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The reasons for establishing the interest rate on overpayment resulting from the decision confirming overpayment – comments *de lege lata* and *de lege ferenda*

**Przesłanki oprocentowania nadpłaty
wynikającej z decyzji stwierdzającej nadpłatę –
uwagi *de lege lata* i *de lege ferenda***

Abstract. The subject of the study is an analysis of the legal regulations concerning the interest rate on overpayment resulting from a decision recognizing an overpayment. In the author's opinion, there is no doubt about the validity of solutions regarding the interest rates on overpayments, including those resulting from decisions that confirm them. At the same time, the existing solutions in this respect have been assessed as raising doubts as to the date from which the interest should be calculated. The difficulty in interpreting the regulations is related to the

need, raised in the case law and the doctrine, to assess only the subjective elements of the “contribution” to the delay in issuing a decision by the tax authority due to the conscious and intentional actions of the taxpayer. The paper proposes that in connection with the proposal to pass a new Tax Ordinance, the shape of legal solutions in this area be modified, taking into account the assumption that the taxpayer should not suffer the negative consequences of the flawed functioning of the public authority in terms of both law making and the application of the law.

Keywords: tax; overpayment; confirmation of overpayment; interest on the overpayment.

Streszczenie. Przedmiotem opracowania jest analiza regulacji prawnych dotyczących oprocentowania nadpłaty wynikającej z decyzji stwierdzającej nadpłatę. W ocenie autora nie budzi wątpliwości konieczność obowiązywania rozwiązań w zakresie oprocentowania nadpłat, w tym również tych wynikających z decyzji je stwierdzających. Jednocześnie obowiązujące rozwiązania w tym zakresie zostały ocenione jako wywołujące wątpliwości odnośnie do terminu, od którego oprocentowanie powinno zostać naliczone. Trudność w interpretacji przepisów związana jest z podnoszoną w orzecznictwie oraz doktrynie koniecznością oceny wyłącznie subiektywnych elementów „przyczynienia się” do opóźnienia w wydaniu przez organ podatkowy decyzji poprzez świadome i celowe działanie podatnika. W opracowaniu zaproponowano, by w związku z propozycją uchwalenia nowej ordynacji podatkowej zmodyfikować kształt rozwiązań prawnych w tym zakresie, uwzględniając założenie, iż podatnik nie powinien ponosić negatywnych konsekwencji związanych z wadliwym działaniem władzy publicznej w zakresie zarówno stanowienia, jak i stosowania prawa.

Słowa kluczowe: podatek; nadpłata; stwierdzenie nadpłaty; oprocentowanie nadpłaty.

1. Introduction

From the beginning of their validity, the regulations regarding overpayment contained in the provisions of the Act of 29 August 1997 – Tax Or-

dinance¹ have raised numerous doubts as to their interpretation². The consequence of these doubts was the subsequent amendments to the provisions concerning both the overpayment itself and the procedures for its confirmation. The last significant legislative change was the amendment introduced on 1 January 2016 by the Act of 10 September 2015 amending the Tax Ordinance Act and some other acts³. This amendment, evaluated positively in the doctrine, changed the rules of proceedings in the case of finding an overpayment, resolving some of the problems appearing in practice⁴. At the same time, amendments to the regulations did not eliminate all the disputes, including the provisions on overpayment interest rates, the application of which is also connected with doubts as to interpretation. The subject of this study is an analysis of the regulations concerning the interest rate on overpayment in the event of a decision confirming the overpayment. The rationale behind this issue is that the provisions regulating this matter have not changed since 1 January 2003, which allows us to conclude that the legislator did not see the need to change the adopted solutions. On the other hand, the draft of the new Tax Ordinance developed by the Codification Commission of the General Tax Law⁵ adopts in this respect modified regulations in relation to the existing

¹ Consolidated version, Dz.U. [Polish Journal of Laws] of 2018, item 800 with subsequent amendments, hereinafter: "Tax Ordinance".

² Cf. *inter alia* M. Kalinowski, *Nadpłata w świetle przepisów ordynacji podatkowej* [in:] Z. Chmiel (ed.), *Księga pamiątkowa ku czci docenta Eligiusza Drgasa: studia z zakresu ordynacji podatkowej*, Toruń 1998, p. 75 et seq.; M. Ślifirczyk, *Postępowanie w sprawie stwierdzenia nadpłaty – zagadnienia podstawowe* [in:] L. Etel (ed.), *Ordynacja podatkowa w teorii i praktyce*, Białystok 2008, p. 227; B. Gruszczyński [in:] S. Babiarez, B. Deuter, B. Gruszczyński, R. Hauser, A. Kabat, M. Niezgodka-Medek, *Ordynacja podatkowa. Komentarz*, Warszawa 2007, pp. 346–347 and 355–356; L. Etel, S. Babiarez, R. Dowgier, H. Filipczyk, W. Gurba, I. Krawczyk, W. Kuśnierz, M. Łoboda, A. Nikończyk, A. Nita, A. Olesińska, P. Pietrasz, M. Popławski, J. Rudowski, D. Strzelec, *Ordynacja podatkowa. Kierunkowe założenia nowej regulacji*, Białystok 2015, p. 158; E. Piechota, *Nadpłata podatkowa – zasadnicze kontrowersje* [in:] M. Ciecierski, A. Mudrecki, P. Stanisławiszyn (eds), *Wybrane problemy prawa finansowego w Polsce*, Opole 2009, p. 393.

³ Dz.U. of 2015, item 1649, hereinafter: "amending legislation".

⁴ B. Brzeziński, H. Filipczyk, *Nadpłata* [in:] B. Brzeziński, W. Morawski (eds), *Nowelizacja ordynacji podatkowej*, Warszawa 2016, p. 111.

⁵ Established by the Regulation of the Council of Ministers of 21 January 2014 on the establishment, organization and operation of the Codification Commission for the

ones⁶. At the same time, we should stress the importance of the problem of confirmation of overpayment in the light of the fact that the conducted research indicates that the total amount of overpayments obtained as a result of the determination of overpayment exceeded the amount of overpayments reimbursed *ex officio*⁷.

2. Legal character of overpayment

According to the normative definition of overpayment resulting from Article 72(1) of the Tax Ordinance, overpayment is the amount of: overpaid or undue paid tax; undue tax collected by the payer, or in an amount greater than due; liability paid by the payer or collector, if in the decision on their liability, it was determined to be undue or in an amount greater than due; liability paid by a third party or the heir, if in the decision on their tax liability or decision determining the tax liability of the deceased it was found that the tax was undue or in an amount exceeding the tax liability⁸. The above definition, which is construed on the principle of calculating the amounts regarded as overpayment (by the way, this calculation does not encompass all possible cases of overpayment), is based primarily on the recognition of overpaid provisions as overpayment (the amount paid is higher than the amount due) and those paid unduly (when payment of tax occurs despite no obligation)⁹. The definition of overpayment adopted in the doctrine in turn underlines the necessity of an erroneous belief on the part of the payer that s/he must pay tax

General Tax Law (Dz.U., item 1471).

⁶ L. Etel, S. Babiaryz, R. Dowgier, H. Filipczyk, W. Gurba, I. Krawczyk, W. Kuźnierz, M. Łoboda, A. Nikończyk, A. Nita, B. Ogrodowczyk, A. Olesińska, P. Pietrasz, M. Popławski, J. Rudowski, D. Strzelec, G. Taborski, A. Zajączkowski, *Nowa ordynacja podatkowa*, Białystok 2017, p. 309.

⁷ Cf. M. Popławski, *Uprawnienia podatkowe. Procedura dochodzenia należności podatkowych od skarbu państwa lub jednostek samorządu terytorialnego*, Warszawa 2014, p. 238.

⁸ There is a dispute in the doctrine as to whether the tax law defines overpayment at all (cf. more broadly – M. Popławski, *Uprawnienia podatkowe. Procedura...*, p. 72).

⁹ M. Kalinowski, *Nadpłata...*, p. 78 and 81; M. Ślifirczyk, *Nadpłata podatku*, Kraków 2005, p. 21; O. Łunarski, *Zapłata podatku*, Gdańsk 2002, p. 158.

at a specific amount, assuming that the overpayment should be regarded as the amount which was provided with the intention of executing the tax liability, although such a liability did not exist or was of a smaller size¹⁰. Consequently, by referring to the content on the tax-law relationship, the doctrine points out that, since making an overpayment does not constitute the discharge of a tax liability, it is a provision paid on the occasion of the performance of a public-law obligation and is therefore not included in the scope of that relationship¹¹.

On the other hand, an overpayment treated as a tax event requires a property transfer, in the absence of a normative basis for such a transfer, and requires that the rules of tax law be linked to the fulfilment of the above two conditions having legal effects¹². The occurrence of an overpayment in the doctrine is connected with three reasons: the fault of the taxpayer, the fault of the tax authority (or entities acting in their place), or reasons beyond the control of these entities¹³. The first two reasons result in the emergence of so-called incidental overpayments related to unlawful activities on the part of entities obliged to pay or of tax authorities. On the other hand, independent reasons result in the emergence of structural overpayments (resulting from the use of advance payments in the construction of tax)¹⁴ or judicial overpayments (arising in connection with the rulings of the Constitutional Tribunal or the Court of Justice of the European Union)¹⁵.

¹⁰ M. Kalinowski, *Nadpłata...*, p. 84. As a rule, this intention is reflected in the submitted tax declaration (O. Łunarski, *Zapłata...*, p. 165). It is indicated that an overpayment is a benefit provided towards the subject matter of the tax liability – tax (H. Filipczyk, *Postępowanie w sprawie stwierdzenia nadpłaty a postępowanie w sprawie określenia zobowiązania podatkowego* [in:] B. Brzeziński (ed.), *Wykładnia i stosowanie prawa podatkowego. Węzłowe problemy*, Warszawa 2013, p. 27).

¹¹ M. Kalinowski, *Nadpłata...*, p. 76.

¹² M. Ślifirczyk, *Nadpłata...*, p. 24.

¹³ M. Popławski, *Uprawnienia podatkowe stanowiące podstawę...*, p. 629.

¹⁴ M. Ślifirczyk, *Nadpłata...*, p. 26.

¹⁵ 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. 380.

3. Procedure for the declaration of overpayment

The procedure for the determination of overpayment shall be indicated as a means of identifying overpayment, which shall apply where the overpayment is not the result of the operation of the tax system¹⁶. The institution of identifying overpayment is closely linked to the technique of tax self-calculation or calculation by the taxpayer, since it limits the risk of the consequences of an incorrect calculation of tax amounts¹⁷. A requirement for the application of an institution of overpayment is the request of the entity applying for its determination, which initiates a separate procedure aimed at determining whether an overpayment has arisen as well as its amount¹⁸. At the same time, it is debatable in the doctrine whether the filing of an application for a declaration of overpayment is connected with a substantive-law institution or leads to the initiation of tax proceedings¹⁹. Due to the fact that the subject matter of this paper concerns a different issue, the above problem will not be addressed. However, attention should be paid to the view according to which, taking into account the possibility of determining the amount of overpayment in the decision ending the assessment procedure and verification of the claim of overpayment as part of verification activities, the introduction of a special procedure for establishing overpayment was considered unnecessary²⁰.

Pursuant to Article 75(1) of the Tax Ordinance, if a taxpayer contests the legitimacy of paid tax or the amount of collected tax, s/he may file an application for a declaration of overpayment of tax. Pursuant to Article 75(2) of the Tax Ordinance, taxpayers, payers, and debt collectors, as well as persons who were partners in a civil law partnership at the time of dissolution of the partnership with respect to the company's liabilities, are

¹⁶ M. Kalinowski, *Nadpłata...*, p. 89.

¹⁷ J. Zubrzycki [in:] B. Adamiak, J. Borkowski, R. Mastalski, J. Zubrzycki, *Ordynacja podatkowa. Komentarz*, Wrocław 2016, pp. 472–473.

¹⁸ L. Etel [in:] L. Etel, C. Kosikowski (eds), *Ordynacja podatkowa. Komentarz*, Warszawa 2006, p. 349.

¹⁹ Cf. more broadly in M. Ślifirczyk, *Postępowanie...*, pp. 213–214.

²⁰ *Ibidem*, pp. 227–228.

entitled to file a request for a declaration of overpayment. Pursuant to Article 75(3) of the Tax Ordinance, if the tax law stipulates an obligation to submit a statement (declaration), the taxpayer, payer or collector is obliged to submit a corrected statement (declaration) concomitantly with the application for a declaration of overpayment. Pursuant to Article 75(4) of the Tax Ordinance, if the correctness of the amended statement (declaration) does not raise any doubts, the tax authority returns the overpayment without issuing a decision stating the overpayment. In such a case, the correction produces legal effects. Pursuant to Article 75(4a) of the Tax Ordinance, in the decision confirming an overpayment, the tax authority determines the correct amount of tax liability to the extent to which the overpayment is related to a change in the amount of tax liability. To the extent that the request is unfounded, the tax authority refuses to declare the overpayment. Pursuant to Article 75(4b) of the Tax Ordinance in the wording in force as of 1 March 2017, the provision of (4a) does not limit the possibility of issuing a decision in accordance with Article 21(3) of the Tax Ordinance, which is communicated to the addressee in the decision stating that the overpayment has occurred. The aforementioned provisions are also related to the content of Article 259a of the Tax Ordinance, pursuant to which a decision declaring an overpayment of tax expires on the date of service of a decision determining the amount of tax liability with respect to the same tax and for the same tax year or another accounting period, issued as a result of proceedings instituted *ex officio*. On the other hand, pursuant to the Article 81b(2a) of the Tax Ordinance, the revision submitted together with the application for a declaration of overpayment does not have legal effects in the event of refusal to declare overpayment in whole or in part and in the event of discontinuance of proceedings in connection with the withdrawal of the application. In the justification of the decision issued, the tax authority indicates the ineffectiveness of such a correction.

It should be noted that in the case-law of administrative courts, within the framework of the interpretation of Article 75(4a) of the Tax Ordinance, the content of the justification for the draft amending act is indicated as an important interpretative premise. For instance, in the judgment

of the Voivodeship Administrative Court in Szczecin of 15 March 2017²¹ it was indicated that, as it results from the justification of the draft amending act – Government draft act amending the act – Tax Ordinance and certain other acts – parliamentary print No 3462 (p. 59 et seq.) – the proceedings to determine the overpayment should be separate from the proceedings to determine the tax liability initiated ex officio on the basis of Article 21(3) of the Tax Ordinance. The entity initiating the proceedings is the applicant, and the purpose of the proceedings is to verify the self-calculation of tax which, in the opinion of the applicant generated the overpayment in question. In the justification of the draft amending act, it was pointed out at the same time that there have been discrepancies in the rulings of administrative courts, as well as in the content of the Supreme Administrative Court's resolution of 27 January 2014²², under which, in the event of questioning the correctness of the corrected tax declaration submitted together with the application for the declaration of overpayment, in accordance with Article 75(3) of the Tax Ordinance, the tax authority is not obliged to initiate proceedings in each case in order to determine the amount of tax liability referred to in Article 21(3) of the Tax Ordinance prior to consideration of that application.

While characterizing the adopted new solutions in the range of proceedings for the determination of an overpayment, one should also refer to the judgment of the Voivodeship Administrative Court in Gliwice of 31 January 2017²³, where it was indicated that point 4a, added as of 1 January 2016 to Article 75 of the Tax Ordinance, limits the material scope of the overpayment determination proceedings, since the introduction of this provision means that the scope of the proceedings on the determination of overpayment will be limited by the content of the taxpayer's application and the extent of the correction made by the taxpayer. Within the framework of this procedure, the tax authority analyses only the factual situation defined by the taxpayer. The proceedings aimed at determining

²¹ I SA/Sz 74/17, Central Database of Decisions of Administrative Courts (CBOSA) at: www.orzeczenia.nsa.gov.pl/cbo/query.

²² II FPS 5/13, CBOSA.

²³ I SA/Gl 1054/16, CBOSA.

the correct amount of tax liability in the decision determining the overpayment is limited to the extent specified in the taxpayer's request. The purpose of the overpayment determination procedure is to clarify only the issue of overpayment raised by the taxpayer²⁴.

4. Interest rate on overpayments

Imposition of interest on an overpayment is a form of remuneration for the use of taxpayer's, payer's, or collector's money by a tax creditor²⁵. Pursuant to Article 78(1) of the Tax Ordinance, overpayments are subject to interest at a rate equal to the amount of default interest charged on tax arrears. Article 78(2) of the Tax Ordinance provides that overpayments, the amount of which does not exceed twice the costs of a reminder in enforcement proceedings, are not subject to interest. The method of determining the overpayment interest rate by linking its amount with tax arrears points to the public and legal nature of the overpayment as being concurrent with the institution of the tax liability²⁶. What is important for the interpretation of the overpayment interest rate regulations is that Article 78(2) of the Tax Ordinance introduces the principle of imposing an interest rate on overpayment, which means that if the regulations do not stipulate the exclusion of interest, the interest rate on overpayment should be charged²⁷.

As a rule, interest is a consideration derived from civil law, and is a gratification for the use of someone else's money or other items marked by type, calculated in relation to the value of the sum from which they are

²⁴ A similar judgment of Voivodeship Administrative Court in Kraków of 12 May 2016, I SA/Kr 383/16, CBOSA.

²⁵ M. Kalinowski, *Nadpłata...*, p. 96.

²⁶ O. Łunarski, *Zapłata...*, p. 172.

²⁷ As in M. Ślifirczyk, *Nadpłata...*, p. 339. Cf. also a compromise view in this respect in: B. Brzeziński, H. Filipczyk, M. Kalinowski, K. Lasiński-Sulecki, M. Masternak, W. Morawski, A. Nita, A. Olesińska, J. Orłowski, E. Prejs, J. Pustul, *Ordynacja...*, p. 413. It should also be noted that the case-law of administrative courts indicates that the interest rate on overpayments is not a rule, but an exception, and the regulations in this respect are very strict (judgment of the Supreme Administrative Court of 17 March 2015, I FSK 361/17, CBOSA).

charged, and in relation to the duration of its use²⁸. Payment of interest is always ancillary to the main payment, and may stem from different legal titles (e.g. legal transactions). The main function of interest is related to remuneration for the use of someone else's money or property²⁹. There is no doubt that the main purpose of the existence of interest, also in tax law, is the economic aspect of this institution³⁰. In the context of tax law, the problem of the nature of interest should be mainly associated with the compensatory function³¹. Interest should serve as compensation for the use of money which, according to the law, should not be at the disposition of the entity that has received it. At the same time, interest should be paid regardless of the demonstration of damage, and its receipt in certain cases does not preclude the injured party from also seeking compensation³². The above should apply to interest paid as overpayment interest³³. Overpayment interest as an ancillary service is not linked to the occurrence of an independent claim for payment, but to a modification of the existing obligation to reimburse someone with a certain sum of money (interest is therefore a single benefit)³⁴.

²⁸ W. Czachórski, *Zobowiązania – zarys wykładu*, Warszawa 1998, p. 70.

²⁹ T. Dybowski, A. Pyrżyńska, *Świadczenie* [in:] E. Łętowska (ed.), *System prawa prywatnego. Prawo zobowiązań – część ogólna, Tom 5*, Warszawa 2006, p. 245.

³⁰ On interest rate on outstanding tax – A. Nita, *Czynnik czasu w prawie podatkowym. Studium z dziedziny zobowiązań podatkowych*, Gdańsk 2007, p. 201.

³¹ On interest rate on delayed payment – S. Babiaryz [in:] S. Babiaryz, B. Dauter, B. Gruszczynski, R. Hauser, A. Kabat, M. Niezgódka-Medek, *Ordynacja podatkowa. Komentarz*, p. 267.

³² Cf. L. Etel, *Komentarz do art. 78* [in:] L. Etel (ed.), *Ordynacja podatkowa. Komentarz*, LEX 2018.

³³ Cf. more broadly on possible functions of interest on overpayment – M. Ślifirczyk, *Nadpłata...*, pp. 344–345.

³⁴ M. Ślifirczyk, *Nadpłata...*, p. 338.

5. The time-frame for the calculation of interest on overpayment resulting from the decision confirming overpayment

An important issue for both the taxpayer and the tax authority is the date on which interest on overpayment interest is charged.

Regulations concerning interest rates on overpayments are provided for in Article 78(3), (4) and (5) of the Tax Ordinance. Referring to the general rules, it should be stated that, as a principle, overpayment interest is due from the date it is made until the date of its return (Article 78(3)(1) of the Tax Ordinance). The above regulation, also applied in other countries, should be treated as a basic principle, from which there are substantial exceptions in the provisions of the law³⁵. Such exceptions are, *inter alia*, situations in which the overpayment was ascertained in the decision determining the overpayment. It should be noted that the introduction of exceptions to the rule of charging interest from the date of overpayment is rational, since if the overpayment is a consequence of mistakes made by the taxpayer or another entity obliged to pay, there is no legitimacy in granting the interest from the date of overpayment.

Pursuant to Article 78(3)(3)(a) and (b) of the Tax Ordinance, in a situation where a decision on an overpayment is issued, interest is due from the date of filing an application for the declaration of overpayment together with a corrected statement (declaration): if the overpayment has not been repaid within 30 days from the date of issuing the decision on overpayment; if the decision on overpayment has not been issued within 2 months from the date of filing the application for the declaration of overpayment, unless the taxpayer, payer, or collector has contributed to the delay in issuing the decision. The two-month time limit for issuing a decision stating the overpayment adopted in the aforementioned provision results from the connection of this regulation with the time limit provided for in Article 139 (1) of the Tax Ordinance under which the matter requiring evidentiary proceedings should be settled without undue delay,

³⁵ M. Popławski, *Uprawnienia podatkowe. Procedura...*, p. 219.

but not later than within a month, and a particularly complicated matter – not later than within 2 months from the date of instituting proceedings, unless the Tax Ordinance provisions stipulate otherwise. The *ratio legis* of regulations concerning the date of calculation of interest is in turn connected with disciplining the tax authority to ensure that it does not defer material and technical activity in the form of reimbursement of the overpayment and does not extend the procedure for determining the overpayment beyond the two-month period³⁶. At the same time, the doctrine indicates that the procedure for determining the date on which interest is to be charged in other cases is more complicated³⁷.

The application of Article 78(3)(3)(a) of the Tax Ordinance, which provides for interest from the date of submission of an application for a declaration of overpayment, if the overpayment has not been repaid within 30 days from the date of the decision establishing the overpayment, does not raise any doubts. The only issue that can be discussed is whether the term “issuance of a decision” should be connected with its delivery). Since the wording of the provision interpreted directly refers to the act of “issuing a decision”, it is clear that the 30-day time limit is therefore not related to the service of the decision.

Significant problems, both theoretical and practical, are related to the interest rate on the overpayment owing to the completion of the procedure for its determination in the form of a decision within a period exceeding 2 months from the date of submission of the application. Doubts are raised by the exception provided for in Article 78(3)(3)(b) of the Tax Ordinance, pursuant to which interest on an overpayment from the date of filing an application for its determination will not be payable if the taxpayer, payer, or collector has contributed to the delay in issuing the decision. It should be emphasized that the interpreted regulations will not give a rise to any disputes as to their interpretation in “model” situations, in which the tax-

³⁶ Cf. judgment of the Supreme Administrative Court of 16 December 2014, II FSK 582/14, CBOSA. More on institutions which aim to protect the taxpayer from the sluggishness of the authorities in settling cases of overpayment, cf. M. Popławski, *Nadpłata i zwrot podatku. Zagadnienie wspólne dotyczące realizacji uprawnień podatkowych*, Warszawa 2014, p. 23 et seq.

³⁷ M. Ślifirczyk, *Nadpłata...*, p. 342.

payer submits an application for a declaration of overpayment, fulfilling all the requirements specified by the law (e.g. by attaching properly corrected declarations) and then cooperating with the tax authorities by actively participating in gathering evidence during the conducted proceedings (e.g. by providing appropriate documentation and requested information), and taking reasonable effort to ensure that the proceedings can be carried out smoothly and promptly. Such an attitude should, by definition, be presented by every rational applicant, as if s/he verifies the correctness of the tax paid and then applies for a declaration of overpayment, then, being rational, s/he will not take actions aimed at extending the period of not having access to the money³⁸. On the other hand, the assumption of a model functioning of the tax authority should in turn require that it conducts proceedings efficiently and quickly, observing the principle of objective truth requiring all necessary steps to be taken in order to clarify the facts of the case and settling it by issuing a decision within 2 months of the date of submission of the application.

In practice, however, the presented model of the procedure for the declaration of overpayment is not the dominant one. In the reality of conducting proceedings for the determination of overpayment, there are instances of exceeding the two-month time limit, and so disputes arise regarding the understanding of the taxpayer's, payer's, or collector's contribution to the delay in issuing a decision stating overpayment. In particular, doubts will arise if the overpayment is found to be limited to the part of the amount claimed by the taxpayer, while the authority refuses to declare an overpayment in relation to the remaining part of the amount claimed by the taxpayer. This situation results from the submission of an application for a declaration of overpayment of an amount higher than the actual amount of the overpayment. Pursuant to Article 75(4a) of the Tax Ordinance, in the decision declaring the overpayment, the tax authority

³⁸ Of course, it cannot be ruled out that the applicant will be interested in the longest possible conduct of the proceedings owing to the wish to obtain interest rates, which in the case of overpayments are higher than "market rates", although such an assumption is difficult to accept as a rule for the majority of taxpayers (there have been no studies to verify this thesis).

should then determine the correct amount of tax liability to the extent that the overpayment is related to a change in the amount of tax liability, and to the extent that the request is unjustified, the authority will refuse to declare the overpayment. In the course of the conducted proceedings, a dispute may arise (and it usually does) requiring numerous activities to be undertaken by the tax authority, including broad evidentiary proceedings, which will result in the prolongation of the proceedings beyond the period provided for in Article 78(3)(3)(b) of the Tax Ordinance. This in turn gives rise to the problem of assessing the “taxpayer’s contribution to the delay” in the issuance of a decision stating overpayment by the tax authority in the light of the two-month deadline for issuing a decision, counted from the day the taxpayer submits the application for the declaration of overpayment.

Referring to the case-law of the administrative courts, it should be pointed out that in some judgments the understanding of the premise “taxpayer’s contribution to the delay in issuing a decision” is limited to conscious and deliberate extension of proceedings³⁹, directly affecting the failure to issue a decision within the deadline (e.g. by not submitting a document requested by the tax authority)⁴⁰. The doctrine also indicates that said “contribution” can only be assigned to conscious and intentional actions of the taxpayer, payer or collector, aimed at obtaining interest on the overpayment by extending the proceedings for determining or returning the overpaid amount⁴¹.

Referring to the aforementioned judgments, it should be stated that when interpreting Article 78(3)(3)(b) of the Tax Ordinance, it is correct to state that the fact of conducting proceedings longer than 2 months should result in interest on the overpayment also if the extension of proceedings

³⁹ Judgment of Voivodeship Administrative Court in Gliwice of 23 February 2017, I SA/Gl 1136/16; judgment of Voivodeship Administrative Court in Łódź of 13 November 2008, I SA/Łd 1073/08; judgment of Voivodeship Administrative Court in Gliwice of 28 February 2017, I SA/Gl 1410/16, CBOSA.

⁴⁰ Judgment of Voivodeship Administrative Court in Warszawa of 17 May 2017, III SA/Wa 2421/16; judgment of Voivodeship Administrative Court in Gdańsk of 15 July 2015, I SA/Gd 724/15, CBOSA.

⁴¹ J. Zubrzycki [in:] B. Adamiak, J. Borkowski, R. Mastalski, J. Zubrzycki, *Ordynacja...*, p. 500.

results only from objective reasons, i.e. for example from the complexity of the case, and it is irrelevant that the body exercises its competences correctly, including in particular the collection of evidence and the time-consuming implementation of subsequent stages of proceedings⁴². The judgment of the Supreme Administrative Court of 24 January 2013⁴³ should also be cited, stating that the taxpayer's exercise of procedural rights in the course of tax proceedings does not justify the thesis that the party has contributed to the delay in issuing the decision, unless it is evidenced that the actions taken by it (or its representative) are not actually aimed at achieving a comprehensive clarification of all the circumstances relevant to its decision, but the intention of the party is to extend the duration of the conducted proceedings. Therefore, the taxpayer's actions with-in the procedural rights cannot be treated as "contributing to the delay in the issuance of the decision".

At the same time, it should be stated that a literal interpretation of the provision of Article 78(3)(3)(b) of the Tax Ordinance indicates that this provision does not refer to the category of wilful misconduct, but only points to "contributing to a delay" by the taxpayer, without analysing the extent of this premise. Therefore, it is not correct to claim that for an occurrence of the taxpayer's "contribution" to a delay, it is only necessary for the taxpayer to "deliberately" prolong the proceedings in progress. In principle, such a contribution may also include a passive attitude, such as the failure to submit documents requested by the tax authorities. Simultaneously, it should be stated that the "contribution to delay" will also cover a situation in which the taxpayer's action being beyond his/her powers will result in the tax authority not being able to issue a decision within the statutory time limit, but it will be compelled to conduct comprehensive evidentiary proceedings. Should the proceedings subsequently confirm that the taxpayer's actions were aimed at recovering the overpayment in an amount undue in relation to the submission of an application for a declaration of overpayment, together with a corrected

⁴² As, *inter alia*, the judgment of Voivodeship Administrative Court in Gdańsk of 27 February 2018, I SA/Gd 52/18, CBOSA.

⁴³ II FSK 961/11, CBOSA.

declaration indicating overpayment, this will be tantamount to contributing to the extension of the proceedings beyond the period provided for in the provision under interpretation.

At the same time, we cannot challenge the interpretation of the disputed provision that the premise of a “contribution” by a taxpayer takes place also in a situation of conscious and deliberate action of a taxpayer aimed at prolonging the proceedings in order to obtain interest on the overpayment. It should also be recognized that also those activities of the taxpayer should be classified as contributing to the delay in issuing the decision, which are not actions affecting the prolongation of proceedings already underway owing to their deliberate obstruction, but are related to an improperly prepared declaration of overpayment (even if it is a result of an error), which entails undertaking verification activities in connection with the proceedings related to collecting evidence. It should be noted that the taxpayer during the proceedings, after realizing that s/he has overestimated the amount of overpayment in the application, has the opportunity to correct the submitted declaration and modify the request for confirmation of overpayment, which in the circumstances of the case may result in the recognition that there was no “contribution to delay”⁴⁴.

It should also be noted that Article 78(3)(3)(b) of the Tax Ordinance refers to “failure to issue a decision on overpayment within the specified time limit”, which may raise doubts as to the decision, which determines overpayment in part and refuses to recognize overpayment in the remaining area (which is usually the result of the filing of a defective application by a taxpayer). It should be acknowledged that by setting a two-month deadline for issuing a decision without consequences in the form of interest payment, the legislator encompassed in the interpreted provision a situation in which the party respects all its obligations, including the submission of the proper correction of the declaration, which allow for a positive verification of the application by the tax authority within a relatively short period of time and its issuance of a decision favourable to the taxpayer. On the other hand, if the application

⁴⁴ Cf. judgment of Voivodeship Administrative Court in Gdańsk of 15 July 2015, I SA/Gd 724/15, CBOSA.

and the correction of the declaration do not indicate the correct amount of the overpayment in the entire course of the proceedings (which has exceeded the two-month period), thus obliging the authority to issue a decision unfavourable (in part) for the taxpayer, it should be repeated that at that time there are no grounds for granting interest on the basis of Article 78(3)(3)(b) of the Tax Ordinance. In the light of the above interpretation of the regulations, the fact that a taxpayer, for example, takes part in the pending proceedings, and cooperates with the tax authority without knowingly and intentionally prolonging the proceedings, does not preclude the assessment that by outlining too broad an extent of the proceedings the taxpayer may contribute to a delay in issuing the decision within the meaning of Article 78(3)(3)(b) of the Tax Ordinance.

Finally, it is also worth noting the current historical aspect related to the widespread series of rulings of administrative courts, which, although proved to have been erroneous⁴⁵, in practice had a significant impact on the course of the pending proceedings for the determination of the overpayment, including their length. It should be stated that the duration of proceedings for the determination of overpayment until the end of 2013 was also influenced by the fact that the tax authorities considered it necessary to conduct, simultaneously with the proceedings on overpayment, assessment proceedings in connection with the then common interpretation of regulations sanctioned in judicial rulings⁴⁶. The courts recognized that the procedure for determining tax liabilities has the character of the basic (primary) procedure in relation to the proceedings for determining

⁴⁵ Cf. also the criticism of the body of rulings in this respect by the doctrine – L. Etel, *Stwierdzenie nadpłaty po nowemu* [in:] R. Dowgier, M. Popławski (ed.), *Ordynacja podatkowa. Zmiany w ogólnym prawie podatkowym*, Białystok 2016, p. 129.

⁴⁶ As, *inter alia*, the judgments of: Supreme Administrative Court of 22 February 2007, II FSK 345/06; Voivodeship Administrative Court in Gliwice of 12 February 2008, I SA/Gl 905/07; Supreme Administrative Court of 27 February 2008, II FSK 1753/06; Voivodeship Administrative Court in Białystok of 16 June 2010, I SA/Bk 100/10; Voivodeship Administrative Court in Kraków of 28 June 2011, I SA/Kr 472/11; Voivodeship Administrative Court in Warszawa of 28 May 2010, III SA/Wa 30/10; Voivodeship Administrative Court in Lublin of 16 January 2009, I SA/Lu 565/08; Voivodeship Administrative Court in Olsztyn of 15 January 2009, I SA/Ol 468/08; Voivodeship Administrative Court in Warszawa of 4 November 2008, III SA/Wa 500/08 and Voivodeship Administrative Court in Gliwice of 9 July 2008, I SA/Gl 130/08, CBOSA.

overpayment. Therefore, when the tax liability arises under the law and the applicant initiates proceedings regarding the determination of overpayment, this type of proceedings is of a secondary nature, i.e. it should be preceded by a procedure to determine tax liabilities. It was not until the resolution of the Supreme Administrative Court of 27 January 2014⁴⁷ that it was settled that in the event of contesting the correctness of a revised tax declaration submitted together with the application for determination of overpayment, pursuant to Article 75(3) of the Tax Ordinance, the tax authority is not obliged in each case to institute proceedings aimed at determining the amount of the tax liability. At the same time, the court acknowledged that, only in the event that the applicant makes a statement in which s/he corrects the entire or a significant part of the tax self-assessment in support of the request for overpayment, should the authority initiate proceedings regarding the tax liability. Although it is now a historical remark, it should be pointed out that while interpreting the provisions of Article 78(3)(3)(b) of the Tax Ordinance, we cannot omit the fact that in the period prior to the Supreme Administrative Court's resolution, the tax authorities, referring to the effective line of rulings, in the first place instituted proceedings to determine the amount of the liability in order to terminate the overpayment determination proceedings (some judgments indicated at the same time the justifiability of terminating the case at the stage of issuing an assessment decision, without issuing a decision regarding the determination of overpayment). Of course, this resulted in an extension of the procedure for determining overpayment, usually beyond the two-month period. In turn, the proceedings for the determination of liability could be extended owing to the taxpayer's lawful activities (however, it was possible that the taxpayer may not have been interested in a rapid conclusion of these proceedings, for instance, owing to the completion of the limitation period). It should be emphasised that in accordance with judicial decisions in the proceedings for the determination of overpayment, the authority is not released to any degree, either from the obligation of the full, exhaustive gathering of evidence, or from carrying out

⁴⁷ II FPS 5/13, CBOSA.

a comprehensive assessment while respecting the party's right to actively participate in the proceedings. Courts recognise that "should a party submit an application for the determination of overpayment, the tax authority is obliged to conduct a thorough procedure under the tax regulations"⁴⁸. The above remarks, despite the fact that they concern an issue which is no longer valid, illustrate the scale of the problem related to the application of Article 78(3)(3)(b) of the Tax Ordinance in the context of keeping the statutory deadline for the issuance of a decision confirming overpayment.

Summing up, the regulation concerning interest on overpayment in the situation when the authority has issued a decision confirming an overpayment in part raises some serious doubts in relation to the assessment of the "contribution" of the taxpayer, payer, or collector to the delaying of the decision. While there is no doubt regarding the purpose of the analysed solutions and the need to regulate the issue of interest on overpayments, there are doubts related to the functioning of the currently effective regulations. At the same time, the assessment of a typical situation in which the tax authority exceeds the two-month time limit for settling a case owing to the sluggishness in conducting proceedings does not give rise to any disputes. On the other hand, the assessment of the said "contribution" on the basis of the above mentioned case-law of administrative courts and doctrine views in some disputable cases puts into question the implementation of the *ratio legis* of the binding regulations. Problems are caused by the use of the term "contribution" in the generally interpreted regulations without indicating whether this refers solely to a partial cause⁴⁹ and the omission in Article 78(3)(3)(b) of the Tax Ordinance decisions stating an overpayment in part as well. It is also disputed whether by contribution of the taxpayer, payer, or collector to the delay the legislator referred only to intentional actions, as indicated in the literature.

⁴⁸ As the judgment of Voivodeship Administrative Court in Łódź of 7 October 2008, I SA/Łd 834/08, CBOSA.

⁴⁹ In the doctrine, in the case provided for in Article 78(3)(1) of the Tax Ordinance, it is considered that the condition of "*contributing*" is also met in the situation of partial responsibility of the authority for repealing or changing the decision (M. Popławski, *Uprawnienia podatkowe. Procedura...*, p. 221).

6. Conclusion

Today, there is no doubt that the principle of charging interest on overpayments, including those resulting from decisions confirming them, should apply. The existing solutions in this respect should at the same time take into account the assumptions set out in the doctrine of reimbursement of overpaid amounts, with or without interest, depending on the cause of overpayment. Under these assumptions, interest is not due if the overpayment results from the taxpayer's faulty actions and is due if the tax authority is at fault in connection with the occurrence of the overpayment or fails to repay it within the statutory deadline⁵⁰.

At the same time, the analysis of regulations concerned with charging interest on overpaid amounts in the case of a decision confirming such amounts, as described in this study, raises doubts as to the shape of solutions adopted with respect to the date from which interest should be charged. The difficulty in interpreting the regulations is related to the need, raised in the case law and the doctrine, to assess only the subjective elements of the "contribution" to the delay in issuing the decision by the tax authority through the conscious and intentional actions of the taxpayer, which have not been challenged so far. However, this view is not correct. It seems that owing to the proposal to pass a new tax law, now is the right time to rethink the shape of legal solutions in this area, taking into account the undisputed assumption that the taxpayer should not suffer negative consequences related to the malfunctioning of the public authority in terms of both law making and law enforcement⁵¹. The purpose of the overpayment interest is to compensate the payer for prolonged proceedings or lack of return of the overpaid amount and the resulting unavailability of one's own funds. It is also undisputed that a protracted overpayment determination procedure should result in charging interest on the overpayment, as the sole reimbursement of the overpayment amount after a long period of time may be of no significance to the taxpayer.

⁵⁰ M. Popławski, *Uprawnienia podatkowe stanowiące podstawę...*, p. 630.

⁵¹ L. Etel, S. Babiaryz, R. Dowgier, H. Filipczyk, W. Gurba, I. Krawczyk, W. Kuśnierz, M. Łoboda, A. Nikończyk, A. Nita, A. Olesińska, P. Pietrasz, M. Popławski, J. Rudowski, D. Strzelec., *Ordynacja podatkowa. Kierunkowe...*, p. 164.

At the same time, it seems appropriate to eliminate in the interest provisions on overpayments those solutions which subsequently affect the need to assess subjective elements (e.g. the fault of the taxpayer).

It should be noted that the solutions proposed in the draft new tax law provide that interest on overpayment is not to be paid from the date of submission of the request for a declaration of overpayment if the authority has issued a decision declaring overpayment 2 months after submission of the request for a declaration of overpayment, if the delay in adopting the decision within 2 months is attributable to the party entitled to reimbursement of the overpayment or its representative, or if the delay is due to reasons beyond the control of the authority (Article 207(1) in conjunction with Article 204(3))⁵².

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⁵² L. Etel, S. Babiarz, R. Dowgier, H. Filipczyk, W. Gurba, I. Krawczyk, W. Kuśnierz, M. Łoboda, A. Nikończyk, A. Nita, A. Olesińska, P. Pietrasz, M. Popławski, J. Rudowski, D. Strzelec, *Ordynacja podatkowa. Kierunkowe...*, pp. 307–309.

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