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# APPEAL AS A WAY TO CHALLENGE DECISIONS ISSUED IN THE JURISDICTIONAL TAX PROCEEDINGS

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**Abstract**

**Paper purpose** – The purpose of this article is to make academic findings in the scope of the institution of appeal, to evaluate current regulation in force and practical application thereof as well as to draw some conclusions *de lege ferenda*. Furthermore, this paper is to demonstrate that the construction of the legal system ensuring protection of the taxable person's rights is a principal value of a democratic state of law.

**Approach/method** – To prepare this article the authors used any available literature on the subject, judicial decisions of the provincial administrative courts, the Polish Supreme Administrative Court and the Polish Supreme Court as well. Furthermore, also the regulations of the Polish Taxation Act and the Basic Law (the Constitution of the Republic of Poland) were analysed.

**Findings** – The right of a taxable person to effectively question the decision, including the facts, upon which it was issued, is a "foundation stone" of the procedural institutions, which guarantee the taxable person's presence in the tax proceedings. The appeal against tax decisions is one of the preventive guarantees, as well as repressive guarantees of a taxable person's protection against the imperious interference of tax authorities.

**Originality/value** – This article is directed to taxable persons and employees of tax (treasury) authorities as well. The value of its substance may be used while establishing and applying tax laws.

**Keywords** – protection of a taxable person, tax proceedings, appeal, verification.

**JEL Classification –** K34

**Paper type -** Viewpoint

## 1. Introduction

"A legal safety of a taxable person is a principal value and has to be protected in a special way, particularly due to misconduct and infringements made by the very lawmaker, (…) as well as by the tax authorities" (Gomułowicz, 1997, 10; Dzwonkowski, 2003, 15). Furthermore, the Polish legal system is based on a general principle resulting from Article 217 of the Constitution (1997, 483), that only one and only amount of tax may result from the tax statute (Dębowska-Romanowska, 2004, 68; Dzwonkowski 1999, 1-6).

Pursuant to the effective rules of taxation in the Polish legal system a tax authority acting on behalf of a public law association (a tax creditor) is an entity authorised to impose and collect taxes, while a taxable person (a tax debtor) shall pay the tax. A taxable person is liable for and – at the same time – authorised to pay the tax only in the amount resulting from the provisions of law. *A contrario* he/she is not liable for paying the tax in the amount higher than the amount resulting from the tax statutes, and furthermore he/she cannot be obliged to pay the amount other than the amount resulting from these provisions.

The dispute over the amount of tax is a typical dispute between a taxable person and tax authority throughout the World. In the sphere of the tax law, where the principle of equality of all entities in mutual relationships does not apply (Brzeziński 2000, 358; Mariański 2009, 20), there is particularly evident contradiction between the public interest and interest of an individual (Kalinowski, 1996, 7). In Poland the typical disputes include: institutions referring to tax-deductible costs within income taxes, reduction of the amount of the output tax by the input tax within goods and service tax, as well as to the taxation of income unmatched by the disclosed sources or derived from undisclosed sources (Dzwonkowski, Biskupski, Bogucka, Marusik, Nowak, Zbrojewska, Zgierski, 2009, 15; Nykiel 2005, 25; Nykiel, 2008, 1). And the institution of appeal serves elimination of, among others, such disputes.

## 2. The substance and purpose of the institution of appeal

The construction of appeal is based on the concept of *gravanem*, which means that a taxable person lodging an appeal is dissatisfied or feels aggrieved by the judgment of a tax authority and he/she demands control of the adjudication by the tax authority of higher instance. Thus the appeal shall be treated as a statutory right of a taxable person to demand to rehear the case and judge it by the tax authority of higher instance, which is obliged to hear the case in terms of the appropriate findings and findings as to the facts and law as well (Nowak, 2009, 27; Startek 2010, 52-61).

Issuance of a decision by the first instance tax authority, which adjudicates a tax case, creates for a taxable person a new situation in the proceedings in a form of a legal possibility to lodge a legal measure against the decision; that is to initiate the administrative course of instances (Dzwonkowski, 2000, 18). It constitutes only a legal possibility, and the entity entitled to lodge an appeal has his/her procedural right at his/her disposal and only that entity may withhold from its realization (Dawidowicz 1989, 149). The abovementioned possibility reveals the right sense of the principle of two-instance proceedings, as a party, when resigning from lodging the appeal, may stop the administrative course of instances in a given case (Nowak, 2009, 52).

A taxable person's right to stop the administrative course of instances is identical to the right to demand initiating and caring out tax proceedings (the Supreme Administrative Court, 1999, 119). In this way the party demands the tax authority to authoritatively verify the issued tax decision and to remedy the ensuing situation (Borkowski, 1998, 100). Most often a taxable person does it not due to the fact that there was any infringement found in the delivered decision (formal defect), but due to the fact that because of this infringement the substantial law was not applied pursuant to the conception of the addressee (applied incorrectly).

In the appeal understood as a motion to initiate proceedings before a tax authority of higher instance, a taxable person demands that the same case is served and that the same norm of the substantial law as before the authority of first instance are applied. "First of all the purpose of the appeal is to once again carry out the process of application of the substantial law and to reissue the decision in a given case due to the fact that the entity initiating this course does it on

the same grounds, on which he/she initiated the whole proceedings in the case or on which he/she participated in the whole proceedings" (Zimmermann, 1986, 44). Otherwise stated, a party may initiate the course of instances in a situation when a decision infringes his/her subjective or objective right.

The right to appeal shall be understood as a legal possibility granted to a taxable person, to challenge a tax decision, and the right is matched by the duty of competent authorities to rehear and adjudicate the case *in merito* (Wyszomirska-Łapczyńska, 1999, 10; Nykiel, Sęk 2008, 9-61).

The appeal proceedings is based on the principle of compulsory complaint (the Supreme Administrative Court, 1998, Legalis; the Supreme Administrative Court 1998, Legalis), which means that it can be initiated solely as a result of a taxable person's activity, which is lodging appeal. This is the expression of the function which initiates appeals, as without this legal measure no action can be undertaken (Chróścielewski, Tarno, 2009, 158; the Supreme Administrative Court, 1996, Legalis). Only a taxable person's activity in the form of lodging appeal that causes a tax authority of higher instance to use its powers stipulated for a higher authority of appeal (the Supreme Administrative Court, 1984, 51). At the same time it is irrelevant whether the party took part in the proceedings before the first instance authority or not (Babiarz, Dauter, Gruszczyński, Hauser, Kabat, Niezgódka-Medek, 2009, 794). Conducting the appeal proceedings *ex officio*, and not upon the motion of a taxable person, would mean that he/she is deprived of his/her right to appeal against the adverse first instance decision (the Supreme Administrative Court, 1988, 198). Otherwise stated, only a taxable person's appeal causes that a tax authority of higher instance uses its powers (the Supreme Administrative Court, 1996, 130; the Supreme Administrative Court 2001, Legalis), which are reserved for it in the provisions of the Taxation Act (the Act, 1997, 60). Furthermore, it is impossible to replace the appeal proceedings with one of the extraordinary proceedings (the Supreme Administrative Court, 2006, Legalis).

For the purpose of lodging the appeal it is irrelevant whether the decision has a substantial nature or not, as it can be lodged against the decisions adjudicating the case as to its essence, as well as in any other way ending the case in a given instance. Furthermore, also a partial decision may be subject to appeal.

The appeal constitutes an ordinary legal measure (Etel, Dowgier, Liszewski, Popławski, Presnarowicz, 2008, 251-256), which serves to verify non-final decisions issued by the first instance authority. Furthermore, this is a measure which is independent, formal, perfect and examined by the public administration authorities. Its object is a tax decision issued in the first instance.

In the literature it is emphasized that the right to appeal serves against a decision, and therefore against its adjudication and statement of grounds as well (Adamiak, Borkowski, Mastalski, Zubrzycki, 2009, 870). Furthermore, the appeal serves against a non-final decision (the Supreme Administrative Court, 2001, 54124 irrespectively of the fact whether this adjudication complies with the demand or disregards a taxable person's demand (the Supreme Administrative Court, 1993, 62). A taxable person in the tax proceedings defends his/her legal interest, and the assessment whether it was realized can be made only by the taxable person him/herself (the Supreme Administrative Court, 1985, 142).

3. The appeal and the principle of two instances

Pursuant to the principle of two instances of the tax proceedings, expressed in Article 127 of the Taxation Act and specified in Article 220 sec. 1 of the Taxation Act, the party may

lodge an appeal against the decision issued in the first instance only to one instance. It results therefrom that the right to lodge the appeal is strictly connected with the principle of two instances, pursuant to which the adjudication of a first instance tax authority may be, after lodging the appeal, reheard and adjudicated by the authority of appeal (authority of higher instance). Otherwise stated, the principle of two instances of the tax proceedings refers to the legal construction of the appeal, as it may be lodged solely against the decision of the first instance, and the authority competent to hear it is the public administration authority of higher instance, that is the second instance authority.

The principle of two instances, as a significant characteristic of the tax proceedings, is specified by a taxable person's right to lodge appeals, which causes the higher instance authorities to rehear the case which has been already adjudicated by the first instance tax authority and to issue a new decision in this scope (Nowak, 2009, 149). It expresses a taxable person's right to demand that his/her case is heard twice, by two different authorities: the authority which issued the decision in the first instance and the higher instance authority (the Supreme Administrative Court, 1992, 95). Every case should be heard by two tax authorities, taking different position in the public or self-government administration structure if the entitled entities demand it (Chróścielewski, 1999, 32). It can be stated that it is impossible to develop a more complete manner to secure the taxable person's rights in the tax proceedings than the possibility to initiate the proceedings, which enables to verify adjudications, as the tax case adjudicated for the first time is open to be adjudicated again, if an ordinary legal measure is lodged (Borkowski, 1998, 99). Guarantee of hearing the case in two instances, provided by the lawmaker, increases the role of the internal control in administration, as through the two instances system of appeals the tax authorities of higher instance not only verify the correctness of handling the case by the authorities of lower instance, but also are provided with the material to assess the work of these authorities.

The right to appeal against the adjudications issued in the first instance constitutes an element of realising a so-called procedural justice, which has its grounds in the constitutional principle of a democratic state of law (the Supreme Administrative Court, 1993, 101). The application of correct procedure is one of the basic measures which guarantee a just result of the conducted proceedings. Therefore in the state of law it is required that the procedure is regulated clearly, precisely and pursuant to the other rules, appropriate for the essence of the state and also that it is correctly and scrupulously applied in practice, particularly it refers to the rules which specify a taxable person's rights in the proceedings (the Supreme Court, 1993, 181; Sadocha, 2008, 32).

The principle of two instances refers to the ordinary proceedings and extraordinary as well (Chróścielewski, Nykiel, 2000, 27), as each of these types of proceedings is based on the principle of two instances. The administrative course of instances may be initiated in the main proceedings, the object of which is to hear and adjudicate the case in the form of the administrative decision, as well as in the extraordinary proceedings the object of which is to verify the administrative decision issued in the ordinary proceedings. The opinion was confirmed also by the court decisions, which held that the decision (...) "which declares the decisions issued in the ordinary administrative proceedings null and void is the decision of the first instance, against which an appeal may be lodged to the higher instance authority" (the Supreme Administrative Court, 1981, 51). Similarly it can be found in other judgement that "the second instance authority declaring the decision of the authority of first instance null and void (...) acts as the supervisory body, and not as the authority of appeal, which results in the right to lodge an appeal against such a decision declaring invalidity an appeal in the course of instances" (the Supreme Administrative Court, 1981, 55).

In the situation when a taxable person lodged the appeal, it is inadmissible to initiate any of the extraordinary proceedings, because as long as the proceedings within instances are in progress, the supervisory interference can be seen only as a disruption of the normal course of proceedings (Zimmermann, 1986, 118). In the sphere of the tax law the non-competition principle of the appeal measures and ways to verify tax decisions applies (Korzeniowska, 2000, 72). This is the essence of the principle of two-instance proceedings which excludes the possibility to replace the appeal proceedings with the institutions of supervision as they do not provide taxable persons with such possibilities to defend their interests as the appeal proceedings do (Adamiak, Borkowski, 2009, 37). In the process, "in the light of the principle of two instances the appeal proceedings have priority over the extraordinary tax proceedings, thus the second instance authority, within these proceedings, cannot reverse or change tax decisions nor declare them null and void, instead of hearing the appeal lodged by a party" (Brzeziński, Kalinowski, Masternak, Morawski, 2006, 170).

It is inadmissible to use extraordinary proceedings of challenging final decisions as the subsequent instances of tax assessment (the Supreme Administrative Court, 1996, Lex), and due to the fact that the principle of two instances creates for a given person many possibilities of defending his/her legal interest, the appeal proceedings has priority over the extraordinary tax proceedings (Brzeziński, Kalinowski, Masternak, Morawski, 2006, 170). This is explicitly confirmed by the administrative court decisions, in which it was held that declaring a decision null and void (the Supreme Administrative Court, 1987, 78) instead of hearing the party's appeal lodged within the specified time limit infringes the fundamental principle of two instances, and in the process, it shows features of the gross infringement of law (the Supreme Administrative Court, 1987, 45). Consequently the supervisory competences may be performed in the specified chronological order: firstly, there should be the possibility to initiate and carry out the course of instances, and only after it is completed or after the lapse of time limit stipulated for it initiating, the supervisory activity may be admitted. As long as the proceedings within instances are in progress, the supervisory interference can be seen only as a destabilization of the normal course of proceedings (Zimmermann, 1986, 118), and the application of the extraordinary proceedings to a non-final decisions, against which the appeal has been lodged within the specified time limit (...) constitutes gross infringement of the principle of two instances and makes the decisions issued in these proceedings null and void (the Supreme Administrative Court, 1988, 75; the Supreme Administrative Court, 2000, 61).

The authority of appeal cannot interfere in the first instance authority's acts in the proceedings, as forcing the manner in which the case is to be adjudicated on the authority of the basic rank by the second instance authority, in fact, makes the administrative proceedings one-instance proceedings and deprives the authority of the basic rank of its independence (the Supreme Administrative Court, 1995, 201), which is a prerequisite in the administrative judicature (the Supreme Administrative Court, 1985, 7). Limitation of the authority of appeal only to declaration that the findings made by the first instance authority are correct infringes the principle of two instances, as this way of conducting the proceedings deprives a taxable person of the guarantees of protection of his/her legal interest, formed by the provisions of the procedural law (the Supreme Administrative Court, 2001, Legalis). During the appeal proceedings not only the supervision of the challenged decision as to the objections of the appeal but also the substantial rehearing of the case should take place.

The right to the two-instance proceedings means that the authority of appeal cannot replace the first instance authority in the acts conducted in the proceedings and in the process of making decision. In the situation when the authority of appeal goes beyond the evidence gathered in the first instance and creates the proceedings upon the body of evidence, which was

absent in the first instance, "deprives a taxable person of the adjudication of one instance" (Strzelec, 2006, 25; Strzelec, 2008, 22; the Supreme Administrative Court, 1995, Legalis). Otherwise stated, the adjudication of the second instance authority may be based only on the circumstances, which were provided by the tax authority in the statement of grounds being a part of the decision (the Supreme Administrative Court, 1997, Legalis). In the administrative court decisions it is emphasized that to acknowledge that the principle of two instances was realized, it is insufficient just to acknowledge that the case was adjudicated by two authorities of different ranks (the Supreme Administrative Court, 1999, Lex; the Supreme Administrative Court, 1994, 95). It is essential that these decisions are preceded by the proceedings carried by each of these authorities issuing the decision and enabling to reach purposes for which the proceedings are carried out.

Also the limitation of the role of the first instance authority to the execution of the previous findings of the second instance authority as to the tax assessment and to the statement that these *a priori* findings are appropriate and binding, constitutes gross negligence of the principle of two-instance proceedings and the provisions of the proceedings as to the evidence (the Supreme Administrative Court, 1984, 21). Such practices make the supervision of instances illusory (the Supreme Administrative Court, 1987, Legalis).

If the second instance tax authority makes all findings as to the taxable amount and the tax authority competent to hear the case only gives these findings the outer form of the administrative decision, such an activity constitutes the infringement of the competence of the authority competent to hear the case and collides with the imperative of the potential appeal proceedings (the Supreme Administrative Court, 1987, 24). In the process, the authority of appeal cannot replace the first instance authority in resolving the case, as it would infringe the very essence of the principle of two instances, as the party would be deprived of the double assessment of his/her case.

Due to the fact that the principle of two-instance proceedings is the expression of the right to defence, it applies irrespectively of the fact whether the decision is or is not to the benefit of a taxable person. A party is entitled to appeal not only against the adverse decisions, that is the decisions which disregard the demand of the request in its entirety or in part. The assessment of the realization of the legal interest rests in a taxable person and he/she decides whether the case should be heard in the appeal proceedings (the Supreme Administrative Court, 1996, Legalis). This view is emphasized by E. Iserzon, who states that "the common opinion that the appeal applies against a negative decision, that is the decision which fails to comply with the party's request in its entirety, is unjust. Such a statement would lead to the incorrect conclusion that the authority may refuse the party to initiate the proceedings upon the appeal or to hear the appeal on the grounds that the challenged decision complies with his/her request. Only the party his/herself may state whether the decision complies or fails to comply with his/her claims. The fact that the party is unsatisfied with the issued decision constitutes comprehensive grounds of the appeal; that is the right to demand that the appeal is heard." (Iserzon, Starościak, 1970, 26).

The principle of two instances results in the right to lodge the appeal against any non-final decisions. Otherwise stated the realization of the guarantee resulting from the principle of two instances has not been made dependant on the positive or negative content of the adjudication. There are no legal grounds to accept the interpretation that a taxable person is entitled only to appeal against negative decisions and thus disregarding his/her request in its entirety or a part, as a party in the administrative proceedings defends his/her legal interest and thus only this party may assess whether his/her entire interest has been realized (the Supreme Administrative Court, 1992, 62). Thus a taxable person may question any decision, also the decision which, in

the opinion of the tax authority, complies with the demand of the request to initiate the proceedings. This is the principle of two instances that results in the fundamental rights of a taxable person, of which he/she should not be deprived in the state of law (the Supreme Court, 1994, 82). Only the provision which formulates the principle of two instances and which is addressed to taxable persons in the tax proceedings, determines their procedural situation. The possibility to apply a legal measure in the form of appeal is the act in the disposal of a party, as initiating the supervision of instances depends only on his/her will notified within the appropriate time limit.

It is necessary to propose *de lege ferenda* that also the right to withdraw the appeal is not restricted, as only the taxable person him/herself may legitimately state that he/she has no longer any legal interest in the subsequent course of the appeal proceedings. Pursuant to the principle of disposal, meaning that a taxable person may dispose of the appeal, there should be the guarantee of the possibility to use the protection without the risk of deteriorating the legal situation. The party lodging the appeal should not be afraid of the possible deterioration of his/her case in the second instance, as otherwise it would eliminate the incentive to use the appeal measure against the tax decisions.

Similarly, when the second instance tax authority hears the case without lodging the appeal, it constitutes the infringement of the principle of two instances of the proceedings (the Supreme Administrative Court, 1985, 198; Kmieciak, 1998, 17), as only a taxable person understood as the other party of the procedural relationship, and not the adjudicating authority itself, may be the initiator of the proceedings. Otherwise stated, the two-instance tax proceedings is connected with a taxable person's right to appeal against decisions concerning his/her status, and thus it is inadmissible to initiate the second instance proceeding *ex officio*, as these proceedings may be held only after the appropriate legal measure has been lodged (appeal, complaint) by the entitled entity and within the statutory time limit.

## 4. Conclusion

The ideal of the appropriate concept of the protection of a taxable person's rights using the institution of appeal "is definitely the effective protection against the unjustified, inappropriate or even unlawful interference of the tax administration authorities in the sphere of his/her legal interests and against the effects of complex and unclear regulations" (Szczurek, 2008, 273; Brzeziński, 2005, 20).

The level of the protection of a taxable person in the legal system "is decided not only by the form of particular, individually seen rights of a taxable person, but also by a sufficiently high level of protection of these rights in the whole system of the tax law institutions" (Brzeziński, 2008, 272-273).

Facing the increasing volume of the provisions of the tax law and the level of their complexity a taxable person needs an efficient institution which serves as the appeal measure against the decisions of tax authorities. The possibility for a taxable person to appeal against the decisions issued by the tax authority of lower instance to the hierarchically higher authority constitutes one of the basic principles, which guarantees the appropriate administration of justice in modern states. In the process, a taxable person is provided with the guarantee that misconduct of the first instance tax authority will be corrected in the course of the appeal proceedings, and furthermore, he/she may be certain that other person will thoroughly assess his/her case and adjudicate it competently (Strzelec, 2009, 10). Otherwise stated, the institution of appeal is to support and protect a taxable person's rights in case of unlawful or biased

activities of the tax administration and its authorities, and also in case of difficulties in understanding the contents or manner of application of the provisions of the tax law.

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