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New types of “invoice” crimes in the Polish Criminal Code as an attempt to “effectively” prosecute perpetrators of VAT fraud

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1. Value added tax as the “perfect” intermediate tax

Taxes or other public levies have been a regular part of reality for centuries. However, the current growing spending needs of the public finance sector have resulted in taxes appearing in virtually every sphere of social life. This phenomenon is also associated with the introduction of new types of taxes. The current important source of public revenue is the so-called indirect taxes, i.e., taxes on expenditure – on consumption. In contrast to income taxes, where the public-law relationship is directly linked to the taxpayer’s income, in this case their relationship to income is hidden, because formally the subject of taxation is linked to another phenomenon, which

is the expenditure of income.¹ A typical example of indirect taxes is consumption taxes, where the actual tax burden lies with the purchasers of goods and services and the subject of taxation is the acquisition of specific goods and services. It is the purchasers who pay the “amount” of the tax, which is a component of the purchase price. However, the taxpayer in this case is not the purchaser of the goods or services (consumer), but the seller. The taxes in this group include excise tax and the goods and services tax. The latter is a common tax, i.e., in somewhat simplified terms, it is charged to each entity conducting business activity which participates in the process of distribution of a given good or service covered by the tax to the consumer. And undoubtedly, the tax on goods and services is a turnover tax, but its construction was intended to ensure that although it appears at every stage of trade in goods or services, it does not effectively burden the purchaser – the taxpayer of this tax. This feature of the tax is defined as its neutrality. In other words, a taxpayer purchasing goods and services charged with goods and services tax, which are necessary for the sale of goods and services by this taxpayer, also charged with this tax, has the right to deduct the entire goods and services tax related to the purchase of goods and services (the so-called input tax) from the amount of tax he is to pay on his turnover (the so-called output tax). Moreover, without entering into complicated detailed considerations, if in a given tax settlement period, the amount of input tax is greater than the amount of output tax, the taxpayer may even demand a refund of that excess from the tax authority. This, in turn, means the possibility of receiving a specific financial benefit from the tax office.

There is also another important aspect for further consideration. As a tax on turnover, the tax on goods and services is subject to EU harmonization. This follows from the fact that, owing to the abolition of customs borders between the member states of the European Union and the related free movement of goods and services

¹ B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki*, Toruń 2017, p. 137.

between the EU countries, the different tax policies of the member states in the field of indirect taxes could obstruct this principle.² Nevertheless, the so-called EU standards in the sphere of the tax burden in the goods and services tax determine the minimum and maximum rates of this tax, making these rates different in individual member states. And in order not to create again tax competition between member states and not to disadvantage the position of entities from countries with a higher rate of this tax, the principle is to tax the supply of goods in the destination country, while the trade of goods between member states is subject to a "zero" rate of goods and services tax. Furthermore, it should be noted that the abolition of customs borders within the European Union has also contributed to the escalation of the scale of VAT fraud, as the border control of goods transfers has been eliminated, and this has contributed to an even greater decline in the supervision of customs and tax authorities over the actions of taxpayers, especially in trade between different countries, i.e. different authorities of this administration.

In other words, when goods are sold between taxpayers of this tax from two different countries of the European Union, the consignor of the goods is charged a "zero" rate, while the tax obligation arises in the purchaser's destination country – also the taxpayer of this tax. The latter, however, is not yet liable to pay the tax, since on acquisition he calculates the amount of input tax and then deducts it in full. The actual tax effect should therefore arise at a later stage of the distribution of goods in the destination country. In a perfect model, the real tax effect should have been created after the addition of the margin and further sale of goods imported from another EU country. In such a case, the goods tax would be calculated on the net amount of the purchase, plus the margin of the vendor - the previous buyer of the goods within the framework of the intra-community delivery.

² See: S. Fedeli, F. Forte, *International VAT Fraud: The Carousel Game*, "Journal of Modern Accounting and Auditing" March 2011, vol. 7, No. 3, p. 213, who clearly assume that the increase in VAT fraud was precisely the result of the introduction of the common market in the European Union countries in 1993.

2. New forms of tax fraud based on the characteristics of VAT structure

The tax on goods and services, which is charged on turnover, is therefore typically associated with tax evasion, i.e. economic activity conducted in the so-called “grey market”. Because this tax is so common in economic turnover, a typical form of tax evasion is the failure to disclose the turnover for fiscal purposes. In many cases, the consumer himself also benefits financially, since the price he pays is not burdened with tax mark-ups and is therefore lower than the market price. This phenomenon concerns small-scale economic activity, services in particular. Therefore, in this case, legal solutions are applied to limit this kind of phenomenon, such as e.g. the obligation to register turnover at the fiscal cash register or the obligation to issue fiscal receipts from transactions covered by this tax. In some countries these fiscal obligations go beyond the obligations of the taxpayer himself – e.g. in Italy, it is the consumer buying services in restaurants or bars who is obliged to collect the fiscal receipt and the breach of this obligation is formally a separate fiscal tort.³ These forms of tax evasion, however, also concern any other type of tax.

On the other hand, the structure of the tax on goods and services has become a direct basis for the emergence of new ways of tax fraud.⁴ What is more, although it seems to contradict the key feature of each tax, which is the non-refundability of the obligation to provide funds to the public creditor, the features of structure of this tax have become the basis for the fraudulent acquisition of funds from the State. With regard to these new forms of VAT evasion, there are two key features of VAT that have been decisive

³ M. Kean, S. Smith, *VAT Fraud and Evasion: What Do We Know and What Can Be Done?*, “National Tax Journal” December 2006, vol. LIX, No 4, p. 866.

⁴ J. Pastuszka, *Planowane rozwiązania ograniczające lukę podatkową VAT w Polsce*, „Kontrola Państwowa” July-August 2016, No. 4, p. 103; S. Fedeli, F. Forte, *International VAT Fraud: The Carousel Game*, pp. 211–213.

in this respect. The first one is the principle of neutrality of this tax, i.e. the right of the taxpayer to deduct the amounts of the tax on goods and services purchased for the purposes of sales subject to this tax. The second key feature of this tax is the zero rate for intra-Community supplies of goods. In the actual trade of goods, a complex VAT fraud has appeared, referred to as the "tax carousel". It is related to a supply chain where some transactions are not economically significant, but are crucial for tax evasion. In a nutshell, there are at least three parties in this scheme: the first party (A) makes an intra-community supply to the second party (B). Party B makes the supply to the final purchaser – party (C), i.e., the subject at the end of this "distribution" process, who is often unaware of being involved in fraudulent tax activity. Party A applies for a refund of the input tax on goods and services that he previously purchased in order to sell it to party B (i.e., he receives an appropriate profit – a refund of the tax included in the purchase price). Party B, in turn, does not settle the tax with the tax office, as it is the so-called disappearing taxpayer.⁵ This scheme occurs mainly within the framework of intra-community supplies, but this phenomenon also takes place on internal markets.⁶ Thus, the various models of this scheme of fraud are rightly emphasized. One of its manifestations is e.g. a fictitious supply to another EU member state and the actual sale of goods in the country, without paying the due goods and services tax. This action may therefore also take the form of an act of unfair competition – goods sold at prices below the market price are placed on the market, precisely because of the lack of fiscal burdens in the price.⁷ However, the

⁵ See: W. Kotowski, M. Majczyna, J. Matarkewicz, B. Sobocha, M. Zborowski, I. Ożóg (ed.), *Przestępstwa karuzelowe i inne oszustwa VAT*, Warszawa 2017, pp. 20–24; F. Borselli, *Pragmatic Policies to Tackle VAT Fraud in the European Union*, "International VAT Monitor" September/October 2008, pp. 333–334.

⁶ See: L. Sergiou, *Value Added Tax (VAT) Carousel Fraud in the European Union*, "Journal of Accounting and Management" 2012, vol. 2, No. 2, pp. 10–11.

⁷ Cf. B. Zaleska, K. Dziadek, *Odwrotne obciążenie podatkiem VAT przedmiotem kontroli zarządzającej*, „Zeszyty Naukowe Uniwersytetu Szczecińskiego”, No. 833, „Finanse, Rynki Finansowe, Ubezpieczenia” 2014, No. 72, pp. 271–272.

essence of this scheme is always to introduce the so-called disappearing taxpayers into the middle of the transaction chain.

To summarize this reflection stream, new forms of VAT fraud, closely related to its structure, can be divided into two dominant groups. The first one consists of undue deduction of input VAT and is based on the use of so-called “blank” invoices or invoices documenting the actual purchase of goods and services, which, however, had no connection with the taxed sale to the buyer. The second group is based on the evasion of due VAT by understating actual turnover for tax purposes or on the “loss” of due VAT in the “carousel” fraud.⁸

The doctrine emphasizes that after the introduction of this tax in EU countries and the abolition of customs borders, its supposedly “ideal” structure was uncovered for the purposes of new methods of VAT evasion. It is evident that this has become common knowledge, which has made the phenomenon of VAT evasion a problem for the entire European Union. And undoubtedly, the growing scale of the losses is also connected with the acquisition of knowledge and experience about the systemic failure to counteract this phenomenon, knowledge about the nature of this tax, and loopholes in the tax system, providing a considerable sense of impunity and unreasonably high benefits.⁹ And there is nothing that encourages fraud like the benefits and the sense of impunity.

It is reported that in the EU countries the total annual amount of lost VAT proceeds is estimated to be between 60 billion and

⁸ A. Altunbasak, *An Examination and Evaluation of the Value Added Tax Frauds in the European Union Upon Leading Cases*, “Law & Justice Review” June 2016, year 7, issue 12, p. 349.

⁹ A typical example of the increase in the scale of such practices in Poland, related to the scale of construction investments concerning the organization of Euro 2012, was the mass share of steel products on which VAT was not paid on the market. The key mechanism of avoiding payment of this tax and offering products even at prices lower than the sales prices from Polish steel mills was the carousel fraud, associated with the simulation of the so-called Community supply of goods, while steel products were delivered to the domestic market. See more: J. Binda, R. Będzikowski, *Przestępczość podatkowa i oszustwa finansowe zagrożeniem dla finansów publicznych w Polsce*, „Zeszyty Naukowe WSFiP” 2014, No. 3, pp. 104–106.

100 billion euros. Moreover, in some countries there has been a significant increase in the total loss, e.g. in Sweden in 2007 the lost VAT proceeds were calculated at SKR 35 billion, while in 2002 they were "only" SKR 1.6.¹⁰ In 2005–2006, lost VAT proceeds in the UK were valued at EUR 18.2 billion, while in Germany the gap was EUR 17 billion in 2007.¹¹ The latest EU report on the scale of the VAT gap in 2018 highlights an improvement in the situation, but the phenomenon still cannot be eliminated. According to the European Commission, the smallest tax gap in 2018 was found in Sweden (0.7%), Croatia (3.5%) and Finland (3.6%). However, there are EU countries with a very high tax gap ratio, above the EU average of 11%, and in 2018 they included Romania (33.8%), Greece (30.1%), and Lithuania (25.9%). There is no doubt that in the EU countries with strong economies, despite a decrease in the size of the VAT gap, the nominal amount of the VAT gap is still significant – Italy (35.4 billion euros), Great Britain (23.5 billion euros) and Germany (22 billion euros).¹² In the context of Poland, the report is quite optimistic. It indicates that between 2014 and 2018, the VAT gap level dropped from 24.4% to 9.7%.¹³ Nevertheless, the years 2010–2013 in Poland were also marked by a dynamic increase in the scale of the tax gap, from PLN 20 billion PLN in 2010 to PLN 45 billion in 2013. It is assumed that this growth was a result of increased activity of tax fraudsters.¹⁴ It is rightly pointed out that in many cases VAT tax fraud is the result of the activity of typical

¹⁰ L. Sergiou, *Value Added Tax (VAT) Carousel Fraud in the European Union*, p. 13.

¹¹ S. Fedeli, F. Forte, *International VAT Fraud: The Carousel Game*, p. 213.

¹² Full report: Study and Reports on the VAT Gap in the EU-28 Member States 2020 Final Report, https://ec.europa.eu/taxation_customs/sites/taxation/files/vat-gap-full-report-2020_en.pdf, p. 9 (access: 13.09.2020).

¹³ Study and Reports on the VAT Gap, p. 44, https://ec.europa.eu/taxation_customs/sites/taxation/files/vat-gap-full-report-2020_en.pdf, (access: 13.09.2020).

¹⁴ M. Malesa, *Efektywność polskiego systemu VAT w świetle wzrostu skali oszustw podatkowych*, in: *Przedsiębiorstwa, banki, polityka regionalna w nowej perspektywie finansowej UE*, eds. J. Grzywacz, S. Kowalski, „Zeszyty Naukowe PWSZ w Płocku, Nauki Ekonomiczne” 2015, v. XXII, p. 264.

criminal groups. And it does not concern a taxpayer who has been operating for many years, but groups of people who instrumentally use commercial law institutions (e.g. limited liability companies) to “lose” the VAT due by creating a transaction chain. In this respect we can observe two important features of this scheme: this type of economic activity is based on a predetermined intention to reduce the tax burden, or even an intention to obtain money from the state by deception, by improperly demanding a refund of the excess input VAT. The second feature is the fact that the entities “pretending” to be taxpayers are registered by the figureheads or represented by the so-called “dummies”, i.e., persons who lend their names to the actual organizers of the underhand dealings and their actual beneficiaries.¹⁵ One of the features of this scheme is the only temporary “use” of legal entities registered as taxpayers and the introduction of new, previously inactive taxpayers into the transaction chain. Such a move also makes it difficult to reveal criminal practices at the financial flow stage. The tasks of the figureheads include: registering a company and registering it as a taxpayer of value added tax, setting up and operating a bank account, withdrawing money from the account, issuing documents, including VAT invoices, concealing the documentation of a given “company”, and lack of cooperation with tax and law enforcement authorities. The analysis of the conducted cases shows clearly that the scale of activity of only one figurehead may be significant: e.g. one of the suspects has issued invoices amounting to PLN 100 million gross in just four months (this was connected with a visible increase in the value of invoices issued by such “taxpayers” since 2010).¹⁶

¹⁵ J. Pastuszka, *Planowane rozwiązania ograniczające lukę podatkową VAT w Polsce*, p. 107. See also: J. Duży, *Ściganie przestępczości zorganizowanej w zakresie obrotu złomem i paliwami*, „Prokuratura i Prawo” 2010, No. 7–8, pp. 74–75.

¹⁶ K. Nowak, *Wybrane zagadnienia dotyczące działalności tzw. słupów w ramach zorganizowanych grup przestępczych dopuszczających się oszustw podatkowych w związku o obrotem wyrobami stalowymi*, „Przegląd Bezpieczeństwa Wewnętrznego” 2014, No. 10, pp. 172–173. The author emphasizes that it is not possible to work out one profile of a figurehead. Certainly, it is not only

Another consequence of the criminal groups' involvement in tax fraud is the very low efficiency of tax administration. The doctrine indicates that tax offices have effectively recovered 2.3% of their tax arrears. This was caused precisely by the pre-planned fraud schemes - the collection targeted entities that were no longer active, entities that did not have any assets at the time of the collection and whose representatives and owners, as a rule, were lending their name to other people's activity (so-called "dummies") and had no assets, which practically eliminates any effectiveness of possible liability of third parties for tax arrears (including the obvious impossibility of identifying the person whose activity was being endorsed).¹⁷

At this point we arrive at two more important issues related to this type and scale of tax fraud: the first one is connected with the possibility of deferring the tax burden, while the other - with the importance of the documentation in the form of a VAT invoice. Tax fraudsters have taken advantage of the fact that the purchase of goods/services gives the right to deduct VAT. The obligation to pay the tax arises only when the taxable sale exceeds the value of purchased goods and services. As a rule, then, the right to deduct, including the right to claim a refund of the excess input VAT was created first. Formally, the right to deduct tax is connected with obtaining an invoice with input VAT. It comes as no surprise that a VAT invoice is referred to as a "bill to the government", because in a scheme based on a fraudulent claim for a refund of excess input tax, a VAT invoice that entitles to deduct the amount of input tax becomes a key tool in this act. The Dutch experience shows that 44% of this tax fraud was based on the use of a so-called "blank" VAT invoice.¹⁸ This means that a VAT invoice has been an important

the unemployed and poorly educated people; every seventh person of those involved in criminal cases had higher education; *ibidem*, p. 178.

¹⁷ W. Kotowski, M. Majczyna, J. Matarkewicz, B. Sobocha, M. Zborowski, I. Ożóg (ed.), *Przestępstwa karuzelowe*, p. 119.

¹⁸ M. Kean, S. Smith, *VAT Fraud and Evasion: What Do We Know and What Can Be Done?*, "National Tax Journal" December 2006, vol. LIX, No 4, p. 867.

tool in many tax frauds, which is directly related to the importance of the tax document in this very tax.

3. VAT invoice and its meaning in VAT structure and tax fraud; the concept of the “blank” invoice

The VAT invoice is a very important document for the settlement of VAT, which has also made it an important element of new tax frauds in this area. The importance of this document results of course from the tax law regulations. The occurrence of an event which causes the VAT obligation to arise is also connected with the creation of a separate, so-called instrumental tax obligation.¹⁹ Without moving into a very complex topic, in a nutshell, it is the obligation to register the tax event at the fiscal cash register or the obligation to issue a VAT invoice.

The latter document has a special tax significance in transactions between taxpayers of this tax. The recipient (purchaser) of the goods or services being in possession of a VAT invoice is one of the conditions for obtaining the right to reduce the amount of output tax to the extent that the purchased goods or services are used for the subsequent performance of activities covered by this tax.²⁰ Nevertheless, this invoice must be correct in formal and material terms; in other words, its content must comply with the requirements of the Act, but at the same time it must reflect the true course of the economic operation. This means that its issuer should be an active taxpayer of this tax and the content of this invoice should cover not just any supply or service, but the supply of goods or performance of services of the type and quantity described in the invoice. Obviously, the issuer of the VAT invoice must

¹⁹ W. Kotowski, M. Majczyna, J. Matarkewicz, B. Sobocha, M. Zborowski, I. Ożóg (ed.), *Przestępstwa karuzelowe*, pp. 68–70.

²⁰ *Ibidem*, pp. 74–75.

be the entity that actually made the supply of goods or services referred to in the invoice.²¹ Therefore, a document displaying the characteristics of a VAT invoice that reveals a business event that did not actually take place or that documents the actual supply of goods or performance of a service that was performed by another “undetermined” entity, i.e. an entity other than the one indicated in the invoice as its issuer, is called a “blank” invoice.²²

4. “Invoice” amendment to the Penal Code

The low effectiveness in limiting the growing scale of VAT fraud in Poland has become a direct reason for the introduction of new “invoice” offences into the Penal Code. The new criminal legislation was introduced on 1 March 2017 by virtue of the Act of 10 February 2017 amending the Penal Code and certain other acts (Journal of Laws, item 244). The amendment added to the Penal Code the following provisions:

- provisions of Article 270a (1–3) of the Penal Code, covering three new types of offences of VAT invoice counterfeiting: the basic type (Article 270a (1) of the Penal Code), the qualified type (Article 270a (2) of the Penal Code) and the privileged type, the so-called act of a lesser significance (Article 270 a (3) of the Penal Code);
- provisions of Article 271 a (1–3) of the Penal Code, covering three new types of offences, the so-called attestation of false information in the content of a VAT invoice: the basic type (Article 271 a (1) of the Penal Code), the qualified type (Article 271 a (2) of the Penal Code) and the privileged type, the so-called act of a lesser significance (Article 271 a (3) of the Penal Code). However, it is rightly pointed out that in this case the occurrence of the basic offence depends on the

²¹ Ibidem, p. 78.

²² K. Patora, *Zbrodnia wystawiania pustych faktur*, „Acta Universitatis Lodziana, Folia Iuridica” 2019, No. 86, pp. 93–94.

value of the invoice(s) issued. For the act to be performed it is necessary that the gross amount of receivables from the invoice(s) be at least significant, which, according to Article 115 (5) of the Penal Code means the amount of at least PLN 200,000.00. An invoice that attests false information below this value shall not exhaust the criteria for a criminal offence under Article 271(1a) of the Penal Code (which does not mean the possibility of a different penal evaluation, e.g. on the basis of Art. 62(1a) of the Fiscal Penal Code).²³

The independent circumstances constituting the “qualified types” of Art. 270a of the Penal Code and Art. 271a of the Penal Code include:

- creating a permanent source of income from committing these crimes;
- issuing an invoice or invoices the total value of which exceeds five times the property of significant value, which in relation to Art. 115 (5) of the Penal Code means the amount of at least one million zlotys.

Moreover, provisions of Article 277a of the Penal Code, covering qualified types of offences under Article 270a of the Penal Code and Article 271a of the Penal Code, which the Act classified as the most serious category of offences, i.e. felony, have also been introduced to the Penal Code. The circumstance determining the qualification of this act as an invoice felony is the total value of the invoices or an invoice, exceeding ten times the property of great value, which in relation to Article 115(6) of the Penal Code means an amount higher than ten million zlotys.

The new penal regulations clearly indicate that the acts concerning VAT invoices must have a tax context. This means that the issue or use of a counterfeit or unreliable VAT invoice for non-tax purposes, e.g. for the extortion of a bank loan, will not exhaust the criteria for any of the new provisions of the Penal Code referring to

²³ A. Liszewska, *Odpowiedzialność karna za wystawianie faktury w sposób nierzetelny lub używanie takiej faktury po nowelizacji Kodeksu karnego*, „Przełęcz Podatkowy” 2017, No. 9, p. 19.

"blank" invoices.²⁴ This shows the key aspect of this amendment to the Penal Code, which is to move the penalization to the foreground of the actual tax fraud or extortion of undue reimbursement of this tax.²⁵ For the existence of each of these offences, it is of no importance whether there has been any tax loss through the use of a counterfeit or unreliable invoice, or even a fraudulent reimbursement of the excess amount of input VAT over output VAT. By the way, it should be pointed out that this is a document which has the characteristics of a VAT invoice, but which, due to its false or unreliable content, is in fact not a VAT invoice within the meaning of tax regulations, i.e. it is not a document granting the right to e.g. deduct input VAT.²⁶

Other consequences of this amendment also seem to include a shift in the burden of prosecuting such practices under the provisions of the Penal Code and not under the provisions of the Fiscal Penal Code. Hence, we have other obvious objectives and effects of such legislature. The first of them is a clear lack of association of the features of each of these acts with the occurrence of tax arrears. This means that it is not formally necessary to determine the value of the tax arrears, which is a key aspect of each of the tax frauds under Articles 54–56 of the Fiscal Penal Code. In other words, tax decisions determining the tax arrears should not have a procedural meaning for the purposes of criminal proceedings involving the acts under the Fiscal Penal Code related to "blank" invoices.²⁷

²⁴ M. Utracka, *Przestępstwa fakturowe: czy są przestępstwami przeciwko wiarygodności dokumentów?*, „Czasopismo Prawa Karnego i Nauk Penalnych” 2018, z. 3, p. 101; K. Radzikowski, *Nowelizacja kodeksu karnego i kodeksu karnego skarbowego w zakresie tzw. przestępstw fakturowych*, „Przegląd Podatkowy” 2017, No. 3, p. 36.

²⁵ See: V. Konarska-Wrzosek, *Przestępstwa fakturowe – ich waga, kwalifikacja prawna i miejsce w systemie polskiego prawa karnego*, „Ius Novum” 2017, No. 2, pp. 88–89, which accurately assesses the issuance of a "blank" invoice for tax purposes as a stage of preparation for tax fraud and its posting before the tax settlement period as a stage of attempted fraud.

²⁶ T. Oczkowski, in: *Kodeks karny. Komentarz*, wyd. 2, ed. V. Konarska-Wrzosek, Warszawa 2018, p. 631.

²⁷ As rightly observed by K. Radzikowski, *Nowelizacja kodeksu karnego i kodeksu karnego skarbowego w zakresie tzw. przestępstw fakturowych*, p. 45. It

Undoubtedly, the purpose of this amendment to the Penal Code was also to make the process of introducing “blank” invoices into the tax market, clearly criminal in nature, while at the same time making the punishment more severe. These new regulations then became special in comparison with other regulations of the Penal Code, which provide for the punishability of acts against the credibility of documents.²⁸ The common crimes are felt to be socially more harmful and socially stigmatized than the acts forbidden in the Fiscal Penal Code.

Finally, another aim and effect of the amendment was to prevent the perpetrators from benefiting from special instruments of the Fiscal Penal Code, performing the illusory function of enforcement. A special provision of the Fiscal Penal Code is Article 16A which ensures the complete impunity of the perpetrator if he uses the instrument of a corrected tax return. The doctrine correctly emphasizes the “criminogenic” aspects of Art. 16a of the Fiscal Penal Code, related to the extra-code extension of the right to effectively file a correction of the tax return, including the irregularities found as a result of the tax inspection.²⁹ It is true that the instru-

should be emphasized, however, that on the grounds of the Fiscal Penal Code in the field of prosecution of tax fraud in criminal proceedings, there is no clear position on the necessity to issue decisions determining the tax arrears, the jurisdictional independence of the criminal court in determining the amount of the tax arrears in judging tax fraud is advocated by: G. Łabuda, *Zawieszenie postępowania karnego skarbowego ze względu na prejudykat*, “Prokuratura i Prawo” 2011, No. 3, p. 82; J. Duży, *Kompetencja sądu karnego do ustalenia kwoty uszczuplonego podatku*, “Prokuratura i Prawo” 2014, No. 1, p. 115; I. Zgoliński, in: *Kodeks karny skarbowy. Komentarz*, ed. I. Zgoliński, Warszawa 2018, pp. 380–382. Unlike M. Charkiewicz, *Samodzielność jurysdykcyjna sądu karnego na gruncie art. 54 i 56 ustawy Kodeks karny skarbowy – rzeczywistość znana i nieznaną*, „Prawo i Podatki” 2012, No 12, p. 20.

²⁸ A. Liszewska, *Odpowiedzialność karna za wystawianie faktury w sposób nierzetelny lub używanie takiej faktury po nowelizacji Kodeksu karnego*, p. 18.

²⁹ See more: L. Wilk, *Prawo karne skarbowe jako instrument egzekwowania podatków*, „Palestra” 2010, No. 3, pp. 20–21; I. Sepioło-Jankowska, *Optymalny model odpowiedzialności prawnej za czyny karne skarbowe*, Warszawa 2016, p. 162; J. Sawicki, *Zaniechanie ukarania sprawcy przestępstwa skarbowego i wykroczenia skarbowego – próba oceny i kierunki zmian*, in: *Kodeks karny*

ment of corrected tax return involves the payment of tax arrears. This, however, does not change the fact that this provision was an excellent mechanism for ensuring complete impunity for tax fraud with “blank” invoices. In other words, in the case of an inspection of a VAT payer who issued “blank” invoices, the scope of activity revealed during the inspection was taken into account by the recipients of these invoices within the very instrument of corrected tax return. It should be added that the correction carried out with regard to the recipients of the blank invoices was only adequate within the scope of the tax inspection and did not cover other tax years. Therefore, the solution under Article 16A of the Fiscal Penal Code was a great tool to ensure impunity for tax fraudsters. No provision of the Penal Code guarantees such a drastic preference for perpetrators of crimes to the detriment of other people’s property interests, even if the damage caused by e.g. a fraud is repaired in full (see Article 295 of the Penal Code, see also Article 277 c and d of the Penal Code) – the latter concern precisely “invoice” crimes and may improve the legal situation of the convicted offender in the case of prior return of the “tax” benefits obtained, but they do not ensure total impunity under the law.

5. Final conclusions

The introduced amendment gives rise to justified critical comments. In particular, they concern a drastic and systemically incoherent statutory threat or are associated with difficulties in the unambiguous interpretation of their features, constituting a breach of the guarantee function of criminal law. The doctrine correctly points out, especially in the context of the offence under Article 277a of the Penal Code, that we are dealing here with an abnormally high criminal threat, which is systemically incoherent, i.e. far removed

from the previous criminal policy. It is difficult to justify the fact that acts against the credibility of tax documents have a higher criminal threat than the crime of human trafficking (Art. 189a of the Penal Code), the crime of battering rape (Art. 197(4) of the Penal Code) and a threat actually similar to the most serious crime, which is murder (Art. 148(1) of the Penal Code).³⁰ If we add to this that the upper limit of the sentence of imprisonment for multi-million fraudulent extortion of an undue refund of VAT cannot, as a rule, exceed 10 years, this position should be considered fully justified.

The introduction of “blank” invoices to the market or their use could have been classified as common offences even before the amendment entered into force, even though acts against taxes should as a rule be prosecuted on the basis of another codification, the Fiscal Penal Code.³¹ It should also be clearly emphasized

³⁰ As rightly observed by K. Radzikowski, *Nowelizacja kodeksu karnego i kodeksu karnego skarbowego w zakresie tzw. przestępstw fakturowych*, p. 36.

³¹ However, this issue is very complex and has been linked to the problem of assessing the relationship between identical provisions of the Fiscal Penal Code and the Penal Code, where the prevailing position, both in doctrine and jurisprudence was that the use of “blank” invoices for tax fraud should be prosecuted under the provisions of the Fiscal Penal Code as special provisions, see: I. Zgoliński, *Wystawienie lub postępowanie się nierzetelnym dokumentem podatkowym*, “Prokuratura i Prawo” 2012, No. 3, pp. 164–168; T. Oczkowski, *Glosa do uchwały składu 7 sędziów Sądu Najwyższego z dnia 30 września 2003 r.*, *sygn. I KZP 22/03*, OSNKW 2003, No. 9–10, item 75, „Studia Iuridica Toruniensia” 2008, No. 1, p. 163; M. Zwolińska, *Glosa do postanowienia SN z dnia 8 kwietnia 2009 r.*, IV KK 407/08, „Palestra” 2012, No. 3–4, pp. 169–175; M. Szafaryn, *Glosa do postanowienia SN z dnia 8 kwietnia 2009 r.*, IV KK 407/08, „Prokurator” 2009, No. 3–4, pp. 108–117; J. Kanarek, *Glosa do uchwały SN z dnia 24 stycznia 2013 r.*, I KZP 19/12, „Palestra” 2013, No. 7–8, pp. 173–177; L. Wilk, *Glosa do uchwały SN z dnia 24 stycznia 2013 r.*, I KZP 19/12, „Orzecznictwo Sądów Polskich” 2013, No. 7–8, pp. 602–609; J. Duda, *glosa do uchwały składu siedmiu sędziów Sądu Najwyższego z 24 stycznia 2013 (I KZP 19/12)*, „Czasopismo Prawa Karnego i Nauk Penalnych” 2013, z. 1, pp. 123–133, see also K. Eichstaedt, *Idealny zbieg przestępstw z art. 286 § 1 k.k. i art. 76 § 1 k.k.s.*, „Prokuratura i Prawo” 2012, No. 7–8, pp. 25–30; J. Sawicki, *Z problematyki idealnego zbiegu czynów karalnych w prawie karnym skarbowym*, „Prokuratura i Prawo” 2015, No. 12, pp. 35–36; P. Kardas, *O wzajemnych relacjach między przepisem art. 76 § 1 k.k.s. a przepisem art. 286*

that the amendment does not in any way solve the problem of the double-track criminal reaction to certain acts against fiscal interests, which may also foster the feeling of impunity for members of criminal groups. The Fiscal Penal Code essentially provides for a fine, but this cannot ultimately disregard the financial situation of the convicted person, and it is clear that the typical "figurehead" did not possess any property. As a result, many perpetrators have been interested in having their tax frauds involving "blank" invoices conducted and judged solely on the basis of the provisions of the Fiscal Penal Code, within the framework of proceedings conducted by tax authorities as prosecutors in fiscal and criminal cases. It is in their interest to "escape" from criminal evaluation under the provisions of the Penal Code, with the prosecutor as a key figure in "common" criminal proceedings. It should be remembered that the multiplicity of criminal assessments does not change the key principle of *ne bis in idem* – in a case concerning one act, one proceeding can be conducted and only one ruling can be made.³² However, this issue undoubtedly goes beyond the framework of this article and is connected with another problem, which is the necessity of maintaining the Fiscal Penal Code as a separate branch of criminal law designed to prosecute harmful actions against various

§ 1 k.k., „Prokuratura i Prawo” 2008, No. 12, pp. 28–31; O. Włodkowski, *Przegląd orzecznictwa Sądu Najwyższego w sprawach o przestępstwa skarbowe i wykroczenia skarbowe za rok 2014*, „Prokuratura i Prawo” 2016, No. 1, p. 133; O. Włodkowski, *Przegląd orzecznictwa Sądu Najwyższego w sprawach karnych skarbowych za rok 2013*, „Prokuratura i Prawo” 2014, No. 10, p. 137. What was fundamental in this respect was the resolution 7 SSN of 24 January 2013, I KZP 19/12 “Orzecznictwo Sądu Najwyższego. Izba Karno i Wojskowa” 2013, No. 1, item 13, in which the Supreme Court finally took the position that the rules for exclusion of the multiplicity of criminal law assessments do not apply in the situation of an ideal coincidence of a common crime and a fiscal crime or offence, which means that in the opinion of the Supreme Court there is no legal mechanism that would make it possible to assume that the provisions of the Fiscal Penal Code are special in relation to similar provisions included in the Penal Code. However, this position is not accepted in the doctrine.

³² See: J. Duży, *Przestępstwa „fakturowe” – ocena regulacji z perspektywy trzech lat obowiązywania*, „Prokuratura i Prawo” 2020, No. 3, pp. 18–19.

tax obligations.³³ Therefore, it is necessary to take the position that this amendment to the Penal Code should be a starting point for the consideration of necessary changes in criminal policy and systemic changes related to the prosecution of organized crime embedded in the tax context. In the context of the amendment and other changes in the sphere of tax law, another obvious conclusion can also be seen. The value of the benefits of such an act in the context of the low efficiency of the tax system and law enforcement authorities with respect to the elimination of benefits will always outweigh the fear of a severe criminal reaction. No harsh punishment will, in itself, significantly reduce the scale of harmful phenomena. It is only an abstract threat, and the general preventive action should be connected with the effectiveness of the prosecution, i.e. with the inevitability of the punishment. Therefore, the issue of limiting the scale of VAT fraud is primarily related to extensive extra-punitive changes, which may increase the efficiency of the tax system, including limiting the possibilities of fraudulent practices (e.g. split VAT payment, uniform control files). Nevertheless, despite the justified criticism of certain elements of the amendment, I would not deny the legitimacy of the invoice amendment to the Penal Code, hoping that it will be the beginning of greater changes in the approach to counteracting organized crime in the tax context.

STRESZCZENIE

Nowe typy przestępstw „fakturowych”
w polskim kodeksie karnym, jako próba „skutecznego”
ścigania sprawców oszustw w podatku od towarów i usług

Artykuł obejmuje omówienie fenomenu nowych typów oszustw w podatku od towarów i usług, opartych na cechach konstrukcji tego podatku, w szczególności zasady neutralności i objęcia go procesem harmonizacji

³³ Also: *ibidem*, p. 27, see also: P. Kołodziejski, *Skuteczność ścigania przestępczości skarbowej a zmiany systemowe*, „Prokuratura i Prawo” 2015, No. 3, pp. 89–105.

na terenie Unii Europejskiej. Europejskie doświadczenia wskazują na występowanie luki podatkowej w tym podatku, której powstanie jest także wynikiem aktywności zorganizowanej przestępczości. Jest więc oczywiste, że ograniczenie tego zjawiska wymaga różnych inicjatyw i działań. W Polsce jedno z prawnych działań, powziętych w celu przeciwdziałania oszustwom podatkowym, wiązało się ze wprowadzeniem w życie nowych typów przestępstw, tzw. przestępstw „fakturowych”. I te nowe przestępstwa będą także przedmiotem analizy.

Słowa kluczowe: podatek od towarów i usług; luka podatkowa w podatku od towarów i usług; oszustwa karuzelowe; nowe przestępstwa „fakturowe”

SUMMARY

New types of "invoice" crimes
in the Polish Criminal Code as an attempt to "effectively"
prosecute perpetrators of VAT fraud

The article concerns the phenomenon of new tax frauds relating to value add tax based on its structure, especially the principle of neutrality and its inclusion in the harmonization process on the territory of the European Union. European experience shows that there is a tax gap in this tax, which is also the result of organized crime. It is obvious then, that limiting this phenomenon requires various initiatives and actions. In Poland one of such legal actions, taken to reduce tax crime, was related to the introduction of new types of crimes into the legal system, the so-called "invoice" crimes. The article will also analyse these new criminal offences.

Key words: value add tax; tax gap at VAT; carousel frauds; new "invoices" crimes

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