax Code, which provides that the tax may be assessed on the basis of tax returns, bills or *ex officio*.

The third important and complementary provision, respectively provision summarizing the procedure of the authorities in the context of the

tax administration objective is the provision of Section 145 of the Tax Code – Procedure for failure to submit a correct or additional tax claim:

"(1) In the absence of a proper tax claim, (a) the tax administrator will ask the taxpayer to file it and (a) set a substitute period. If the taxpayer fails to comply with this notice within the specified time limit, the tax administrator (b) may impose the tax by himself; or (c) assume that the taxable person claimed a tax of CZK 0 in the correct tax claim.

(2) Where it is reasonable to assume that the tax will be imposed, the tax administrator may invite the taxable person to submit an additional tax claim and set a substitute period. If the taxpayer fails to comply with this notice within the specified time limit, the tax administrator may levy tax by himself".

It follows from the above that the tax administrator will endeavor to initiate voluntary compliance and then eventually assess the tax. Or the tax administrator may assume that the tax entity is not economically active and has no tax liability. Otherwise, in the light of the principle of legality (and previously the presumption of zero-rate taxation), the tax administrator would have to call every taxpayer. However, such an administrative activity would cost a lot of money and was at the expense of the resulting tax and contrary to the principle of economy and efficiency of the proceedings. Generally, for checking the compliance, the tax administrator has other mechanisms, the search process begins and the tax audit ends.

3. Judgment of the Supreme Administrative Court

The following decision is the first decision of the Czech courts which change the existing decision-making practice based on the case-law of the European Court of Human Rights. The Supreme Administrative Court took this opinion in its decision: "Penalty payment under Section 37b of Act No 337/1992 Coll., On the Administration of Taxes and Fees, in the version effective from 1 January 2007 to 31 December 2010 and Section 251 of the Act No 280/2009 Coll., of the Tax Code, has the character of

a punishment; and Article 40(6) of the Charter of Fundamental Rights and Freedoms and Articles 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms are to be applied to them"[13].

The reason why the court had to make a decision is very interesting. "Offender" is basically a change in the legal regulation, when Tax and Fee Administration Act was replaced by the Tax Code. The institute of penalty payment is, of course, also contained, but due to the complex recodification of the tax process, somewhat different from the previous one. The new regulation performs the function of penalty payment better and it reflects its importance throughout the system. Also, with regard to other modifications in the part of the Tax Code labeled "Consequences of breach of obligations in tax administration".

In the analysed case, the taxpayer (trade company) defended against the prescribed penalty payment[14] in accordance with the transitional provisions of the Tax Code, which, however, ordered the application of the Tax and Fee Administration Act. However, in the Tax and Fee Administration Act, the penalty payment was essentially five times higher than in the new legislation. Moreover, according to the Tax Code, the moderation right of the tax administrator has disappeared in relation to tax penalty payment. There is already a certain shift in systematization of consequences of violation of tax law norms. However, as it will be noticed later, the Regional Court assessed the changes made and their impact on the system only partially, refers to a formal interpretation and claims that the penalty payment is a sanction because it is included in the section called sanctions, or because it is mentioned in the explanatory memorandum or because of that it is in essence, procedurally, equated reimbursement. However, the regional court did not deal with the penalty payment institution itself.

The tax entity therefore considered all possibilities and thought that in criminal law there is a principle that if the later legal rule is more favorable for the offender it is applied instead of the legal regulation, which

[13] Nejvyšší správní soud [The Supreme Administrative Court] 4 Afs 210/2014.

[14] The decision of the tax office in Ostrava was confirmed by the Financial Directorate in Brno.

was in force in the time when the offense was committed. And in order for this interpretative rule to be used, it was necessary to declare a penalty payment for a penalty in the sense of criminal law. The tax entity then challenged the decision of the Financial Appeal Directorate at the Regional Court in Pilsen. The Regional Court first reviewed the development of Section 63 of the Tax Administration Act in the light of the case law of the Supreme Administrative Court (judgment of 22 February 2007, No 2 Afs 159/2005-49 and judgment of 28 April 2007, 2011, No 1 Afs 1/2011-82) and Act No 230/2006 Coll., which amended the above mentioned provision. On the basis of that analysis, the court concluded that the penalty payment may, for the reasons set out above, be considered a penalty payment – for an administrative offense, or for criminal charges within the meaning of Article 6(1) of the Convention. The Regional Court made this decision: "The proceedings were not definitively terminated by the entry into force of the Tax Code, so it was necessary to apply to the plaintiffs a more favorable legal regulation in Section 251(1)(c) of the Tax Code in place of Section 37b(1)(c) of the Tax Administration Act. The transitional provision in Section 264(13) of the Tax Code could not then be interpreted in contradiction with the second sentence of Article 40(6) of the Charter and Article 15(1) of the International Covenant on Civil and Political Rights. The defendant was therefore more inclined to take into account the more recent legislation more favorable to the plaintiff when deciding" [15].

With such a verdict, the Appeal Finance Directorate did not reconcile and filed a cassation complaint. Here he argued that the Regional Court had wrongly assessed the nature of the provisions of Section 37b of the Tax Administration Act because it considered that this was not a sanction for an administrative offense or a criminal charge, since, unlike the rest, the penalty was payable directly by law and the decision to impose a penalty payment is only of a declaratory nature. The tax administrator also stated that the penalty payment is not only of a punitive nature, but may constitute a flat-rate compensation for any potential harm to the state,

15 Nejvyšší správní soud [The Supreme Administrative Court] 4 Afs 210/2014.

public budgets, as well as a certain motivation of the tax entity to properly discharge tax obligations.

The Supreme Administrative Court had first to examine the nature of the tax penalty and, since the Fourth Chamber of the Supreme Administrative Court had a different opinion from the court's previous decision-making practice, the matter was referred to the enlarged Senate. Up to this, the penalty payment has been understood as a flat-rate compensation for potential state harm by the professional public[16].

The Supreme Administrative Court therefore came out of the case law of the European Court of Human Rights, which at that time interpreted the concept of criminal charges very broadly and usually it also applied it to sanctions in the area of tax law. The Supreme Administrative Court analyzed the Penal Institute in Czech tax law by the test of the so-called Engel Criteria[17].

The third criterion (type and severity of the sanction) was crucial for the final decision of the Supreme Administrative Court. The Supreme Administrative Court stated that the penalty payment was not a flat-rate form of damages, i.e. that had not reparatory character, but especially sanctioning character, since the purpose was in particular to punish the taxpayer. The severity of the sanction was found in a possible interference with the property sphere, that is, property law. The penalty payment is mainly compared with default interest, and claims that if the penalty payment would be flat-rate compensation, then it would be required twice (also in the form of default interest).

It should be noted at this point that such a result had caused legal uncertainty and caused the legitimate fears of the tax administrators of the effect of any assessment of the tax penalty payment on subsequent criminal proceedings. Whether an earlier decision of the financial administration to impose a penalty payment would be considered in the criminal proceedings as an obstacle *(res judicata)* and the tax payer thereby effec-

[16] See Nejvyšší správní soud [The Supreme Administrative Court] 1 Afs 1/2011: "The penalty cannot be understood as a sanction for an administrative offense, so the principles of criminal substantive law cannot be applied in its determination".

[17] Ibidem.

tively avoids prosecution by paying a penalty payment. In the extreme case, this would mean the factual abolition of criminal offenses in the area of tax crime. This was also the stated by the Supreme Administrative Court saying "on the brink" of the decision, but because of its powers and factual affiliation it could not deal with it. It was therefore necessary to decide at the level of the Supreme Court.

4. Judgment of the European Court of Human Rights

Before the Supreme Court decided, there had been changes in European case law, there had been another milestone in the development of the *ne bis in idem* principle – the judgment of the European Court of Human Rights of 15 November 2016 in cases A and B against Norway, complaint No 29758/11 and 24130/11. This decision made the earlier decisions more relative.

The problem arises where two procedurally different parts regulate "the same", respectively the same act (perhaps only with different social danger), and impose sanctions, that can be described as criminal. In order to assess whether there has been or has not been a dual procedure, within the meaning of Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, a test must be carried out on the basis of the criteria defined by the European Court of Human Rights in its decisions A and B against Norway. In order not to be a "bis", the procedure must be linked in such a way that it forms a coherent complex. This means that both the purpose of the individual proceedings and the means used by public authorities must in principle be complementary and there must be unity of time. In addition, the consequences of such proceedings and factual procedures of the authorities must be foreseeable for the persons concerned and the responses should be proportionate.

Therefore, it is necessary to address the following key factors and to evaluate the relationship of individual proceedings or their interrelation (factual context):

- the two separate procedures pursue a complementary objective and thus concern, not only *in abstracto* but also *in concreto*, the various aspects of the infringement;
- the duplication of procedure in question is the foreseeable consequence of the same offending action, both legally and factually (*idem*);
- the relevant proceedings are conducted to avoid duplication in gathering and evaluating evidence, as much as possible, in particular through appropriate mutual interaction between the various competent authorities, thereby making use of proven facts in the second procedure;
- and, first of all, the fines imposed in the proceedings, which was terminate as the first, are taken into account in the proceedings which are the most recent proceedings in order to prevent the individual from being ultimately exposed to excessive burdens; the probability of this risk is the lowest if a compensation mechanism exists to ensure the proportionality of the overall amount of all imposed penalty payments[18].

5. Judgment of the Supreme Court

The decision of the Supreme Court:

"Penalty payment according to Section 251 of Act No 280/2009 Coll., The Tax Code, as amended, imposed in the tax proceedings for failure the obligation of claim by a final decision of the administrative body, has the character of a criminal sanction, sui generis, therefore, also Article 4(1) of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[18] The European Court of Human Rights of 15 November 2016, in cases *A and B against Norway*, No 29758/11 and 24130/11.

Tax proceedings and prosecutions for the action which consists in the failure the obligation of claim has, in addition to a payment offense, significant in the field of administrative punishment, the features of the crime of tax cuts, according to section 240 of the Criminal Code, are the same actions. This is the case when the subject of this crime and the tax entity is the same natural person.

A final decision which terminates one of the parallel or successive tax and criminal proceedings, which both are criminal proceedings in the sense of the Engel Criteria, does not create an obstacle judicata with the effects of *ne bis in idem*, if between tax and criminal proceedings there not only close factual context, but also the time relation (see judgment of the High Court of Human Rights of the European Court of Human Rights in cases *A and B v. Norway*, No 24130/11 and No 29758/11 of 15.11.2016, paragraphs 132 and 134).

The relevant factors for determining whether there is a sufficiently close factual context are: whether the two separate proceedings pursue a complementary objective and thus whether they concern not only *in abstracto* but also *in concreto* the various aspects of the infringement; whether the combination of the proceedings is the foreseeable consequence of the same action, both legally and factually; whether the relevant proceedings are conducted to avoid duplication in gathering and evaluating evidence, as much as possible, in particular through appropriate mutual interaction between the various competent authorities, thereby making use of proven facts in the second procedure; and, in particular, whether the sanction imposed in the proceedings which was the first is taken into account in the proceedings which is the last in order to prevent the individual from excessive burdens. This means that, in the context of individualizing the setting of a criminal sanction, it is necessary to take into account the sanction imposed in the tax proceedings and its reimbursement. The court must therefore take into account, when determining the type of sentence and its assessment, the final decision of the tax office on the obligation to pay a penalty payment and explain how that factor has been taken into account in the grounds of the judgment.

The temporal link must be sufficiently tight to provide the individual protection against uncertainty, delay and prolongation of proceedings. The weaker the link in time is the greater demand on clarification and justification of the delays in the proceedings, for which the state can be held accountable, must be put on".

In particular, this decision seeks to bring light to the issue of the assessment of the nature of the tax penalty payment, as well as the impact of the fact that penalty payment is assessed as a criminal sanction for possible follow-up criminal proceedings and the question of whether there is a unity of deed. Last but not least, this decision is interesting in view of the conditions that must be applied to use the institute of effective regret.

In the analysed case, L.P. – the accused person (the natural person)[19], reduced the tax, fee and similar obligatory payments pursuant to Section 148(1) (3) (c) of Act No 140/1961 Coll., Criminal Code, effective until 31 December 2009. Due to the amount of its assets – the income which was in proportion to the granted tax, the tax administrator had doubts about the correctness of the claimed tax. Since it provided incomplete information in its tax returns and did not take into account income from the sale of immovable property, the tax administrator was taxed him for each tax period. The Tax Administrator also, having regard to the provisions of Section 8 of the Code of Criminal Procedure, in conjunction with the relevant provisions of the Tax and Fee Administration Act, nowadays the Tax Code[20], has fulfilled the notification duty and informed the court. The District Court subsequently decided, respectively stopped the proceedings

[19] When penalizing a crime, the principle of individualization of punishment is fully applied, the amount of the reduced tax is only one of a number of decisive aspects. Finally, in the case of criminal liability of natural persons, the transfer of criminal sanctions to another person is excluded, but this is possible in the case of tax penalty payments, even if they were imposed on a natural person. A typical tax law institute is the transfer of tax liability to the legal successor. In accordance to Section 239a of the Tax Code, after the death of a natural person, the tax obligation of the deceased passes to the heir. Since, pursuant to Section 2(5) of the Tax Code, the penalty payment is an accessory to the tax that follows its fate, the legal successor will also be subject to the obligation to pay a penalty payment. This shows the different nature of the penalty and penalties of a criminal nature (see 15 Tdo 832/2016).

[20] See Section 53(2) of the Tax Code.

and stated, without looking into the nature of the tax period, that the Czech Republic is bound by Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (published under No 209/1992 Coll.). Subsequently, on the basis of the appeal of the state prosecutor, the decision was revoked by the regional court, but the first instance court again decided in favor of the defendant, this time for extinction of punishment for effective regret. This decision was once again challenged by the verdict on the sentence, and thus confirmed by the Court of Appeal. Therefore means guilty, but abandoned by punishment, respectively the imposition of a summary sentence with respect to other proceedings and punishment. However, the defendant disagreed with such a decision and appealed to the Supreme Court.

The Eighth Chamber of the Supreme Court concluded that the criminal proceeding was a second proceeding, with a subsequent criminal sanction. The Court considered the penalty payment to be a criminal sanction. Such a decision would, however, contradict both the previous case-law of the Supreme Court and the European Court of Human Rights, and that the case was referred to the Grand Chamber of the Supreme, which decided on 4 January 2017 as stated above.

The Supreme Court thus agreed with the view that the tax penalty payment is a criminal sanction and that the act committed has the characteristic of both – an administrative (tax) payment offense and a crime of tax reduction, and the related proceedings are thus actions of the same kind.

However, the Supreme Court also added that the Convention for the Protection of Human Rights and Fundamental Freedoms (published under No 209/1992 Coll.) does not preclude the proceedings being divided into different stages where penalty payments for infringements are imposed in parallel or in succession, and referred to the latest jurisprudence of the European Court of Human Rights.

In the case under consideration, the Supreme Court concluded that the tax and criminal proceedings followed each other and also the preparatory proceedings did not show any significant delays. Certain delays or shortcomings of the first-instance proceedings have been caused by the non-consistency of the case-law. However, this is not related to the ques-

tion of maintaining a close link between follow-up proceedings. The courts (first and second instance) therefore proceeded fundamentally correctly and their procedure was duly substantiated.

It was therefore noted that, both in the light of factual and legal circumstances, the defendant was not reduced to his rights and suffered no inappropriate harm or injustice as a result of the authorities' proceeding as a result of a lack of real income disbursement and a reduction in the tax. The *ne bis in idem* principle was not violated and therefore there were no conditions for stopping the prosecution of the accused according to the provisions of Section 11(1)(j) of the Criminal Procedure Code. Accordingly, the prosecution was not assessed as inadmissible by law and therefore the appeal was rejected.

6. Conclusion

By assessing the position of the penalty payment in the system of tax law, of the tax process, it can be concluded that the penalty payment is a key element in the tax assessment system in the self-application mode, i.e. in the form of tax claims respectively tax obligations. Without the penalty payment, it would not be possible to meet the tax proceedings objective (to correctly identify taxes and secure their reimbursement)[21]. The system works on a "trust" in a tax entity that itself assesses the rights and obligations contained in tax norms, then applies them concretely, and then states in the tax return all relevant facts – calculates tax, determines and pays in time. Subsequently, in the second phase, the tax administrator checks, whether systemically, on suspicion or on a random basis, the compliance. There is a need for some preventative "motivation" in the form of the occurrence of adverse consequences (the question of the perception of their intensity may be individual). In general, positive incentives for addressees in the form of discounts and tax exemptions may be prioritized before penalty payment for non-compliance, especially in the case of formal errors (see, for example, Section 247a of the Tax Code).

[21] Section 1(2) of the Tax Code.

However, only this way, it is possible to effectively regulate, i.e. to control, the tax collection in the self-application mode. Otherwise, *ad absurdum*, each entity would have set a tax of CZK 1 and waited for the tax administrator to invite, verify, and testify, i.e. to proceed as the law imposes on him. Thus, in the first phase, the entire tax collection system can generate costs higher than revenue, or relatively soon will collapse the system, as the tax administrator will not be able to assess the tax within the tax assessment period (with regard to the need to control each entity).

To this, it must be added that, in the event that a taxpayer fails to fulfill his obligations on a voluntary basis and does not cooperate, he does not need to ascertain all the facts in the tax audit but is obliged to "make a picture of" taxable income and to impose the tax himself. In this spirit, it is also necessary to perceive penalty payments that are fundamentally related to the tax assessed as certain flat-rate compensation (real or hypothetical), except for the secondary motivation of voluntary fulfillment of the obligations mentioned above, and allow the tax collection to function on the principle of self-application of legal norms.

Tax administrator motivation should also be taken into account. It has no rational reason to "destroy" taxpayer despite any problems with the payment of taxes at any cost. Its purpose is only to collect taxes according to the rules and therefore there are, for example, institutes of cuts or payments, so that the taxpayer can engage in gainful employment and repay his obligations.

Penalty payments may lead for bankruptcy and liquidation, in particular, legal persons. In these cases, it is "worthwhile" for a tax entity to set up a new legal entity, and in fact, in the least, make the administration of taxes more difficult. So even in these cases there is no motivation of the administrator or the legislator to punish.

Penalty payment has a lack of individualization of punishment, there is no discretion. Of course, certain individualization is the percentage rate of sanction, which rather suggests the flattening of the compensation for the possible damage to public budgets.

While it is possible to agree with the Supreme Court's decision in the case *ne bis in idem*, that the relation between tax and criminal proceedings

and the need to set the amount of the sanction in the light of the previous proceedings (in line with the principle of proportionality), it is not possible to agree with the Court's opinion that the nature of the penalty payment is not primarily sanctioning. The Court did not take sufficient account of the specifics of the tax procedure. Penalty is only an institute supplementing and ensuring the collection of taxes under the tax regime of self-application so that the taxpayer has the incentive to provide all decisive and complete data for the assessment of the tax and also fulfills the subsequent payment obligation. It should be noted that in a very extensive interpretation, it would be possible to classify a number of rules in the legal order as punishment, respectively of a punitive nature. Yes, but that is what characterizes the law, unlike the system of moral standards. There are norms that motivate us to fulfill our obligations, as we are participants in a system of rules. And as we know from history, most of duties are performed voluntarily, but not all. The very question is the volunteer of the majority and the influence of the preventive effect of the sanctioning norms, as well as the nature of the sanction.

Regarding the possible adjustments of legal regulation based on decision-making practice and clearer setting of rules in the legislation proposed by, for example, Radvan (response to an earlier judgment of the Supreme Administrative Court[22]), it can be concluded that a change of regulation is not essential, it is not entirely clear what the change should be, how it should be systemically embedded, and whether it is at all technically possible to formulate a clear rule that would be interpretative and, in particular, application benefit and not a burden. Resp. for practical reasons, the change could be problematic, do not intended consequences, but new risks would arise (new interpretation, unclear outcome of the legislative process). Moreover, the legal order must be quite general in order to be applicable to a previously unplanned number of cases. It is important to

[22] M. Radvan, *Zásada ne bis in idem v případě trestného činu zkrácení daně, poplatku a podobné povinné platby [The ne bis in idem principle in the case of a crime of tax, charges and similar obligatory payments cuts]*, "Státní zastupitelství", vol. 13, No 4, p. 25.

investigate ad hoc cases, and in the individualization of punishment this needs to be left to the judiciary.

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