CONCEALMENT OF DOING BUSINESS

dr hab. Mirosław Cienkowski

Uczelnia Medyczna im. Marii Skłodowskiej-Curie w Warszawie
e-mail: miroslaw.cienkowski@uwmsc.pl

Abstract: Fiscal fraud is one of the most dangerous tax frauds for the state budget. It consists of carrying out a business activity through a person who has been appointed, without declaring him for taxation in his own name. This type of fraud is particularly popular among taxpayers who claim an undue refund of input VAT or do not pay the output VAT. The scale of these scams is considerable, and this is a problem that affects most EU countries[1].

Keywords: fiscal fraud, business, taxable person, VAT, taxpayer.

Introduction

The essence of fiscal fraud is to conduct business activity in a veiled manner or to conceal its actual size with the use of the substituted entity, which exposes the tax to depletion[2]. Explaining the institution of fiscal fraud, the Voivodeship Administrative Court in Gliwice indicated that it consists in the fact that a taxpayer (endorser), with the consent of another person (brand owner), acting in order to conceal the conduct of business activity or its actual size, uses the first name and surname, naming or company name of that person. The fiscal fraud assumes that the company (endorser) uses a substitute who does not actually run the business and is not a taxpayer in this respect. The company (brand owner) at least cooperates with the company (endorser) in this procedure. It is obvious that both parties to this procedure are not interested in its disclosure, due to the tax consequences and, above all, its criminal liability. Therefore, they usually take actions to create the appearance that it is the company (brand owner) that runs the business and derives profits from it. Although the company (brand owner) is, in fact, a figurehead, it can take actions which, in contacts with third parties and authorities, create the appearance that it is actually self-employed. That is why certain activities "outside" are performed by the company (brand owner), especially towards employees or contractors. A company (endorser) acting in order to conceal its own activity takes steps to hide this circumstance from the authorities, making sure that the company (brand owner) is noticed in the civil law and is perceived as running a business. The described way of implementing the fiscal fraud activity indicates that the evidence should not only focus on the circumstances

related to the way of conducting business activity in such a procedure but also endeavour to determine who actually derives profits from such activity [Zalewski, 2004].

1. Legal and tax consequences of conducting business activity under someone else's company

The consequence of proving to the taxpayer and the third party about fiscal fraud is their joint and several liability for tax arrears incurred during the conduct of this activity. The taxpayer referred to in Article 113 of the Tax Ordinance Act is the one who actually conducts a business activity (endorser) and deliberately acts with the intention of directly concealing his own business activity or its size, and thus exposes the tax to depletion. The responsibility of the company (brand owner) is personal and joint and several with the company (endorser). The provisions of the Tax Ordinance do not contain any limitations on this liability, so it is irrelevant what benefits the company (brand owner) will actually gain from providing its name, naming or company name [Prusak, 2006].

On the other hand, the catalogue of third parties liable for someone else's tax arrears is closed, and this type of fraud is limited to the company (brand owner). Its responsibility is personal and jointly and severally with the company (endorser). The Voivodeship Administrative Court in Gliwice stated that with respect to the legal status of the case, it is necessary to point to the regulation contained in Art. 107 § 1 and 2, points 2 and 4 of the Tax Ordinance Act, according to which in the cases and to the extent provided for in Chapter 15 of Section III, third parties are also jointly and severally liable with the taxpayer for the tax arrears of the taxpayer (§ 1). Unless further provisions stipulate otherwise, third parties shall also be liable for interest on arrears and costs of enforcement proceedings (§ 2 points 2 and 4). Pursuant to Article 108 § 1 and 2, point 2 letter a of the Tax Ordinance Act on the third party's tax liability, the tax authority shall rule by means of a decision (§ 1). Third-party tax liability proceedings cannot be initiated before the date of receiving the decision determining the amount of the tax liability (§ 2, point 2 letter a). However, pursuant to Article 113 of the Code of Commercial Partnerships and Companies, if a taxpayer, with the consent of another person, in order to conceal the conduct of business activity or the actual size of this activity, uses or has used the name, surname, naming or company name of this person, this person is jointly and severally liable with the taxpayer for all own assets for tax arrears arising during the conduct of this activity.

The provision in question does not limit liability, as it states that the company (brand owner) is liable with all its assets. Consequently, it does not matter what benefits the company (brand owner) actually received from providing its name and surname or company name. What is important is that the decision on the liability of third parties does not relieve the debtor from this liability, but broadens the circle of entities from which the tax authority may seek fulfilment of overdue liabilities. The liability of the company (brand owner) is a subsidiary with respect

to the liability of the taxpayer. It also depends on the existence of tax liability and its implementation by the taxpayer. The decision determining the tax liability should be addressed first to the taxpayer, i.e. the company (endorser). On the other hand, if the taxpayer does not pay the tax liability on time, then the tax authorities are obliged to initiate procedures against the company (brand owner). As a rule, it is only when the company (endorser) is insolvent that the execution can be directed against the endorser. However, as the Supreme Administrative Court stated in its judgment of 27.01.2016, the endorser is not responsible for the tax liability, but as a third party for someone else's debt. However, such liability is possible only when the taxpayer fails to pay the tax on time, which results in tax arrears and when the conditions are met for third party liability referred to in Articles 107 and 108 of the Tax Ordinance Act.

The decision on the liability of the third party (brand owner) should indicate the responsible entity, as well as the amount of the claim for which it is responsible. The amount of this receivable will be closely related to the amount that resulted from the previous decision made against the endorser.

The liability of persons involved in fiscal fraud includes the tax arrears incurred in the course of carrying out this activity. The tax arrears are therefore the tax not paid by the due date. The tax arrears are also considered to be unpaid tax advances or tax instalments not paid on time.

The consequence of proving to a taxpayer of fiscal fraud is the loss of the privileges he has gained thanks to it, such as concessions, exemptions, lower tax rate and, as a result, the necessity to pay a higher tax. Fiscal fraud causes negative tax consequences not only between its participants but also creates problems for their contractors. The implication of proving the fact of the fiscal fraud is the deprivation of the contractor of the right to deduct input tax on the purchase of goods or services covered by this procedure. The tax authorities may deny a firm's counterparty (endorser) this right because the invoice issued by the company (brand owner) does not document the actual transaction. The actual supplier of a good (or service) is a company (endorser), and it is not the one who appears on the invoice as a seller.

In VAT, we usually deal with a fiscal fraud in situations where the company (endorser) uses the data of another entity in its business activity in order to retain the right to a subjective exemption depending on the size of turnover, referred to in Article 113(1) of the VAT Act. It follows from the above-mentioned provision that taxpayers are exempt from tax if the value of taxed sales did not exceed in total the amount of PLN 200 thousand in the previous tax year. The effects of proving fiscal fraud are much more unfavourable for both the company (endorser) and the company (brand owner). The tax authorities have the right to refuse the company (brand owner) the right to reduce the amount of tax due by the amount of input tax. The reason for contesting the right of deduction is that the company (brand owner) cannot be regarded as a VAT taxable person. The provision of Article 15 section 1 of the VAT Act states that the taxpayers are legal persons, organisational entities without legal personality and natural persons performing independently the economic activity referred to in section 2, regardless of the

purpose or result of such activity. However, the company (brand owner), while granting its name to another person actually carrying out the activity, does not carry out this activity itself. Therefore, since the company (brand owner) is not a taxpayer within the meaning of the VAT Act, it is not entitled to deduct the VAT referred to in Article 86(1) of the Act. Thus, as a result of a statement of fiscal fraud, the tax authorities deny the company (brand owner) the right to reduce the tax due by the amount of input tax on purchases of goods or services made for the purposes of the firm's (endorser) business activities. This position is justified by the jurisprudence of administrative courts. The Supreme Administrative Court, assessing the allegations of infringement of substantive law in the context of the facts adopted by the voivodeship court, which showed that the actions taken by company "T." were fictitious; that the company was used by T.K. to conceal its business activities on its own account; that the seller was, in fact, T.K, and not the issuer of the invoices, who received fuel from warehouses without documents; that there was no sale of goods between the issuer of the invoices and the applicant company; and that there is no doubt that the fact that T.K.'s activities are being branded by "T.", stated that they are unjustified. In particular, it considered the allegation of infringement of Article 19(1) of the 1993 VAT Act to be incorrect in that, as the appellant put it, "its erroneous interpretation consisting in the assumption that, if it is established that the taxpayer's contracting party is a company (brand owner) within the meaning of Article 113 of the Tax Ordinance, the taxpayer loses the right to deduct input tax on goods acquired from it because that contracting party was not the owner of those goods and therefore could not effectively transfer their ownership to the taxpayer". According to the Supreme Administrative Court, "The reasoning for this allegation shows that in fact the party is contesting the factual findings concerning the non-existence of the transaction between the invoice issuer and the applicant, which (...) cannot be considered effective. As follows from the content of the above-mentioned provision, the taxpayer has the right to reduce the amount of tax due by the amount of input tax on the purchase of goods and services related to taxed sales. The amount of input tax shall be the sum of the amounts of tax indicated in the invoices recording the acquisition of goods and services, including the discounts referred to in Article 15(2), and, in the case of imports, the sum of the amounts of tax resulting from the customs document. Therefore, if, as established by the tax authorities and as adopted by the Court of First Instance in the judgment under appeal, and those findings have not been effectively combated by the appellant, the invoices issued by "T" did not establish the acquisition of the fuel in question by company "D", they could not constitute grounds for reducing the tax due by the input tax on that acquisition. Therefore, the recognition by the Court of First Instance of the legality of the contestation by the tax authorities of the right to deduct input tax arising from such invoices does not constitute an infringement of Article 19(1) of the VAT Act 1993. The Supreme Administrative Court also found the allegation of infringement of § 50(4) point 5(a) of the Implementing Regulation, which the party's attorney justified by an incorrect interpretation consisting in the assumption that an invoice documenting the sale of an item not owned by the seller does not constitute a

basis for the reduction of tax due. The basis of allegation states that the applicant also seeks in this case to demonstrate that the facts of the case are incorrect. In addition, in fact, it proves that there was an error of subsumption in considering that the provision was incorrectly applied to what it considers to be the correct facts. That provision stipulates that in cases where invoices, corrective invoices or customs documents are issued stating operations which have not been carried out, those invoices and customs documents shall not constitute the basis for a reduction in the tax due or for the refund of the tax difference or of the input tax. (...) It follows from the facts not effectively contested by the applicant that the issuer of the invoices did not carry out the sale. Therefore, the conclusion of the Court of First Instance that the issued invoices cannot constitute the basis for reducing the tax due is correct [Bartosiewicz, Kubacki, 2010].

Also, the company (endorser) cannot use the right to deduct because it has not declared its intention to use the right to reduce output VAT. This is because the company (brand owner) has a right of deduction, as it is the purchaser on the VAT invoice. However, the real buyer is the company (endorser), as it made the purchase for its own business activities. Consequently, the tax authorities attribute to the company (brand owner) the turnover and the tax payable by the company (endorser) in the course of the branded firm's business under its name (brand owner). The financial consequences may be catastrophic for the latter, given that it is not entitled to deduct VAT for the period in which its activities were undertaken by another person. Assignment of the turnover to the company (endorser) absolutely does not result in overpayment by the company (brand owner). According to Article 108 of the VAT Act, a company (brand owner) which issues a VAT invoice and shows the amount of tax in it is obliged to pay it. The issuance of an invoice is in any case connected with the necessity to pay VAT. The provision is structured in such a way that, regardless of whether the invoice reflects an actual sale or an activity that did not actually take place, the mere issue and presentation of the amount of tax have the consequence of having to pay the indicated tax.

2. Fiscal fraud offence - responsibilities of the company (brand owner) and the company (endorser)

Fiscal fraud is subject not only to economic sanctions but also to criminal liability. Pursuant to Article 55 § 1 of the Penal and Fiscal Code, a taxpayer is subject to criminal liability if he uses the name, surname, naming or company name of another entity in order to conceal his business activity on his own account or the actual size of this activity and thus exposes the tax to depletion. The provisions of § 1 and 2 of the above-mentioned article define the basic and privileged type of fiscal fraud, in view of the amount of the tax vulnerable to depletion. However, § 3 of the article defines a case of fiscal fraud qualified as a tax offence when the amount of tax vulnerable to depletion did not exceed the statutory threshold, i.e. five times the amount of the lowest monthly remuneration at the time of committing the prohibited action.

According to this provision of the Penal and Fiscal Code, fiscal fraud is a way of evading the obligation to pay tax by using someone else's name or surname to conceal one's own business or its actual size. An important condition for committing a crime or fiscal fraud offence is that the tax is exposed to depletion. Therefore, it is not a formal crime (offence), as the effect of a tax reduction is required to commit it. Therefore, fiscal fraud is a kind of consequence offence. An offence of fiscal fraud is committed when the following conditions are met:

- the entity committing a prohibited action is a taxpayer conducting business activity on his own account,
- a taxable person's act consists in using another person's name, surname, naming or company name in order to disguise business activity on his own account or the actual size of that activity,
- as a result of the act, the taxpayer exposes the State Treasury or a local self-government unit to the depletion of tax.

Responsibility for the crime (offence) of fiscal fraud is assumed by the taxpayer carrying out the business activity (endorser), including the VAT taxpayer, when he “divides” the activity carried out on his own account and thus makes use of the subjective exemption from VAT for each of these “separate” activities.

Although the rule in Article 55 of the Penal and Fiscal Code refers only to a taxpayer (endorser) who uses the name or surname and naming or company name of another entity, it does not mean that the company (brand owner) will not be subject to criminal liability. A person allowing to use his name or surname or a naming (brand owner) may be liable for criminal cooperation in the form of complicity (Article 9 § 1 of the Penal and Fiscal Code) or aiding (Article 18 § 3 of the Penal and Fiscal Code), the so-called passive fiscal fraud.

In this respect, the provisions of Articles 9 § 1 and 18 § 3 in conjunction with Articles 20 § 2 and 9 § 1 of the Penal and Fiscal Code provide that not only the person who performs the prohibited act alone or jointly and in agreement with another person is liable for the offence, but also the person who directs the performance of the prohibited act by another person or using the other person's dependence on himself, instructs him to perform such act. However, it is difficult to imagine a situation in which the company (brand owner) directs the act of the company (endorser). However, the basis for the application of the liability towards the company (brand owner) on the basis of aiding according to Article 18 § 3 of the Penal and Fiscal Code is Article 20 § 2 of the Penal and Fiscal Code. It provides that the provisions of, inter alia, Article 18 § 2 and § 3 apply respectively to fiscal offences. However, pursuant to Article 46 of the Penal and Fiscal Code, the provisions of the general part of the Code of Petty Offences do not apply to fiscal offences. The lack of application of the provisions of the Code of Petty Offences results in the fact that in the case of a fiscal fraud qualified as an offence there are no grounds to hold the company (brand owner) liable for criminal liability on the basis of the principle of aiding.

As indicated by the Voivodeship Administrative Court in Kielce in its verdict of 27.05.2010, I SA/Ke 224/10, the notion of fiscal fraud was defined in Article 55 § 1 of the Penal and Fiscal Code and Article 113 of the Tax Ordinance Act. The comparison of the content of Article 1 § 1, Article 5 § 1 and Article 24 of the Penal and Fiscal Code shows unequivocally that a fiscal offence can only be committed by a natural person. One of the prerequisites for responsibility is the age of the perpetrator. When regulations apply to legal persons, this is undoubtedly due to their content.

The crime of fiscal fraud is related to conducting business activity. The explanation of this concept should be sought rather on the basis of the Tax Ordinance. The doctrine indicates that a strong functional argument speaks for the adoption of the definition in Article 3(9) of the Tax Ordinance Act. Also, the Supreme Court, in its decision of 4 October 2012, stated that the term "economic activity" used in Art. 55 § 1 of the Penal and Fiscal Code should be understood as defined in Art. 3 point 9 of the Tax Ordinance Act. Thus, it is any gainful activity within the meaning of the provisions on freedom of economic activity, including any other gainful activity carried out in one's own name and for one's own or for someone else's account.

The content of the above-mentioned provision indicates that using the name, surname, naming or company name of another entity for the purpose of concealment presupposes that the perpetrator acts with full awareness. Thus, the fiscal fraud offence can only be committed by the company (brand owner) with a direct intention, which means that it intends to commit this act, i.e. it wants to commit it [Web].

Exposure to tax depletion covers the difference between the tax that has been determined and paid on the activity carried out by the endorser under someone else's name and that which would have been payable if the true extent of that activity had been concealed.

The mere fact of causing a risk of tax depletion, i.e. causing a situation in which loss is likely to occur, constitutes an offence specified in the norm of Article 55 of the Penal and Fiscal Code. However, it should be remembered that if there has been no exposure of the tax depletion, then the concealment of conducting business activity on one's own account by using someone else's name does not constitute a crime (offence) of fiscal fraud.

For committing an offence in the form of fiscal fraud, the offender may be punished with a fine of up to 720 daily rates, imprisonment of up to three years or both. When imposing a fine for a fiscal offence, the court determines the number of rates and the amount of one daily rate. The lowest number of rates is 10, and the highest is 720. When setting the daily rate, the court shall take into account the offender's income, personal and family conditions, property relationships and earning possibilities. The daily rate may not be less than 1/30th of the minimum wage or exceed four hundred times the minimum wage. In some cases, the perpetrator of fiscal fraud can expect lesser liability. Pursuant to Art. 55 § 2 of the Penal and Fiscal Code, if the amount of tax exposed to depletion is small, the perpetrator is liable to a fine of up to 720 daily rates. Apart from that, the court may also pronounce, as a penal measure, a prohibition to conduct a specific business activity, which is expressly permitted under Art. 34 § 2 of the Penal

and Fiscal Code. This prohibition is imposed from one to five years. In addition, in accordance with Article 30 § 2 of the Penal and Fiscal Code, the court may also impose a penal measure in the form of forfeiture of objects. In justified cases, the court may also make the judgment public (Article 35 of the Penal and Fiscal Code).

The perpetrator may also be responsible for a fiscal offence. The border between fiscal offences specified in Article 55 § 1 and 2 of the Penal and Fiscal Code and the misdemeanour is the amount of the tax exposed to depletion. A fiscal misdemeanour is a prohibited act under the penalty of a fine specified in the amount if the amount of the depleted or exposed to the depletion of the public law liability or the value of the object of the act does not exceed five times the minimum wage at the time of its perpetration. The fine for a fiscal misdemeanour shall be between 1/10 and 20 times the minimum wage. A penalty fine may be imposed of up to twice the minimum wage. When imposing a fine or penalty payment, the economic and family relationships of the perpetrator and his income and livelihood shall also be taken into account.

3. Assessing the credibility of contractors, i.e. how to protect against dishonest entities

It is difficult to protect oneself completely from dishonest contractors in an era of ever-increasing tax fraud. Practice shows that reliable taxpayers also fall victim to fraudsters. As a consequence, it is not always possible to protect oneself from exposure to fraudulent practices, but nevertheless, the risk can be minimised by means of properly selected tools.

When starting cooperation with a new contractor, one should check its credibility on the basis of available information. Such an assessment may be carried out primarily through the analysis of registration documents such as NIP, VAT, REGON, National Court Register or entry in the business activity register, or possibly an excerpt from CEIDG; it is also possible to apply to the relevant tax office to confirm whether a given supplier is registered as an active or exempt VAT taxpayer pursuant to Article 96(13) of the VAT Act. Although no legal provision imposes an obligation on a taxpayer to check his contractors, it is in the interest of the business community to take measures which would eliminate the risk of cooperation with unreliable entities, since it is the taxpayer who bears the negative consequences of deducting input tax from an invoice which does not reflect the actual transaction, i.e. also the one relating to the entity of the transaction. In the case where doubts arise as to whether the recipient of the invoice is aware of participating in a transaction aimed at tax fraud, failure to verify the counterparty under Article 96(13) of the VAT Act will be an aggravating circumstance for the party claiming to have exercised due diligence in order to avoid participation in tax fraud [Babiarz ao., 2015, p. 68].

If the contractor is from another European Union country, the tenderer's VAT identification number must be checked using the VIES system, which is available on the

European Commission's website. Another way to check a foreign contractor is to apply to the VAT Information Exchange Office in Konin or your local tax office. This method allows for obtaining information confirming or not confirming the client's status as a VAT taxable person. On the other hand, entities registered in the Czech Republic can be checked on the portal of the Ministry of Finance of the Czech Republic, where information on the so-called unreliable VAT taxpayer was published. The Ministry grants an entrepreneur the status of "unreliable VAT taxpayer" (by means of an administrative decision) when he significantly breaches obligations under tax law. This is about, among others:

- failure to comply with the obligation to submit declarations,
- non-payment of declared tax,
- lack of cooperation during a tax inspection,
- participation of the taxpayer in suspicious transactions where there is a risk of non-payment of tax,
- the cumulation of VAT arrears over a period of at least three months in the amount of minimum CZK 500,000 (approx. PLN 80,000).

Certainly, additional security will also be the signing of a contract or submission for approval of the general terms and conditions of supply and sale, i.e. the description of the rules for placing an order, indicating how the cooperation will be implemented. The general terms and conditions of supply and sale contain arrangements for such important issues as the terms and conditions of delivery, the time when the risk passes to the buyer, the seller's liability for defects in the goods, the rules for returning the goods, the payment terms and conditions, as well as the determination of the court having jurisdiction over a dispute with the contractor.

Attention should also be paid to the circumstances in which the sale takes place and purchases should be avoided if they are unusual and questionable. Undoubtedly, it will be helpful for the legality of the transaction to conclude non-cash transactions in the case of purchasing fuel, to request, in addition to the invoice, also a certificate of its quality, to check whether the seller is in the database of companies holding licences to fuel trading, to check whether the seller is listed in the list of entities introduced by the Minister of Finance which have lodged a guarantee deposit.

Conclusion

Fiscal fraud is a growing problem affecting the State Treasury through tax evasion by taxpayers. The impact on honest entrepreneurs who are helpless against the law is also becoming increasingly apparent. On the contrary, it seems that tax inspection authorities, in cases where circumstances may suggest the existence of fiscal fraud, should focus their efforts on making those involved in tax fraudsters accountable for their tax liabilities, who can be proved to be responsible for tax irregularities, knowingly complicit in the activities aimed at evading VAT and enforce tax arrears. Making firms, or rather those who are the initiators and organisers of fraud, accountable and depriving them of the financial benefits they have gained

should become a domain of interaction with the fiscal control of law enforcement agencies, which for this group of people have more appropriate procedures and tools to identify and hold them accountable.

Bibliography

1. Babiarz S., Dauter B., Gruszczyński B., Hauser R., Kabat A., Niezgódka-Medek M. (2015). *Ordynacja podatkowa. Komentarz.* Warszawa: Wolters Kluwer.
2. Bartosiewicz A., Kubacki R. (2010). *Kodeks karny skarbowy. Przestępstwa i wykroczenia podatkowe oraz dewizowe*, Warszwa: C.H. Beck.
3. Prusak F. (2006), *Kodeks karny skarbowy. Komentarz,* t. II. Kraków: Zakamycze.
4. Zalewski D.(2009). Monitor Podatkowy. *Firmanctwo jako oszustwo podatkowe*,Vol. 4.
5. http://ec. Europa.eu/taxation_customs/vies [3.03.2020].