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On the need to regulate the legal concept of paying agents withholding taxes at source

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1. Introduction

The concept of *paying agent* is applied in the Polish taxation system relatively widely. In fact, there has been a tendency to extend its applicability. This tendency would not be a reason for concern if it were not for the fact that there is little reflection among legal scholars and commentators on the legal concept of the term *paying agent*. In consequence, *paying agent* is used to refer to two markedly different legal concepts without drawing any distinction in terminology. More specifically, the word *paying agent* is used to refer not only to a person with the normative characteristics of a paying agent as specified in the Polish Tax Act [Polish: *Ordynacja podatkowa*], but also to a person required by law to withhold tax amounts at source, but for which no such normative characteristics are defined. Moreover, the provisions of the Polish Tax Act that

deal with paying agents are applied in either case without drawing any distinctions, although there are serious legal questions to be answered as regards the application of the provisions to the latter, i.e. a person required by law to withhold tax at source.

2. The legal concept of paying agent under the law as it stands

The term *paying agent* is defined in s. 8 of the Polish Tax Act. *Paying agent* is defined to be a natural person, body corporate or organisation without a separate legal personality that is required by tax law to calculate and deduct a tax amount from a taxable person and to transfer the deducted tax to the relevant tax authority by a certain date. The same definition of *paying agent* can be found in a bill that proposes to amend the Polish Tax Law put forward by the Polish General Taxation Law Codification Committee.

It can be concluded from s. 8 of the Tax Act that the statutory obligation for a paying agent to deduct a tax amount from a taxable person will not arise before the taxable person himself becomes legally obligated to pay the tax. In other words, a taxable person must be legally obligated to pay tax before a paying agent is required by law to calculate the amount of the tax to be withheld from the taxable person and transferred to the relevant tax authority. This interpretation is based on that part of the provision which requires the tax to be collected from a taxable person. A taxable person is a person legally obligated to pay a tax amount in connection with the occurrence of a specific event described in a tax provision.¹ That event must occur before the taxable person becomes legally obligated to pay the tax and, consequently, before a legal relationship arises between the taxable person and the central government or a local government authority. No person may be regarded as a taxable person in legal terms and obligated to pay any tax in respect of a taxable event before the event occurs and that person

¹ Cf. M. Kalinowski, *Podmioty biernie stosunku podatkowoprawnego. Przyczynek do teorii podmiotowości podatkowej*, Toruń 2019, p. 52 et seq.

becomes so obligated. If section 8 of the Polish Tax Act requires a paying agent to collect, or withhold, tax from a taxable person, then the term taxable person used in that section means a person in respect of whom a specified taxable event has occurred and, as a result, that person is legally obligated to pay tax in connection with that event and under his legal relationship with the central government or a local government authority.

As noted above, a paying agent is obligated to collect an amount of tax from a taxable person as a result of a legal obligation arising between that taxable person and the central government or a local government authority. It follows that a paying agent's obligation must be based on two interlinked legal rules. One of them relates to the taxable person and deals with the taxable event, the occurrence of which creates a tax liability. The other relates to the paying agent and deals with the event, the occurrence of which imposes certain obligations on the paying agent.² The occurrence of both these events will create a tax liability, and the paying agent will become legally obligated to transfer the tax collected, or withheld, from the taxable person to the tax authorities. In other words, the paying agent's obligation is a result of the taxable person's obligation.

The definition of *tax* in s. 3(3) of the Polish Tax Act includes payments on account (or advance tax payments) and tax instalments. Accordingly, a person legally obligated to collect, or withhold, a payment on account or a tax instalment could also be regarded as a paying agent. However, this conclusion would be justified under s. 8 of the Polish Tax Act if the taxable person was himself legally obligated to make a payment on account or to pay a tax instalment following the occurrence of a taxable event described in a tax statute.

The legal concept of *paying agent* can be reconstructed by referring to another provision of law, namely s. 59(1)(2) of the Polish

² Cf. A. Parlato, *El responsable y el sustituto del impuesto*, in: *Tratado de Derecho tributario*, Vol. 1, ed. A. Amatucci, Bogota 2001, p. 215 et seq.; A.V. Billingham, *Los sujetos tributarios. Contribuyentes, sustitutos y agentes de retención*, in: *El tributo y su aplicación: perspectivas para el siglo XXI*, Vol. 1, eds. C.G. Novoy, C.H. Jiménez, Buenos Aires 2008, pp. 961–962.

Tax Act. According to that provision, a tax liability will expire fully or partially as a result of the related tax amount being collected, or withheld, by a paying agent. This provision is another confirmation of the fact that the legal relationship between the paying agent and the central government or a local government authority accompanies the legal relationship between the taxable person and such a government or authority. The latter will expire when the paying agent withholds the tax due, a payment on account or a tax instalment. However, the paying agent's legal relationship will not expire as a result of such withholding. As soon as the tax is withheld by the paying agent, it must be paid to the relevant tax authority. According to s. 59(2)(1) of the Polish Tax Act, the paying agent's liability will not expire before the tax withheld by him is transferred to the tax authority.

Finally, for a full picture of the legal understanding of the concept of *paying agent*, it is necessary to look at the provisions governing the liability of paying agents.

Liability for tax is unquestionably a type of legal liability. The term *liability* is given different meanings in different languages; its legal meaning may be different as well.³ In tax law, for example, liability is related to the right of the central government or a local government authority to enforce a person's obligation to pay tax by using the person's assets if the person fails to fulfil this obligation himself. The obligation may be enforced against the assets of the person that the law makes liable.

In principle, it is the taxable person that is legally obligated to pay tax and that is subject to liability for tax. This principle will be modified if, for example, a tax statute requires a paying agent to pay the tax for the taxable person. This modification is based on s. 30(1) of the Polish Tax Act, which provides that a paying agent who fails to comply with the obligations set out in section 8 is liable for the tax not withheld or for the tax that has been withheld but has not been transferred to the tax authorities. The meaning of that provision is that the paying agent will be liable

³ Cf. M. Kalinowski, *Podmioty biernie stosunku podatkowoprawnego*, pp. 144–166.

if the circumstances described in that section occur. In practical terms, it means that if the tax due is not paid, the tax obligation will be enforced against the assets of the paying agent, not against the assets of the taxable person.

A more detailed analysis of the provisions governing the status of *paying agent* shows that the paying agent's liability for tax is not the same in all cases. For example, if the paying agent collects a tax amount from a taxable person, the taxable person's obligation will expire and the paying agent will be liable for his own obligation, which may be enforced against his assets. However, the paying agent's liability will be different if he fails to withhold the tax from the taxable person. In such a case, the taxable person's obligation to pay the tax will be enforced against the paying agent's assets. The paying agent will therefore be liable for the taxable person's obligation. Obviously, he will be so liable because of his failure to withhold the tax he was legally obligated to withhold. As a result of this failure, the taxable person's tax obligation has not expired.

The liability of the paying agent means that the relevant tax authority may enforce the obligation against his assets and that the paying agent must enable his obligation to be so enforced. In consequence, it is the paying agent's assets that guarantee the payment of the tax and, therefore, the tax authorities may use legal means to enforce the payment obligation against such assets.

The very existence of a paying agent in respect of a transaction does not mean that the liability of the taxable person for the tax related to the transaction is excluded automatically. According to s. 30(5) of the Polish Tax Act, the liability of a paying agent is excluded if the law provides otherwise [on the matters provided for in subsections (1)–(4) of the same section] or if the tax due is not withheld through the taxable person's fault. In such cases, it is the taxable person that will be liable for the tax.

3. The legal status of persons deducting payments on account

As noted above, the term *paying agent* is used in the Polish taxation system to refer also to a person legally obligated to withhold tax payments on account. It may be noted – as an example only – that this term is used to refer to the persons required to withhold income tax who are referred to in s. 31 and subsequent sections of the Polish Income Tax Act⁴ as well as to the persons required to withhold VAT who are referred to in s. 18 of the Polish VAT Act.⁵

According to s. 31 of the Income Tax Act, a natural person, body corporate or organisation without separate legal personality (referred to as *employer* in that Act) is legally required to calculate and withhold, during each tax year, payments on account from any person that receives, from that employer, (a) income as an office holder, an employee, an outworker or a cooperative worker, (b) social security payments normally made by employers and (c) payments of that person's share in the profits of a cooperative. Section 32 of the Income Tax Act deals with the calculation of the amounts to be withheld by the paying agent (the employer in this case). Furthermore, an analysis of other provisions of the Income Tax Act shows that this statute does not require the taxable person himself to pay the tax calculated in accordance with s. 32 of the Income Tax Act. This means that no legal relationship under tax law arises between the taxable person and the government whereby the taxable person would be legally obligated to make payments on account and the government would be entitled to receive such payments. A legal relationship under tax law will arise between the taxable person and the government as at the end of the tax year. However, the taxable person's obligation under this relationship is not to make payments on account but to pay the tax due for that tax year. It can therefore be argued that until the end of the

⁴ The Polish Income Tax Act of 26 July 1991 (Journal of Laws of 2019, item 1387, as amended).

⁵ The Polish VAT Act of 11 March 2004 (consolidated text: Journal of Laws of 2020, item 106).

tax year, the taxable person is only obligated to enable the paying agent to make payments on account for the taxable person.

An analysis of the provisions of the VAT Act may lead to similar conclusions. In VAT terms, the obligation to pay tax arises as at the end of either a calendar month or a calendar quarter. In contrast, according to s. 18 of the VAT Act, court bailiffs and administrative enforcement authorities are legally obligated to withhold tax [i.e. VAT] on the supply of goods made as part of their enforcement activities during such periods. However, the use of the word *tax* in section 18 of the VAT Act does not mean that the amounts so withheld are amounts of tax. In fact, they are only payments on account.⁶ Neither the provision of section 18 nor any other provision of the VAT Act regulates the calculation of such payments on account to be made by court bailiffs and administrative enforcement authorities. Moreover, no provision requires the taxable person to make such payments on account. The taxable person is only required to pay the tax due. As is the case with income tax, no legal relationship under tax law arises between the taxable person and the government whereby the taxable person would be legally obligated to make payments on account and the government would be entitled to receive such payments. The taxable person's obligation is not make payments on account but to pay the tax due.

The above is true in most cases where statutory provisions introduce the legal concept of what the law refers to *paying agent*.⁷

The above-described legal situations that involve persons referred to as paying agents are materially different from the typical situation of the paying agent defined in the Polish Tax Act.

As noted above, the term *paying agent* is used to mean a person required to calculate an amount of tax due from a taxable person

⁶ Cf. Judgment of the Court of Justice of the European Union (CJEU) of 26 March 2015, Case C-499/13, *Macikowski v Dyrektor Izby Skarbowej w Gdańsku* (Director of the Tax Chamber, Gdańsk), ECLI:EU:C:2015:201, paragraph 58.

⁷ This is the case with the paying agents introduced in ss. 33–35 and s. 41 of the Income Tax Act. The case is similar with the paying agent introduced in s. 17a of the Polish VAT Act.

and to transfer that amount to the relevant tax authority. The implications of this understanding of the concept of paying agent are such that the taxable person first becomes legally obligated to pay a tax amount as a result of the occurrence of a taxable event described in the relevant tax provision and, subsequently, a person named in another provision becomes legally obligated to perform his obligations as a paying agent.⁸ However, the payment made by the paying agent is not the repayment of another person's tax debt for the reason that no such debt exists yet. This is because no tax provision requires the taxable person to make payments on account and, therefore, no legal relationship under tax law arises between the taxable person and the government whereby the taxable person would be required to pay any tax. The only legal relationship created under these circumstances is one between the paying agent and the government. The paying agent's obligation is to calculate an amount of tax in accordance with the provision that imposes the obligation on the paying agent, to collect that amount from a person who is not a taxable person yet but who is very likely to become a taxable person in the future, and to transfer the amount so collected to the relevant tax authority. This obviously means that the paying agent performs his own obligation to collect, or withhold, an amount of money from a person who is not a taxable person and to transfer that amount to the relevant tax authority. This obligation arises as a result of the occurrence of an event described in a statutory provision that imposes an obligation on the paying agent only. In contrast, the person from whom the paying agent is to collect an amount of tax is not a taxable person under tax law yet, as this person is not legally obligated to make a tax payment for the reason that the event described in the relevant tax provision and the occurrence of which is required for an obligation under tax law to occur has not occurred in respect of that person. No legal relationship exists between that person and the central government or a local government authority, and that person is only required to enable the paying agent to deduct

⁸ Cf. A. Parlato, *op.cit.*, pp. 215–216.

a certain amount from the amount payable to that person.⁹ When the law imposes an obligation on a paying agent to deduct a payment on account, the only legal relationship created under these circumstances is one between the paying agent and the central government or a local government authority. This means that the person from whom that payment is to be deducted is a third party in relation to that relationship.

The fundamental differences between a *paying agent* and a person that withholds payments on account for a person before that person becomes legally obligated to pay any tax, scholars were in disagreement as to whether the latter may be regarded as a paying agent at all. Some tax scholars argued that the person was not a paying agent. Others claimed that that a person withholding payments on account should be regarded as a paying agent. Finally, as such a person is referred to as *paying agent* in some jurisdictions, contemporary legal scholars agree that such a person should be regarded as a paying agent. Nonetheless, in order to underline the difference between this concept and the classic, as it were, normative concept of *paying agent*, a distinction is frequently made at the level of terminology and the paying agent is referred to the *proper paying agent* and the maker of payments on account is referred to as *improper paying agent*.¹⁰

4. The implications of differences between a paying agent and a person obligated to withhold payments on account

The existence of these two types of payers of taxes has significant practical implications. The differences between these two types should force lawmakers to pass provisions that distinguish, at least partially, between these two legal concepts. In particular and as

⁹ J.J. Ferreiro Lapatza, *Instituciones de derecho financiero*, Madrid 2010, p. 333.

¹⁰ Cf. e.g. F. Amatucci, *Principi e nozioni di diritto tributario*, Torino 2016, p. 167.

a minimum, it is necessary to make statutory rules dealing with the expiry of the obligations of the taxable person. According to above-cited section 59(1)(2) of the Polish Tax Act, when a paying agent collects the tax due from the taxable person, the tax liability expires. This is the case only when the taxable person is legally obligated to pay tax or make a payment on account. However, if no tax statute imposes such an obligation on the taxable person, it is logical that the withholding of a payment on account by the paying agent may not result in the taxable person's obligation expiring, as no such obligation exists. If a person is not legally required to make a tax payment or a payment on account and only a paying agent is legally obligated to withhold a payment on account at source, then such withholding only creates a right for the person from whom the payment on account was withheld to treat the amount withheld as a future tax liability, which does not exist at the moment of the withholding and which may arise in the future. Consequently, if the withholding of a payment on account by the paying agent only results in the taxable person's right to deduct the amount withheld from the amount due from the taxable person, then the provision of s. 59(1)(2) of the Polish Tax Act must not apply. Accordingly, it is proposed that the provision of that section be amended so that it clearly applies only where the paying agent withholds tax. In other words, it should not apply where the paying agent withholds a payment on account, as no statutory provision requires the taxable person to make any such payment to the central government or any local government authority.

As was noted earlier, the meaning of s. 30(1) of the Polish Tax Act is such that the paying agent is liable for his failure to withhold a tax payment or to transfer the tax withheld to the relevant tax authority. The law, as it stands, is such that the applicability of this provision to the paying agent is at least questionable. This is because s. 8(1) of the Polish Tax Act provides that a paying agent is required to withhold a tax payment from a taxable person. A tax payment is due from a person in respect of whom a specified taxable event has occurred and the occurrence of which creates a statutory obligation for that person to make a tax payment or

a payment on account. After all, a person will not become a taxable person before the occurrence of a specified taxable event, the occurrence of which creates a statutory obligation for that person to make a tax payment or a payment on account.¹¹ In other words, the status of *taxable person* is conditional upon the occurrence of such an event.

This leads to the conclusion that if a tax statute introduces the concept of *paying agent* for the purposes of payments on account and, at the same time, does not require a taxable person to make such payments, but only requires the paying agent to withhold such payments from a specified person, while that specified person is only required to enable the paying agent to perform his obligation, then this normative mechanism means that the paying agent does not withhold *tax* within the meaning of the Polish Tax Act. It follows that if the paying agent does not withhold taxes (s. 8(1) of the Polish Tax Act), the paying agent may not, in normative terms, be liable under s. 30(1) of the Polish Tax Act.

It further follows that if the paying agent was to be liable, his liability should be provided for properly. The easiest way to provide for such liability would be to amend the relevant provisions so that it is clear that the provisions governing the liability of paying agents must apply to persons obligated to withhold payments on account accordingly.

It also needs to be noted that the relevant tax statutes should definitely be amended to include provisions for the withholding of payments on account by paying agents. The rationale behind it is that a payment on account is an entirely separate and independent payment, the concept of which cannot be derived from the concept of *tax* and, therefore, it is impossible to calculate the amount of such a payment. However, the withholding of payments on account by paying agents is not always sufficiently provided for in Polish statutory provisions. Take, for example, the provision of s. 18 of the Polish VAT Act. A VAT taxable person is required to assess the amount of VAT on a monthly or quarterly basis and this

¹¹ Cf. M. Kalinowski, *Podmioty biernie stosunku podatkowoprawnego*, pp. 58–60.

assessment must be based on all the events that occurred during each calendar month or calendar quarter. Accordingly, the VAT so assessed must be paid on a monthly or quarterly basis. The Polish VAT Act only provides for the assessment and payment of VAT for either period. However, section 18 of the same Act requires certain VAT paying agents, namely court bailiffs and administrative enforcement authorities, to withhold VAT on the supply of goods recovered through enforcement, where such goods are the property of a debtor or in the possession of a debtor in violation of the applicable law.¹² It follows that the amount of such VAT must be assessed by such a paying agent on the basis of the proceeds from a single event. However, neither s. 18 of the VAT Act nor any other statutory provision deals with the rules for assessing the amount of VAT in respect of a *single* event occurring during the taxable period. Consequently, it is difficult to determine what the paying agent is actually required to do. It can therefore be argued that the obligation imposed on such paying agents in s. 18 of the VAT Act is an empty obligation.¹³

Finally, it is necessary to amend the relevant tax statutes so that the deadlines for the withholding of such payments on account by such paying agents are clear. According to s. 47(4) of the Polish Tax Act, the deadline for paying agents is the date by which tax law requires a tax payment to be made. However, the law that provides for the withholding of payments on account by paying agents does not impose an obligation on the taxable person himself to make such payments and, consequently, no deadline for such payments by the taxable person is specified. Consequently, if no deadline for a taxable person to make a payment on account is provided for in any statute, there is no deadline for the paying agent to make a payment on account.

It is beyond any doubt that amendments should also be made to the provision of s. 30(6) of the Polish Tax Act. That section provides

¹² As noted earlier, this particular amount is a payment on account, although it is referred to as *tax* in the statute.

¹³ Cf. M. Kalinowski, *Płatnik jako strona stosunku podatkowoprawnego*, "Forum Prawnicze" 2010, Issue 2, p. 40.

that a tax authority may decide on the liability of a paying agent also after the tax year or any other taxable period. The provision of that section was intended to remove the doubt as to whether a taxable person under income tax provisions may be made liable for a payment on account after the tax year concerned and whether such a payment may be enforced.¹⁴ In fact, that provision will apply to paying agents. Bearing that in mind, it can be argued that the application of that provision may result in serious legal issues, as the provision fails to take into account the nature of the concept of *paying agent*. As noted earlier, the withholding of a payment on account by a paying agent will not directly affect the taxable person's obligation and the only legal implication of such withholding is the taxable person's right to deduct the amount withheld from the tax amount due from the taxable person. If the paying agent fails to withhold such a payment on account, the taxable person will not be entitled to claim that right. Consequently, the taxable person will have to declare, in his tax return and as part of the tax amount due, the payment on account that should have been withheld and to transfer that payment to the relevant tax authority. If the payment on account is not made by the paying agent, the taxable person himself will have to make the payment. Under these circumstances, it is necessary to provide for the liability of both the paying agent and the taxable person. This is because it is unacceptable for the paying agent to be liable for a payment on account after the taxable person has paid the tax amount due. Liability for the payment of taxes is not a sanction, or a penalty, similar to an administrative sanction or a criminal sanction. The only implication is that the assets of a particular person are used to guarantee the payment of the amount due and that the payment of such an amount may be enforced against such assets.¹⁵ Accordingly, a statutory provision that makes a paying agent liable for a payment on account and required to enable the enforcement of

¹⁴ *Ordynacja podatkowa. Komentarz praktyczny*, eds. B. Brzeziński, M. Kalinowski, A. Olesińska, Toruń 2017, p. 241.

¹⁵ Cf. M. Kalinowski, *Podmioty biernie stosunku podatkowoprawnego*, pp. 128–133, 144–166.

that payment against his assets despite the fact that the taxable person concerned has already paid the tax amount due would be inefficient and illogical. If the payment on account was enforced, the taxable person would be entitled to claim a deduction of that payment from the tax amount due from him. It follows that if the taxable person has already paid the full tax amount due, such enforcement would create a tax overpayment on the part of the taxable person. Incidentally, it needs to be noted that the provisions of the Polish Tax Act that deal with tax overpayments do not contain any express rules on refunding such overpayments. If it is true that the Polish Tax Act does not contain any rules on such refunds, the only way of recovering the overpayment would be through litigation. However, the person entitled to claim such a refund under the doctrine of unjust enrichment would be not the taxable person but the paying agent, as it is the paying agent at the expense of whom the State Treasury would be unjustly enriched. This, however, would create a paradoxical situation where a paying agent obligated under a tax statute to make a payment on account performs this obligation and, immediately after its performance, may claim a refund of the payment from the State Treasury.

Under these circumstances, the only reasonable remedy would be to limit the liability of the paying agent for late-payment interest on payments on account not made by the deadline.

Finally, in an attempt to regulate the status of *paying agent*, it is necessary to consider one more significant difference between a paying agent as the maker of payments on account and a paying agent as the payer of tax. As noted earlier, when the law imposes an obligation on a paying agent to withhold a payment on account, the only legal relationship created under these circumstances is one between the paying agent and the central government or a local government authority. In consequence, the person to become a taxable person in the future would be a third party in relation to that relationship. It follows that if Polish law does not allow a future taxable person (a third party in our situation) to perform an obligation with the result being the expiry of the legal relationship under tax law between the paying agent and the government, then that third party performing such an obligation for the paying agent

would have to be regarded as a person that made an undue obligation. The repayment by the future taxable person of the paying agent's debt would affect the legal position of the paying agent either, as the paying agent's obligation would not expire.

If, however, the paying agent is to make a payment on account using the funds of a future taxable person that will become entitled to deduct the payment from the tax amount due from him, then it should be proposed that the provision of s. 62b(1) of the Polish Tax Act be amended so that the law allows the future taxable person to make the payment on account.

5. Conclusions

The above analysis leads to the conclusion that the legal status of *paying agent as the maker of payments on account* is not provided for in the Polish legal system. It follows from the analysis that the legal status of such a paying agent is very different from that of the *paying agent as the payer of tax* under the Polish Tax Act. The provisions of the Polish Tax Act that apply to the latter cannot, therefore, be applied directly to the former. The conclusion is that it is necessary to revise at least the provisions dealing with the liability of paying agents under s. 30(1) of the Polish Tax Act and to add provisions governing the liability of the *paying agent as the maker of payments on account*. It is also necessary to amend the provision of s. 30(6) of the Polish Tax Act as regards the liability of such paying agents after the taxable period. Statutory amendments are also needed as regards the deadline for paying agents to make payments on account, as the provision of s. 47(4) of the Polish Tax Act seems to apply to paying agents to a limited extent only.

As regards the legal status of paying agents, it needs to be noted that Polish lawmakers should ensure that whenever a legal institution is established in respect of a tax, the rules for assessing payments on account in respect of that tax are also made. Where such rules are not specified, which is exemplified by s. 18 of the VAT Act, the paying agent's obligation might be regarded as an empty obligation.

Finally, it should be proposed that the provision of s. 62b(1) of the Polish Tax Act be amended so that the law allows the future taxable person to make a payment on account if it is only the paying agent that is legally obligated to make the payment.

SUMMARY

On the need to regulate the legal concept of paying agents withholding taxes at source

The concept of *paying agent* is applied in the Polish taxation system relatively widely. In fact, there has been a tendency to extend its applicability. This tendency would not be a reason for concern if it were not for the fact that there is little reflection among legal scholars and commentators on the legal concept of the term *paying agent*. In consequence, *paying agent* is used to refer to two markedly different legal concepts without drawing any distinction in terminology. More specifically, the word *paying agent* is used to refer not only to a person with the normative characteristics of a paying agent as specified in the Polish Tax Act [Polish: *Ordynacja podatkowa*], but also to a person required by law to withhold tax amounts at source, but for which no such normative characteristics are defined. Moreover, the provisions of the Polish Tax Act that deal with paying agents are applied in either case without drawing any distinctions, although there are serious legal questions to be answered as regards the application of the provisions to the latter, i.e. a person required by law to withhold tax at source.

The existence of these two types of payers of taxes has significant practical implications. The differences between these two types should force lawmakers to pass provisions that distinguish, at least partially, between these two legal concepts.

In particular the authors recommend to make statutory rules dealing with the expiry of the obligations of the taxable person. According to section 59(1)(2) of the Polish Tax Act, when a paying agent collects the tax due from the taxable person, the tax liability expires. This is the case only when the taxable person is legally obligated to pay tax or make a payment on account. However, if no tax statute imposes such an obligation on the taxable person, it is logical that the withholding of a payment on account by the paying agent may not result in the taxable person's obligation expiring, as no such obligation exists. If a person is not legally required to make a tax payment or a payment on account and only a paying agent is legally obligated to withhold a payment on account at source, then such

withholding only creates a right for the person from whom the payment on account was withheld to treat the amount withheld as a future tax liability, which does not exist at the moment of the withholding and which may arise in the future. Consequently, if the withholding of a payment on account by the paying agent only results in the taxable person's right to deduct the amount withheld from the amount due from the taxable person, then the provision of s. 59(1)(2) of the Polish Tax Act must not apply.

The authors indicate also that the meaning of s. 30(1) of the Polish Tax Act is such that the paying agent is liable for his failure to withhold a tax payment or to transfer the tax withheld to the relevant tax authority. In the opinion of the authors', the applicability of this provision to the paying agent is at least questionable. Consequently, it is postulated in the article to amend the relevant provisions of s. 30(1) and s. 30(1) of the Polish Tax Act so that it is clear that the provisions governing the liability of paying agents must apply to persons obligated to withhold payments on account accordingly.

In the article, it is also noted that the relevant tax statutes should definitely be amended to include provisions for the withholding of payments on account by paying agents. The rationale behind it is that a payment on account is an entirely separate and independent payment, the concept of which cannot be derived from the concept of *tax* and, therefore, it is impossible to calculate the amount of such a payment. However, the withholding of payments on account by paying agents is not always sufficiently provided for in Polish statutory provisions.

In the opinion of the authors', it is also necessary to introduce appropriate changes in 47 § 4 of the Polish Tax Act regarding to the date of payment of tax by remitters, e.g. to amend the relevant tax statutes so that the deadlines for the withholding of such payments on account by such paying agents are clear.

As regards the legal status of paying agents, it needs to be noted that Polish lawmakers should ensure that whenever a legal institution is established in respect of a tax, the rules for assessing payments on account in respect of that tax are also made. Where such rules are not specified, which is exemplified by s. 18 of the VAT Act, the paying agent's obligation might be regarded as an empty obligation.

Finally, it should be proposed that the provision of s. 62b(1) of the Polish Tax Act be amended so that the law allows the future taxable person to make a payment on account if it is only the paying agent that is legally obligated to make the payment.

Keywords: paying agent; withholding agent; tax remitter; paying agents of a payment on account; Tax Ordinance Act

STRESZCZENIE

O potrzebie regulacji instytucji płatnika zaliczek na podatek

W polskim systemie podatkowym instytucja płatnika podatku jest wykorzystywana w stosunkowo szeroki sposób. Co więcej, można dostrzec tendencję polegającą na coraz szerszym jej wykorzystywaniu. Ta tendencja nie budziłaby większego niepokoju, gdyby nie fakt, że nie towarzyszy jej refleksja doktrynalna nad instytucją prawną płatnika podatku. W polskim systemie podatkowym nazwa płatnika jest nadawana bez zróżnicowania dwóm istotnie różniącym się instytucjom prawnym, tj. płatnikom podatków oraz płatnikom zaliczek na podatek. Status prawny tych ostatnich podmiotów znacznie odbiega od statusu prawnego płatników podatku. Stąd też nie da się do nich stosować regulacji prawnych zawartych w Ordynacji podatkowej dotyczących płatników podatku. W artykule poddano analizie istotne różnice między płatnikiem podatku a podmiotem zobowiązanym do poboru zaliczek.

Istnienie różnic między tymi dwiema figurami podmiotowymi wymaga na ustawodawcy konieczność odrębnego unormowania obu tych instytucji prawnych, co skłania autorów do sformułowania wniosków *de lege ferenda*.

Konieczne jest w szczególności odrębne unormowanie zasad wygasania zobowiązań samego podatnika. Zgodnie z art. 59 § 1 pkt 2 Ordynacji podatkowej pobranie podatku przez płatnika powoduje wygaśnięcie zobowiązania podatkowego. Tak może się stać w wypadku, gdy na podatniku ciąży zobowiązanie z tytułu podatku czy też zaliczki na podatek. Jeśli jednak przepisy ustawy podatkowej nie nakładają na ten ostatni podmiot takiego obowiązku, to logicznie rzecz biorąc, pobranie przez płatnika zaliczki na podatek nie może pociągać za sobą wygaśnięcia zobowiązania podatnika, które nie istnieje. Pobranie zaliczki na podatek prowadzi bowiem jedynie do powstania po stronie osoby, od której pobrano tę zaliczkę, uprawnienia do zaliczenia jej kwoty na przyszłe zobowiązanie podatkowe, które w chwili dokonywania poboru jeszcze nie powstało, a które może powstać w przyszłości. W konsekwencji, jeśli pobór zaliczki przez płatnika pociąga za sobą jedynie powstanie prawa podatnika do jej odliczenia od należnej kwoty podatku, to w tej sytuacji nie może znaleźć zastosowania art. 59 § 1 pkt 2 Ordynacji podatkowej. Stąd w artykule sformułowano postulat dokonania zmian w treści tego przepisu, wyraźnie ograniczając jego zakres do tych sytuacji, w których płatnik dokonuje poboru podatku, wyłączając zaś z jego zakresu sytuacje, w których zostaje potrącona zaliczka na podatek, a której obowiązek uiszczenia przez podatnika na rzecz państwa

lub innego związku publicznoprawnego nie został ustanowiony w drodze ustawowej.

W artykule wskazano także, że do ustanowienia przepisów, które mogłyby być stosowane do płatników zaliczek na podatek, konieczna jest nowelizacja przepisu art. 30 § 1 i 6 Ordynacji podatkowej regulującego odpowiedzialność płatników podatku. Zgodnie z art. 30 § 1 Ordynacji podatkowej płatnik ponosi odpowiedzialność za podatek niepobrany lub też niewpłacony na rachunek organu podatkowego. W obecnym stanie prawnym możliwość zastosowania tego przepisu do płatnika zaliczek zdaniem autorów jest co najmniej wątpliwa. Ustawy podatkowe ustanawiające płatników zaliczek na podatek nie nakładają jednocześnie na podatników obowiązku ich uiszczenia, lecz jedynie nakładają na te pierwsze podmioty obowiązek pobrania ich od określonych osób, na te ostatnie zaś nakładają jedynie obowiązek znoszenia działań płatników. W ramach tego mechanizmu normatywnego płatnicy nie pobierają podatków w rozumieniu Ordynacji podatkowej. Jeśli zaś nie pobierają oni należności, o których mowa w art. 8 § 1 Ordynacji podatkowej, to z normatywnego punktu widzenia nie mogą oni ponosić odpowiedzialności na podstawie art. 30 § 1 Ordynacji podatkowej.

W artykule stawiany jest również postulat, zgodnie z którym w poszczególnych ustawach podatkowych należałoby bezwzględnie normować konstrukcję prawną zaliczek pobieranych przez płatników. Jest to konieczne ze względu na fakt, że taka zaliczka jest całkowicie odrębną i autonomiczną płatnością, której konstrukcji nie sposób wyprowadzić z konstrukcji samego podatku, a w konsekwencji również obliczyć jej kwoty. Tymczasem zdaniem autorów ustawodawca nie zawsze czyni to w sposób zadowalający.

Wreszcie, konieczne jest także wprowadzenie odpowiednich zmian w art. 47 § 4 Ordynacji podatkowej dotyczącym terminu wpłaty podatku przez płatników.

Ustawodawca powinien również zadbać o to, by w każdym wypadku, gdy ustanawiana jest instytucja prawna płatnika zaliczek w poszczególnych podatkach, unormował zasady ustalania kwoty tych zaliczek. Brak takich unormowań prowadzi bowiem do sytuacji, w której płatnik nie jest w stanie ustalić zakresu swoich obowiązków.

W artykule zaproponowano też modyfikację art. 62b § 1 Ordynacji podatkowej poprzez dopuszczenie zapłaty zaliczki na podatek przez samego przyszłego podatnika w sytuacji, gdy zobowiązanie z tytułu tej zaliczki ciąży jedynie na płatniku.

Słowa kluczowe: płatnik podatku; płatnik zaliczek na podatek; potrącenie podatku u źródła; Ordynacja podatkowa

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