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Legal protection of individuals against administrative abuse in the light of expiration of the right to issue a decision on the liability of third parties for social obligations

Dr Jan Sebastian Meler

Kolegium Jagiellońskie Toruńska Szkoła Wyższa, Toruń -mail: j.s.meler_kancelaria@wp.pl

Abstract

The subject of the study is an attempt to find legal solutions provide for individuals the legal protection for a issue a decision on the liability of third parties for social obligations after the date of expiration of the right to issue them. The legal term ,,issue a decision" in the currently dominant jurisprudence of administrative courts is interpreter unilaterally in favor of administrative authorities, ignoring the risk of abuse. Author in reference to the applicable provisions of the Tax Oridinance and court decisions is seeking justification for equalizing the position of the parties to legal relations in way that guarantees protection of individual from the state of legal uncertainty or unautjorized activity of the social insurance instituton.

Keywords: Administrative decision; expiration of the right to issue a decision; Zakład Ubezpieczeń Społecznych (Social Insurance Instituton)

The negative development impulse caused in 2008 by the crisis of the banking sector and the real estate market in the USA quickly affected highly developed European countries. In the case of Poland, the economic effects caused by the global crisis came with a certain delay. As Jarosław Nazarczuk points out, the relatively most difficult situation was recorded at the turn of 2008 and 2009. During this period, Polish enterprises, due to declining foreign demand, significantly limited their production activities (Nazarczuk 2013).

The economic slowdown caused by perturbations on capital markets initiated an increase in the number of bankruptcy petitions registered by Polish entrepreneurs (Świerk 2013). The financial difficulties of economic entities also influenced the lack of regularity in the payment of public law dues, in particular social security contributions. Social Insurance Institutions having knowledge about the poor financial condition of contribution payers, despite the often directly fulfilled conditions of Art. 10 and 11 of the Polish Bankruptcy Act, delayed the decision to file for bankruptcy, giving entrepreneurs a chance to adapt to the changing market. And although the above-mentioned actions of the social security authority seemed logical and pro-civic in their own way, they carried the risk of the lack of a real possibility to later enforce the claims of the social security authority in bankruptcy proceedings against contribution payers.

In the event of ineffectiveness of the enforcement of public law receivables in bankruptcy proceedings, the Zakład Ubezpieczeń Społecznych (ZUS - Social Insurance Institution (In the Polish legal system ZUS) issued decisions to the management board members of the bankrupt entities on their liability for liabilities due to social security contributions not paid by payers. When analyzing the cases pending before social insurance courts, it turns out that due to the ZUS delay in initiating bankruptcy proceedings, their lengthiness, and administrative proceedings establishing subsidiary liability of management board members for public and legal obligations of contribution payers, the social security organ often drew up the above-mentioned decisions for a short time before the limitation period for the right to issue them. According to Art. 118 § 1 of the Polish „tax ordinance", which was used by ZUS, it is not possible to issue a decision on tax liability of a third party if 5 years have passed from the end of the calendar year in which the tax arrears arose.

Taking into account the fact that some members of the management boards of the bankrupt contributors were foreigners, often living abroad, it turned out that individual decisions of the social security authorities establishing their financial liability due to the extended postal process were delivered to the addressees after December 31 of the last year in which ZUS had the right to issue these decisions. Therefore, a significant question arose what effect the individual decisions of the social security organ had on these specific persons.

The basic source of law regulating the obligations of the contribution payer in the field of social insurance is the Act of 13 October 1998 on the social insurance system (Dziennik Ustaw (Dz.U.) 2019) (hereinafter referred to as the system act). However, this act does not constitute a comprehensive legal act regulating all issues related to social insurance. The numerous provisions referring to other acts, including tax acts, are evidence of the lack of the above-mentioned normative complexity of the system act. An example of such a delegating provision is Art. 31, which indicates that a number of articles from the Tax Ordinance Act of August 29, 1997 (hereinafter referred to as o.p.) apply accordingly to contributions. (Dz.U.2017 No 201).

ZUS decisions issued to members of the management boards of bankrupt companies were based on the confluence of Art. 31 of the system act from Art. 108 § 1 and article. 116 § 1 of the o.p. indicating that for tax arrears of a limited liability company [...] the members of the management board are jointly and severally liable with all their assets if the execution against the company's assets proved ineffective and the management board member failed to meet the conditions set out in point 1 and 2 (Art. 118 § 1 of the o.p.). The temporal right to issue a decision resulting from the quoted norm should be considered in terms of the statute of limitations of the right to issue such a ruling act, even though the legislator does not use such a term directly (Dowgier 2013).

Additionally, as noted by the Naczelny Sąd Administracyjny - NSA (Supreme Administrative Court), the quoted norm, despite its presence in the Procedural Act, is a substantive provision (NSA Judgement on June 5, 2007) The linguistic interpretation of the analyzed provision seems to be unambiguous. The issuance of the decision should not be equated with its delivery. Linguistic inference is also supported by the systemic interpretation of the tax ordinance. The legislator in Art. 68 § 1 of the o.p. describing the limitation period, he indicated that the tax liability [...] does not arise if the decision establishing this liability is delivered after 3 years [...]. Therefore, since the legislator in the same legal act uses different linguistic expressions for two similar legal institutions (Art. 68 § 1 and Art. 118 § 1), it can be presumed that this distinction has some legitimate, legal purpose.

Nevertheless, despite the above conclusions, over the last dozen or so years, administrative courts of all instances have repeatedly expressed their opinions on the interpretation of the

troublesome normative phrase "to issue a decision" contained in Art. 118 § 1 of the o.p.
On January 6, 2006, the NSA issued a judgment in which it stated that the term "issuance of a decision" used in Art. 118 § 1 of the Tax Ordinance also covers the service of the decision to a third party before the expiry of the five-year period. A different interpretation of that provision, limiting the meaning of that concept to "giving the decision the required form, bearing a date", would deprive that provision of the protective function for the third party liable for someone else's debt (NSA Judgement on January 6, 2006). In the justification of the judgment, the highest administrative instance indicated that the primary objective of this institution was to limit the duration of tax and legal relations, the implementation of which, due to the passage of time, would encounter increasing difficulties related to, for example, a change in the financial situation of a third party.
Additionally, the court emphasized that since the addressee of the norm under Art. 118 § 1 of the o.p. is an authority, it should limit its freedom or discretion in its operation. In such a situation, the assumption that the issuance of the decision was separated from the obligation to deliver it would mean an unjustified freedom of action by the tax authorities and the denial of the protective functions for the taxpayer resulting from the statute of limitations. It would be permissible to backdate the decision and issue the decision with the limitation period and not to deliver it immediately after its issuance (ibidem).
The position of the NSA emphasized in the judgment of 2006 was duplicated in many judgments of the Wojewódzki Sąd Administracyjny - WSA (Voivodship Administrative Court), which made further considerations indicating that the concept of "issuing a decision" appears in regulations in which the legislator made the achievement of a specific substantive legal effect e.g. in Art. 118 § 1 of the GDPR "With some simplification, it can be said that the term" issuing a decision "means its delivery when it is, in fact," settling the matter " (WSA in Warsaw Judgement on 27 February 2007).
Part of the then science of tax law was in a similar position (Brzeziński, 2007). The shape of the above line of jurisprudence was also influenced by the resolution of the NSA of 4 December 2000, in which the analogous content of Art. 83 sec. 1 of the Customs Law, as in force until the end of 2003. In its ruling, this court ruled that the concept of "issuing a decision" covers the delivery (announcement) of a decision to a party within 2 years from the date on which the obligation to pay customs duties arose (Resolution of the NSA composed of 7 judges of December 4, 2000). The issue of the interpretation of the abovementioned normative statement on December 17, 2007 again became the subject of a resolution of the NSA which admittedly referring to the wording of the tax ordinance before January 1, 2003 stated that the concept of "issuing a decision" referred to in Art. 118 § 1 of the o.p. did not mean delivery (Resolution of the NSA composed of 7 judges of December 17, 2007). This resolution initiated a new line of jurisprudence of administrative courts which has dominated until today (NSA judgements on : August 23, 2016).

With the above considerations in mind, an important question should be asked whether there are guarantees of legal protection of individuals against abuses of bodies, which theoretically have the option of drawing up a decision before the deadline for issuing it, can store it for several months and send it to the debtor only when, in the opinion of the preparer, there are the greatest opportunities for its enforcement. After all, the obligation to send the decision immediately after signing it does not result from generally applicable regulations, but from instructions from office authorities and good administrative practices (Regulation No. 30 of the President of KRUS of December 18, 2002).

There is also a risk that some administrative authorities may illegally backdate their decisions, especially when they are issued on the verge of the limitation period. Some of the

scientific community tried to reconcile the emerging interpretative differences in competing jurisprudence lines. In his vote approving the resolution of the NSA of 17 December 2007, Michał Ciecierski indicated that, as a rule, there is a presumption that the date of the decision should be consistent with the date stated on the decision on third party liability. However, in the event of doubts as to whether we are dealing with backdating, documents in the form of mailing books of authorities, registers of post offices should be taken into account in the evidence proceedings (Ciecierski 2007).

Another representative of the tax law doctrine went even further in his considerations, claiming that appreciating the issue of protecting the interests of a party to the proceedings, it should be noted that it can be assumed that the date of issuing the decision is not only the date indicated on it, because it cannot be objectively verified, but the date of its expedition. This date is confirmed in the postal mailing book (Laskowski 2008).

And although the theses put forward by the quoted commentators do not refer to normative sources, but directly aim at justifying the restriction of the privileged position of administrative bodies against the weaker party burdened with tax obligations, in the author's opinion, the general provision of Art. 12 § 6 sec. 2 p. According to this editorial unit, the deadline (in this case, until a decision is issued) is deemed to have been met if the letter was posted at the operator's Polish post office before its expiry […]. Combining Art. 118 § 1 of Art. 12 § 6 point 2 of the o.p. would mean that in order to meet the deadline for issuing the decision, the date of its submission to the authority's office is irrelevant, but its referral to the party in a way that prevents any interference by the authority in the content of the decision.

At this point, it should be emphasized that this concept does not contradict the wording of the resolution of the NSA of 17 December 2007, which analyzes the issue of "issuing a decision" set out in Art. 118 § 1 of the o.p. without going into the technical details of "issuing a decision", it only determines that "issuance" does not mean "service". In the justification of subsequent judgments, the Supreme Administrative Court also referred to the functional interpretation, pointing out that the term "issuance" must be interpreted taking into account the provision under which it was used and the nature of the institution it regulates. The court also pointed out that the provisions governing this issue must be interpreted taking into account the full principle of formality towards the taxpayer, and not the discretion of the authorities' actions. Therefore, the NSA in these judgments assumed that keeping the deadline for "issuing" an administrative act, interpreted not only from the point of view of the interest of the tax authority but also taking into account the principle of certainty of legal transactions, supports the adoption of a principle that takes into account civil guarantees resulting from art. 2 of the Constitution (NSA justifications of judgments on: July 5, 2016).

The above argumentation of the subsidiary use of the content of Art. 12 § 6 point 2 of the o.p. it seems that in relation to the term "to issue a decision" it is also justified in a literal interpretation of the tax ordinance. In the content of this procedure, the legislator does not decide on addressing the content of the quoted norm only to the party to the proceedings, excluding the body itself (WSA inWrocław judgement on June 1, 2017). The reference of the cited norm to the comprehensive process of issuing a decision does not contradict the view, well-established in the case law, that Art. 12 § 6 point 2 does not apply to the time limits for handling the case by the authority (NSA judgement on April 23, 2018). Settlement of a case within the meaning of both the tax ordinance and the administrative procedure means the moment when the externalized will of a public administration body will be communicated to an entity in legal mode, e.g. at the time of delivery of the decision itself or its announcement.

Summarizing the above considerations, it should be pointed out that the decision issued by the social securityauthority pursuant to Art. 31 of the system act in connection with Art. 118 § 1 of the o.p. of a constitutive nature, giving rise to material and legal consequences not for the originally obligated payer of contributions, but for a new entity, which is a third party, should be carried out in compliance with legal principles, in a way that protects the interests of both parties to legal relations to an equal extent. Regardless of the changing interpretation of the above-mentioned provision of the Tax Ordinance, the lack of statutory regulations obliging the social security authorities to immediately send issued decisions to the obliged entities may lead to abuse in the form of backdating of decisions or their deliberate detention for many months.

Therefore, in the case of the statute of limitations on the right to issue a decision on the tax liability of a third party, defining clear rules for the conduct of social security authorities seems to be of key importance for ensuring legal protection of an individual against abuse by administrative authorities. Admitting without reflection in a part of the decisions of the NSA that every activity of the broadly understood tax authorities uses the presumption of legalism, shifts to each addressee of the decision the burden of proving that he has become a victim of administrative abuse, thus disturbing the balance of the parties to the public-law relationship.

Therefore, the reference in the interpretation of Art. 118 § 1 of the o.p. to the general rules of keeping the time limits specified in Art. 12 § 6 point 2 seems to be a rational procedure and not inconsistent with the dominant line of jurisprudence assuming that the rules for calculating time limits indicated in the general part of the tax law do not apply to the activities of tax authorities. The date of dispatch of the decision with all the legally required elements cannot be treated as the settlement of an administrative matter, but as evidence confirming the activities of the authority in a lawful manner. Chancellery instructions in the form of ordinances or circulars in force in administration do not provide citizens with sufficient guarantees to protect their interests against the freedom of activity of the persons issuing the decisions. Therefore, it seems that in order to ensure the certainty of legal transactions, in particular when issuing decisions individually shaping the property liability of third parties for tax or social obligations, protection should be sought in general statutory norms of fiscal procedures.

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