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## **The use of evidence collected in other procedures in the course of Polish tax proceedings – comments on the background of the judgment of the Court of Justice of the European Union of October 16, 2019 (C-189/18)**

**Wykorzystanie w polskim postępowaniu podatkowym  
dowodów zgromadzonych w toku innych postępowań  
– uwagi na tle wyroku TSUE z 16 października  
2019 r. (C-189/18)**

**Abstract.** The subject of the analysis is the legal regulation regarding the materials which are used in tax proceedings. Although the applicable tax regulations provide for the possibility of using material from other procedures as evidence, numerous doubts arise as to the purpose, scope and validity of the use of materi-

als in the light of the protection of the taxpayer's rights. The tax authorities are, therefore, limited in using these materials in connection with the obligation to retain the right of the party to participate in the proceedings, the right to privacy, and compliance with the principle of legality. The case-law of the Court of Justice of the European Union and Polish administrative courts is particularly important, as it points to the obligation to assess the legality of materials obtained in the course of a different procedure by tax authorities.

**Keywords:** tax procedure; evidence proceedings; the right party to participate; taxpayer's rights; protection of taxpayer's rights.

**Streszczenie.** Przedmiotem opracowania jest problematyka wykorzystania w postępowaniu podatkowym dowodów uzyskanych w toku innych procedur. Nie budzi wątpliwości to, że organy podatkowe w celu wykonywania swoich zadań powinny dysponować skutecznymi narzędziami związanymi z gromadzeniem informacji oraz ich wykorzystaniem w postępowaniu podatkowym. Jednocześnie dla organów podatkowych pojawiają się istotne ograniczenia związane z ochroną praw podatnika, w tym prawo do czynnego udziału strony w postępowaniu oraz obowiązek badania legalności pozyskanych dowodów. Powyższa problematyka była przedmiotem orzeczenia Trybunału Sprawiedliwości Unii Europejskiej z 16 października 2019 r. w sprawie Glencore Agriculture Hungary Kft. (C-189/18) oraz wyroku NSA z 7 lutego 2019 r. (I FSK 1860/17), w których, nie negując konieczności przestrzegania zasady prawdy obiektywnej oraz zapobiegania nadużyciom, określono granice działań organów podatkowych odnośnie do możliwości wykorzystania dowodów z innych postępowań oraz konieczność badania legalności włączanego do akt sprawy podatkowej materiału z innych postępowań.

**Słowa kluczowe:** postępowanie podatkowe; postępowanie dowodowe; czynny udział strony; prawa podatnika; ochrona praw podatnika.

## 1. Introduction

The issue of the use of evidence obtained in the course of other procedures in tax proceedings has been a subject of interest in the doctrine of tax law for a long time. There have also been numerous judgments of Polish administrative courts resolving disputes concerning the rules of using evidence in this respect in tax proceedings, with a special role

played by materials collected during investigations and prosecutions related to the crime of fraudulent tax refunds. The important role of these materials results from the fact that although tax proceedings, by virtue of their purpose, are, by definition, autonomous in relation to other procedures, their findings, in particular those made in criminal proceedings, may affect the factual findings adopted subsequently for tax assessment purposes. The relationship between the two proceedings justifies the fact that although the enforcement of tax law norms is primarily ensured by the administrative enforcement of the taxpayer's obligations, the effectiveness of the tax regulations is also secondary to sanctions resulting from criminal law norms. The criminal law provides for legislative solutions that also include the violation of tax law norms as the elements of crimes and offences<sup>1</sup>. Therefore, it is natural that factual findings made in the course of investigations and prosecutions may play an important role in recreating the tax-legal situation, which in turn requires the introduction of legal solutions regulating procedural issues related to the use of materials from other proceedings in the tax procedure. In this context, numerous doubts arise as to the purpose, scope, and legitimacy of using materials collected in the course of other proceedings in the light of the necessity to protect the rights of the taxpayer. The above problem was the subject of the judgment of the Court of Justice of the European Union of 16 October 2019 in the case of *Glencore Agriculture Hungary Kft. v. Nemzeti Adó-és Vámhivatal Fellebbviteli Igazgatósága* (C-189/18), whose theses should have an impact on the juridical practice of the individual EU countries and should prompt reflection on the *de lege ferenda* postulates.

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<sup>1</sup> B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Toruń 2017, p. 392.

## 2. The legal bases for using evidence from other proceedings in the tax procedure

Pursuant to Article 180(1) of the Law of August 27, 1997, the Tax Ordinance<sup>2</sup>, anything that may contribute to the clarification of the case and is not contrary to the law must be accepted as evidence. In turn, pursuant to Article 181 of the Tax Ordinance, evidence in tax proceedings may include, in particular, tax books, declarations submitted by a party, witness statements, expert opinions, materials and information collected as a result of an inspection, tax information and other documents collected in the course of the analytical activities of the National Revenue Administration, checking activities, tax inspection or customs, and fiscal control and materials collected in the course of criminal proceedings or proceedings in cases of fiscal offences or misdemeanours. At the same time, it should be noted that the concept of “materials collected in the course of” other proceedings used by the legislature in the wording of Article 181(1) of the TO is substantially different from the concept of “evidence”. With reference to the views expressed in the doctrine, it must be accepted that the term “materials” includes all documents collected in the course of proceedings (everything contained in the case file), including evidence recorded in the minutes (inspections, testimonies, presentations, etc.) and those relating to events occurring during the proceedings (e.g., notification of the date of the hearing)<sup>3</sup>. It is argued in the literature that these materials are subject to assessment from the point of view of admissibility of use before they are accepted by the tax authority as evidence (*inter alia*, in connection with the inadmissibility in evidence provided for, *inter alia*, in

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<sup>2</sup> Consolidated text: Dz.U. [Polish Journal of Laws] of 2020, poz. [item] 1325 with subsequent amendments, further: TO.

<sup>3</sup> T. Kanty, *Zagadnienie dowodzenia w postępowaniu podatkowym a materiał postępowania karnego*, „Kwartalnik Prawa Podatkowego” 2016, No 2, p. 55. It is also argued that the term “materials” includes non-documentary evidence, including material evidence (P. Kowalczyk, *Zakazy dowodowe w kodeksie postępowania karnego a postępowanie dowodowe w ordynacji podatkowej* [in:] T. Nowak, P. Stanisławiszyn (eds.), *Prawo celne i podatek akcyzowy*, Warszawa 2016, p. 548).

Article 195 of the TO)<sup>4</sup> and only then are they assessed in relation to the resulting facts (Article 191 of the TO)<sup>5</sup>.

In theory, it is indicated that Article 181 of the TO is of a purely informative nature, while emphasizing the need to use the means of evidence indicated therein<sup>6</sup>. Part of the doctrine, in turn, links with the content of Article 181 of the TO also the significant consequences for the interpretation of this provision, claiming that in its final part it provides for a derogation from the principle of direct examination of evidence (i.e. the determination of facts on the basis of evidence carried out by an authority in the course of proceedings) resulting from Article 190 of the TO, allowing the use of evidence gathered in other proceedings, which in turn may adversely affect the correctness of the determination of facts<sup>7</sup>. Similarly, it is also argued that Article 181 of the TO introduces a derogation from the rule of direct evidence proceedings by a tax authority, thus considerably limiting this rule<sup>8</sup>. At the same time, it should be noted that the above view refers primarily to the fact that it is not necessary to take evidence from the testimony of witnesses in tax proceedings if such witnesses were interviewed in other proceedings (primarily criminal and penal fiscal proceedings). The view that the principle of direct examination of evidence does not apply to evidence from documents, where the examination of evidence consists of reviewing their content. At the same time, the applicable regulations of tax proceedings also guarantee an opportunity for the party to become acquainted with the content of the documents and to express an opinion regarding their content<sup>9</sup>. Failure to ensure the possi-

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<sup>4</sup> T. Kanty, *Zagadnienie dowodzenia...*, p. 56.

<sup>5</sup> E. Michna, *Wpływ innych postępowań na postępowanie podatkowe* [in:] B. Kucia-Guściora, M. Munnich, A. Zdunek (eds.), *Stanowienie i stosowanie prawa podatkowego w Polsce. Procesowe prawo podatkowe*, Lublin 2013, p. 256.

<sup>6</sup> B. Brzeziński, H. Filipczyk, M. Kalinowski, K. Lasiński-Sulecki, M. Masternak, W. Morawski, A. Nita, A. Olesińska, J. Orłowski, E. Prejs, J. Pustuł, *Ordynacja podatkowa. Komentarz praktyczny*, Gdańsk 2015, p. 811.

<sup>7</sup> B. Adamiak [in:] B. Adamiak, J. Borkowski, R. Mastalski, J. Zubrzycki, *Ordynacja podatkowa. Komentarz*, Wrocław 2016, pp. 935–936.

<sup>8</sup> Judgment of the Supreme Administrative Court of 16 March 2012, II FSK 241/11; cf. S. Obuchowski, *Dowody przejęte do postępowania podatkowego z innych postępowań – perspektywa teoretyczna*, „Kwartalnik Prawa Podatkowego” 2016, No 4, p. 126.

<sup>9</sup> See Article 200(1) of the TO.

bility of active participation of a party in the proceedings means, in turn, that there are no procedural prerequisites for assessing the evidence and as a result the evidence has insufficient procedural value<sup>10</sup>. In the case of documentary evidence, the authority conducting the tax proceedings after the inclusion of the documents in the evidence is required to give the party the opportunity to comment on their content. At the same time, the above provision does not resolve all the doubts related to the use of materials from criminal and penal fiscal proceedings. In particular, in practice, disputes arise in connection with the questioning by the parties of the possibility of using materials from other proceedings in tax proceedings, including mainly the records from depositions of witnesses and documents<sup>11</sup>. Doubts about the legitimacy of the use of evidence in this respect or the need to produce evidence again arise simultaneously from the requirement to protect the rights of the taxpayer.

### **3. Protection of taxpayer's rights in the course of evidence proceedings under international and EU law**

Because confronted by the tax administration, the taxpayer is by definition the weaker party<sup>12</sup> it is undeniably necessary to balance the taxpayer-public-law relationship in situations where the risk of defective or oppres-

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<sup>10</sup> A. Hanusz, *Podstawa faktyczna rozstrzygnięcia podatkowego*, Kraków 2004, pp. 176–177. The doctrine also specifies that it is not enough for the party to have knowledge of the evidence, but it is necessary to have access to the full content and to verify that the authority has taken into account all the circumstances arising from the evidence (A. Sarna, *Wykorzystanie dowodów z innych postępowań w postępowaniu podatkowym, czyli co wolno organowi podatkowemu. Uwagi na tle wyroku C-189/18, Glencore*, „Przegląd Podatkowy” 2019, No 12, p. 44).

<sup>11</sup> See e.g.: judgment of the Voivodeship Administrative Court in Warsaw of 29 July 2015, III SA/Wa 2670/14 and judgment of the PAC in Gdańsk of 5 January 2016, I SA/Gd 1116/15.

<sup>12</sup> B. Szczurek, *Koncepcja ochrony praw podatnika. Geneza, rozwój, perspektywy*, Warszawa 2008, p. 22.

sive actions of the tax administration bodies may arise<sup>13</sup>. The guarantee of such a balance in the taxpayer-tax authority relation is made of, above all, a granting to the taxpayer of a set of rights, the execution of which is ensured by the standards of the applicable law. Particular importance is attached to procedural guarantees, understood as mechanisms shaped with a view to perform a protective function in the course of pending proceedings, guaranteeing its fairness<sup>14</sup>. The protection of a party's rights in this case may occur at various levels, including regulations protecting the rights of a party under international law, including EU and national law, but given the limited scope of this paper, the latter will not be considered. The guarantee of protection of a party's rights is of particular importance at the stage of an investigation aimed at determining the relevant elements of the fiscal factual situation<sup>15</sup>. The evidence procedure conducted in such a case is determined by its general principles (including the principles of material truth, formality, active participation of the party, provision of information, and the swiftness of the procedure), which, being rules of overriding importance over other standards, determine the applicable standards of protection.

One should point out, as important for the protection of the rights of the taxpayer in the context of the proceedings of evidence, the regulations in force at the level of international law concerning the protection of taxpayers' rights guaranteed primarily by the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950<sup>16</sup>. In the light of its provisions, Article 6 of the Convention, which provides for the right to a fair (reliable) trial, is relevant to the conducted deliberations. According to Article 6(1), first sentence, everyone has the right to a fair and public hearing of their case within a reasonable time by an independent and impartial tribunal established by law when deciding on their civil rights and obligations or on the

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<sup>13</sup> See B. Brzeziński, *Koncepcja praw podatnika i ich ochrony jako przedmiot badań naukowych*, „Kwartalnik Prawa Podatkowego” 2005, No 1, pp. 9–10.

<sup>14</sup> Z. Kmieciak, *Procesowe gwarancje ochrony interesu podatnika*, „Kwartalnik Prawa Podatkowego” 2000, No 1, p. 17.

<sup>15</sup> Cf. W. Olszowy, *Decyzja podatkowa. Podejmowanie i kontrola*, Warszawa 1997, p. 41.

<sup>16</sup> Dz.U. of 1993 No 61, poz. 284 with subsequent amendments, further: Convention.

merits of any criminal charge against them<sup>17</sup>. This regulation gives rise to numerous procedural rights, including the right to remain silent (no obligation of self-incrimination), equality of arms in proceedings and the right to a public hearing<sup>18</sup>. It should be emphasized that despite the limitations in applying Article 6 of the Convention to particular types of cases, including tax cases, this regulation will be applied to cases related to the level of sanctions for tax law violations. In this respect, the freedom from self-incrimination, which can then be used in criminal proceedings against the taxpayer, is particularly important<sup>19</sup>. In the context of the protection of the rights of the taxpayer in the evidentiary proceedings, the content of Article 8 of the Convention is also essential, under which the right to respect for private and family life is provided for and which indicates that interference by public authorities in the exercise of these rights is possible only in justified cases provided for in statutes. In accordance with the jurisprudence of the European Court of Human Rights, this provision implies, *inter alia*, the necessity to constrain the tax administration bodies which counteract possible abuses, including, in particular, judicial review of activities related to search and seizure of evidence<sup>20</sup>.

As far as the protection of taxpayers' rights is concerned, the protection of treaty freedoms, including the regulations of the Charter of Fundamental Rights of the European Union<sup>21</sup> providing for the right to an effective remedy and access to an impartial tribunal, without restrictions as to the category of cases, comes to the fore. In accordance with Article 47 of the Charter, anyone whose rights and freedoms guaranteed by Union

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<sup>17</sup> However, in the context of the jurisprudence of the European Court of Human Rights (ECHR), the possibility of applying Article 6 of the Convention on Tax Matters is questionable (more broadly see B. Brzeziński, *Prawo podatkowe. Zagadnienia...*, pp. 579–580).

<sup>18</sup> See the judgment of the ECHR of 23 November 2006 in the case of *Jussila v. Finland*, No 73053/01.

<sup>19</sup> See B. Brzeziński, *Prawo podatkowe. Zagadnienia...*, p. 580.

<sup>20</sup> See the judgment of the ECHR of 25 February 1993 in the case *Fuke v. France* No 10828/84, where, without questioning the need to use instruments such as searches, it is recognised that both State legislation and practice must provide adequate and effective safeguards against fraud, including judicial review of actions taken by customs authorities.

<sup>21</sup> OJ EU C 303 of 2007, p. 1, further: Charter.



law have been violated has the right to an effective remedy before a tribunal, under the conditions provided for in that Article. The second sentence of this provision stipulates that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial court previously established by law. The general principles of EU law, in turn, provide for the right to respect for the defence, ensuring that the addressees of a decision which appreciably affects their interests should be able to make their views known effectively with regard to the evidence on which the authority intends to rely. This principle implies the requirement to ensure that the addressees of the decision are able to present their point of view effectively on the evidence on which the administrative authority intends to base its decision, on the assumption that the addressees of the decision were able to acquaint themselves with that evidence and, consequently, were granted the right of access to the case file. The infringement of the right of access to the file during the administrative procedure is not, at the same time, remedied by the fact that access to the file was granted in the course of legal proceedings relating to a possible action for annulment of the contested decision<sup>22</sup>.

When materials from other proceedings are used in tax proceedings, and they were obtained without the taxpayer's knowledge and included in the evidence of the case, i.e. without observing the principle of the direct adduction of evidence, the problem of a limitation of protection of the taxpayer's rights arises. It should be emphasized that there are obviously no grounds for questioning the possibility of using materials from other proceedings, including investigations and prosecutions, in the course of tax proceedings. However, the problem arises as to whether, in an attempt to establish objective truth, it is permissible to recognise the right of a tax authority to apply measures that effectively restrict a party's rights to active participation in proceedings and the right of defence. Another problem relates to the assessment of whether the tax authorities should exam-

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<sup>22</sup> Judgment of the Court of Justice of the European Union (CJEU) of 16 October 2019 in case Glencore Agriculture Hungary Kft. (C-189/18) and the jurisprudence referred to therein.

ine whether the material obtained in the course of other proceedings was collected in accordance with the law.

#### **4. The CJEU judgment of 16 October 2019 in the case of Glencore Agriculture Hungary Kft. (C-189/18)**

The essence of the problem resolved by the CJEU judgment of 16 October 2019 was the issuance of a decision ordering the Hungarian company Glencore Agriculture Hungary (the “Company”) to pay VAT, including a fine and penalty for late payment, to pay an additional VAT liability in a situation where in the course of the proceedings the decisions and evidence were only partially revealed to the taxpayer, as the tax authority merely indicated in the audit protocol each of the findings contained in the said decisions, without presenting the decisions and documents on which they were based. Importantly, in its decisions, the Hungarian tax authority considered that the Company unlawfully deducted VAT because it knew or should have known that the transactions it had carried out with its suppliers constituted elements of VAT fraud. The authority relied on the findings made with the taxpayer’s suppliers, considering the fraud to be a proven fact. In accordance with national law, when issuing its decision the authority was at the same time bound by the findings contained in the decisions issued by it as a result of the final nature of the tax controls made with the taxpayer’s final suppliers. The *ratio legis* of the Hungarian legal regulation that underlies the above practice is to guarantee legal certainty by imposing the obligation to draw the same conclusions from the same transaction. At the same time, the regulation is questionable because the tax authority, by issuing a tax assessment decision in relation to the taxpayer, and by questioning the right to deduct tax, relieves itself of the burden of proof by taking into account *ex officio* the findings of previous proceedings in which the taxpayer was not a party. Thus, the taxpayer could not exercise the rights related to the status of the party and the final decisions issued as a result of these proceedings were made known to it

only in the course of the inspection conducted against it without the opportunity to review the evidence on which the facts were based and to refer to it/them.

The national court, when hearing the Company's action against the tax decisions, found that there were doubts as to the compatibility of such a practice with the principle of respect for the rights of the defence and with the right to a fair hearing laid down in Article 47 of the Charter, since, in view of the limits of the judicial review which it may carry out, it is not entitled to examine the legality of decisions taken as a result of inspections concerning other taxpayers and, in particular, to verify whether the evidence on which those decisions are based was obtained lawfully. As a result of those doubts, the General Court suspended the proceedings and referred questions to the CJEU for a preliminary ruling as to whether Directive 2006/112/EC of the Council of the European Union of 28 November 2008 on the common system of value added tax<sup>23</sup>, the principle of respect for the rights of the defence, and Article 47 of the Charter must be interpreted as meaning that that they contravene the legislation or practice of a Member State according to which, as part of the verification of a taxable person's right to deduct VAT, the tax authority is bound by the findings of fact and legal qualifications already made by it in related administrative proceedings against its suppliers, on which the final decisions establishing the existence of VAT fraud committed by those suppliers are based.

The CJEU indicated that where a tax authority intends to base its decision on evidence obtained, as in the proceedings under examination, in related criminal and administrative proceedings initiated against the taxpayer's suppliers, the principle of respect for the rights of the defence requires that the taxpayer has a possibility to access (during the course of the proceedings against him) all such evidence, and evidence which may be used in his defence, unless objectives of general interest justify limiting such access. This requirement is not met by the practice of the tax authority consisting in not granting a given taxpayer any access to this evidence,

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<sup>23</sup> OJ EU L of 2006, No 347, p. 1, further: VAT Directive.

and in particular to the evidence on which the findings made in the protocols was drawn up and on which decisions issued as a result of the related administrative proceedings are based, and if granted, then only in the form of a summary and only of that part of this evidence which the authority has chosen according to the criteria it has adopted and over which the taxpayer may not exercise any control.

The CJEU judgment under review also indicates that the objective of the principle of equality of arms, which is an integral part of the principle of effective judicial protection of rights laid down in Article 47 of the Charter, is to maintain a procedural balance between the parties to judicial proceedings by guaranteeing the equality of the rights and obligations of those parties, in particular as regards the rules governing the taking of evidence and the adversarial procedure before the court and their right of appeal. In order to meet the requirements of the right to a fair trial, it is essential that the parties know and are able to discuss in an adversarial manner both the factual and legal circumstances which are decisive for the outcome of the proceedings. In the view of the CJEU, the national court should be able to verify, in the context of an adversarial debate, the lawfulness of the obtaining and use of evidence gathered in the course of related administrative proceedings brought against other taxpayers, as well as the findings of administrative decisions taken as a result of those proceedings, which are decisive for the outcome of the action. In fact, equality of arms would be infringed and the adversarial principle would not be respected if the tax authority, because it is bound by decisions made against other taxpayers which have become final, was not required to produce that evidence, if the taxpayer was not able to acquaint itself with it, if the parties were unable to hold an adversarial debate on that evidence and those findings, and if that court was not able to verify all the factual and legal circumstances on which those decisions were based and which are decisive for the resolution of the dispute before it. If the national court is not entitled to carry out that verification and if the right of judicial remedy is therefore not effective, the evidence gathered in the course of the related administrative proceedings and the findings made in the administrative decisions issued against other taxpayers as a result of those pro-

ceedings must be rejected and the contested decision, which is based on that evidence and those findings, must be annulled if for that reason it is unfounded (similarly CJEU judgment of 17 December 2015, *WebMind-Licenses*, C 419/14, EU:C:2015:832, point 89).

In reply to the questions referred for a preliminary ruling, the CJEU held that the VAT Directive, the principle of respect for the rights of the defence, and Article 47 of the Charter must be interpreted as meaning that, in principle, they do not preclude legislation or practice in a Member State according to which, when verifying the right to deduct VAT exercised by a taxable person, the tax authority is bound by the findings of fact and legal qualifications already made by it in related administrative proceedings brought against that person's suppliers on which the decisions, which have become definitive, have been based establishing the existence of VAT fraud committed by the suppliers. At the same time, the CJEU made the following three reservations. First of all, the authority cannot be released from the obligation to acquaint the taxpayer with the evidence, including the evidence from related administrative proceedings on the basis of which it intends to issue a decision, and the taxpayer cannot be thus deprived of the right to effectively challenge these factual findings and legal qualifications during the proceedings against it. Secondly, the taxpayer must be able, in the course of those proceedings, to have access to all the evidence gathered in the course of the related administrative proceedings or in any other proceedings on which that authority intends to base its decision or which may be used in the exercise of the rights of the defence, unless objectives of general interest justify a restriction of such access. Under the third reservation, the court hearing a complaint against this decision may review the lawfulness of the acquisition and use of evidence and findings that are critical to resolving the complaint made in administrative decisions issued in respect of these suppliers.

## 5. The use of evidence from other proceedings in the jurisprudence of Polish administrative courts

The obligation to maintain the standards of protection of a party's rights in tax proceedings must of course be borne by the tax authority, which, while conducting specific proceedings with the use of available institutions, is obliged to conduct evidentiary proceedings to ensure that this principle is not violated. In particular, it is necessary to allow the party to familiarize itself with the collected evidence and to comment on its content. In practice, doubts arise in proceedings related to the determination of the amount of VAT liability in a situation where, in the opinion of the authority, the deduction of input tax is unjustified and there is a possibility of committing the so-called "carousel fraud" consisting in the extortion of VAT refund. In tax proceedings aimed at determining the amount of tax and tax sanctions, it is often necessary to use evidence from examinations and investigations, including operational materials<sup>24</sup>.

The above issue was the subject of, *inter alia*, the Supreme Administrative Court judgment of 7 February 2019<sup>25</sup>, in which it was recognized that the consequence of applying Article 179 of the TO to part of the evidence (the institution of the exclusion of a party's right to inspect the file) is the fact that this evidence which is not available to the party cannot be used to prove a given factual circumstance as the party could not express its opinion on it. The Court held that such a conclusion is confirmed by the general principle of active participation of a party under Article 123(1) of the TO, as well as, in the case of harmonized taxes to which EU law applies, by the general principles of that law, which include respect for the rights of the defence, according to which the addressees of a decision which appreciably affects their interests should be able to effectively present their views on the elements on which the administrative authority intends to base its decision. Another issue related to the use of materials from operational activities, which was dealt with by the Court, was

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<sup>24</sup> See A. Sarna, *Wykorzystanie dowodów...*, p. 43.

<sup>25</sup> I FSK 1860/17.

whether it was necessary for the tax authorities to assess the legality of obtaining the materials. In the judgment of the Supreme Administrative Court of 7 February 2019, departing from the existing line of rulings, the tax authorities were deemed to be obliged each time to verify whether the evidence obtained as a result of the use of operational techniques was acquired in accordance with the formal requirements resulting from separate regulations, and whether it took place under the control of a common court. Next, referring to the content of Article 180(1) and 181 of the TO, the Court held that in the situation of evidence being a record of conversations, if such records were made in accordance with the law, as material gathered in the course of criminal proceedings or proceedings in cases of fiscal offences or misdemeanours, although they may be evidence in tax proceedings under Article 181 of the TO, without the recordings attached to it, they are not sufficient to make binding factual findings on the basis of which the tax liability may be determined or established.

The judgment of the Supreme Administrative Court of 7 February 2019 deserves full approval. The theses of the judgment are consistent with the standards of protection of the taxpayer's rights under EU law and Article 180(1) of the TO, understood as providing for the requirement of legality of each means of proof<sup>26</sup>. The judgment is also consistent with the CJEU jurisprudence, including the theses of the above mentioned CJEU judgment of 16 October 2019 in the case of *Glencore Agriculture Hungary Kft. (C-189/18)*. The judgment of the Supreme Administrative Court is also consistent with the thesis raised in the literature that in tax proceedings, the exclusion of documents or information from evidence should be

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<sup>26</sup> More on the different ways in which the tax administration may obtain evidence and the assessment of the legality of such actions in the jurisprudence of Belgian and Dutch courts, see T. A. Van Kampen, L. J. de Rijke, *The Kredietbank Luxembourg and the Liechtenstein tax affairs: notes on the balance between the exchange of information between states and the protection of fundamental rights*, "EC Tax Review" 2008, No 5, p. 221 et seq. For an assessment of court rulings on Canadian and Australian administrative actions regarding the admissibility of the use of illegally acquired material in tax proceedings, see R. Wollner, J. Bevacqua, *The ATO, conscious maladministration, and stolen information*, "Australian Tax Review" 2017, No 46, p. 47.

an exception applied under special circumstances (e.g. when they concern sensitive data or business secrets)<sup>27</sup>.

## 6. Conclusions

It is undisputed that tax authorities should have effective tools to collect information and then use it in tax proceedings. At the same time, tax authorities are faced with significant limitations related to the protection of taxpayer's rights, including the right of active participation of a party in proceedings and observance of the rule of law. The above mentioned jurisprudence of the CJEU and Polish administrative courts deserves approval as regards the boundaries within which the tax authorities have the possibility to use evidence from other proceedings and as regards the necessity to examine the legality of material from other proceedings included in the tax case file. The standards of protection of taxpayer's rights indicated by the judicature create a barrier for administrative authorities in particular against a possible temptation to "legalize" activities related to obtaining information which took place in violation of the law.

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<sup>27</sup> A. Sarna, *Wykorzystanie dowodów...*, p. 49.



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