POLISH, GERMAN AND FRENCH EXAMPLES OF THE APPLICATION OF ACTIO PAULIANA TO TAX OBLIGATIONS. REFLECTIONS ON THE SENSE OF THE DIVISION INTO PUBLIC AND PRIVATE LAW[1]

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Abstract

The inspiration to write the article was the judgment of the Polish Constitutional Tribunal of 2018 confirming the possibility of applying Actio Pauliana to tax obligations. This issue is focused on typical problems for the application of private law in the public sector. It is, among other things, the sense of division into public and private law. Actio Pauliana is included in private law, while tax law is included in public law. The author agrees with the ruling of the Polish Constitutional Court. He is an opponent of overestimating the importance of division into public and private law. The article uses the formal-dogmatic method as well as the comparative law method. The author also discusses the legal status in France and Germany in this respect.

Keywords: *Actio Pauliana, tax obligations, public law, private law.*

JEL Classification: K15, K23, K34

1. Introduction

The admissibility of the use of Actio Pauliana, which is known throughout the European legal system, as the heritage of the Roman law, with regard to tax obligations has been controversial for many years in some EU countries. German and Polish experiences are an example of the above. The issue focalizes the most important controversies concerning the application of private law in the public sector. The inspiration for writing this text originates from a recent judgment of the Polish Constitutional Tribunal (CT) on this subject. It is worth noting here that although in Europe this institution is universally attributed to civil law, it is perceived as one of the basic principles of the entire EU law.[4]

2. Polish legal status - general remarks

2.1. Evolution of views

The institution of Actio Pauliana has been regulated in the Civil Code in art. 527-534. In these provisions there is no reference to applying Actio Pauliana to tax and other public-law obligations. Therefore, substantial doubts arose. Both the Supreme Court (SC) and civil courts initially ruled out the possibility of applying this legal arrangement to tax obligations. At the beginning of the 21st century, the Supreme Court finally revised its previous view on this subject. Yet doubts, have remained in the doctrine. At present, we can already speak about the consolidated position of the Supreme Court and common courts[5], in the light of which it is perfectly possible to use this arrangement to tax obligations. In the judgment of the Constitutional Tribunal of 6 March

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[4] See the judgment of the EU Court of Justice of 10 January 1990 C 115/88, ECR 1990, pp. I-00027. See M. Pyziak-Szafnicka, [in] System Prawa Prywatnego (Private Law System) Tom 6. Prawo zobowiązań – część ogólna, (Law of obligations - general part,), Volume 6, ed. A. Olejniczak, Warszawa 2009, s. 1223.

[5] The evolution of case law in the discussed field is presented in the justification of the judgment of the Supreme Court of 28 October 2010. Orzecznictwo Sądu Najwyższego 2011 No. 1, item 23; Biuletyn Sądu Najwyższego 2010 No. 12, item 17.

2002[6] it says: "Recognizing the independence of the Tax Ordinance, it is impossible to negate the fact that civil law fulfills the role of the so-called universal law, which justifies the reference to its basic concepts." As argued by the Supreme Administrative Court (SAC) in the decision of October 15, 2009[7] referring to the above judgment of the Constitutional Tribunal, "the asymmetry of civil law and tax law solutions cannot be each time explained by the autonomy of tax law. The coherence of the legal system and autonomy of tax law is not to be considered as a 'principle vs exception to principle' relationship. A coherent legal system_must be based on universal values, which are common to all branches of law." SC in its judgment of 28 October 2010[8] regarding the application of Actio Pauliana to the protection of tax obligations, emphasized the importance of some civil law institutions for the entire legal system. In its opinion, the significance of "certain instruments regulated in the Civil Code goes beyond civil law relations". In turn, the Supreme Court in its judgment of 1 June 2011[9] treated the creditor's defense mechanism against the debtor's actions consisting in fraudulent conveyance of his property, called in the civil law "Actio Pauliana" as one of the "basic principles of the legal order common to the entire legal system".

However, a fairly clear opposition between the courts and the doctrine has emerged. In the doctrine, the dominant view in recent decades has been that the application of Actio Pauliana to tax obligations is *de lege* not permissible.[10]

An expression of these doubts was the Ombudsman's challenge of the indicated provisions of the Polish Civil Code directed to the Constitutional Tribunal, to the extent, however, in which the provisions were to be applied to tax obligations. The Polish Ombudsman recognized that the application of these provisions to tax obligations is contrary to the Constitution (especially to art. 2 and art. 84 of the Constitution of the Republic of Poland).

In the motion submitted to the Constitutional Tribunal, Ombudsman presented a synthesis of all the arguments raised so far against the application of Actio Pauliana to tax obligations.

The Ombudsman argues that:

1) Actio Pauliana is a civil law institution; consequently, it can be applied to civil law relations only; whereas tax law is characterized by a certain autonomy, which is why civil law institutions are usually not appropriate to the character of relations between public authority and a taxpayer;

2) the indicated provisions of the Civil Code could be applied to tax liabilities only by way of analogy; meanwhile, analogy in tax law is not acceptable if applied to the detriment of private entities;

3) the liability of third parties for tax obligations has been regulated separately and exhaustively in Chapter 15 of the Tax Ordinance (Articles 107 and n.)[11]; consequently, there is no place for applying Actio Pauliana with regard to tax obligations;

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[6] Judgment of the Constitutional Tribunal of 6.03.2002, P. 7/2000, Z.U. 2002/2A/13.

[7] I FSK 240/2008, LEX no. 1028098, www.nsa.gov.pl; the cited position was confirmed in principle in the Resolution of the Full Panel of the Chamber of Commerce of the Supreme Administrative Court of June 22, 2011. I GPS 1/2011, ONSAiWSA 2011 No. 5 item 93.

[8] II CSK 227/10, OSNC-ZD 2011/1/23, Biul. SN 2010/12/17; likewise, the Constitutional Tribunal in the judgment of 5.10. 2005, SK 39/05, OTK A 2005, No. 9, item 194.

[9] II CSK 513/10, LEX no. 960505.

[10] See B. Brzeziński, M. Kalinowski, Dopuszczalność stosowania skargi pauliańskiej do należności podatkowych (Admissibility of using Actio Pauliana to tax receivables), [in] Przegląd Orzecznictwa Podatkowego (Overview of Tax Jurisdiction) 2015 No. 2, p. 105 and n .; P. Chmielnicka, Skarga pauliańska jako forma ochrony należności podatkowych, [w] Szanse i bariery rozwoju przedsiębiorczości w Polsce – w ujęciu prawa publicznego oraz prawa prywatnego (The Actio Pauliana on as a Form of Protection of Tax Receivables, [in] Opportunities and barriers to the development of entrepreneurship in Poland - in terms of public law and private law), ed. L. Bielecki, J. Mojak, A. Żywicka, Lublin 2017, p. 297 and n .; E. Chylińska, F. Kalinowski, E. Maciejak, Skarga pauliańska a zobowiązania podatkowe (Actio Pauliana and tax liabilities), [in] Analizy i Rekomendacje. Helsińska Fundacja Praw Człowieka (Analyzes and Recommendations. Helsinki Foundation for Human Rights) 2016, No. 3, pp. 1-12; P. Machnikowski, Gloss to the judgment of the Supreme Court - Civil Law of 16.04.2002. V CK 41/02, Orzecznictwo Sądów Polskich 2003 No. 2, item 22, pp. 90-92; A. Nita, W. Morawski, Wykorzystywanie skargi pauliańskiej do zabezpieczenia wykonania zobowiązania podatkowego (Using Actio Pauliana to secure the performance of the tax liability), [in] Przegląd Sądowy (Judicial Overview) 2016 No. 6, pp. 9-20, K. Radzikowski, Czy organowi podatkowemu przysługuje skarga pauliańska (Does the tax authority have Actio Pauliana action) [in] "Przegląd Prawa Publicznego" (Overview of Public Law), 2008, No. 7- 8, p. 71; otherwise, M. Pyziak-Szafnicka, See M. Pyziak-Szafnicka, [in] System Prawa Prywatnego (Private Law System), edited by Z. Radwański, volume 6, edited by A. Olejniczak, Warsaw 2009, p. 1227 and n.

4) extending the application of art. 527 and n. of C.C on cases of tax obligations is an example of non-respect of the rules of decent legislation; this also leads to violation of the principle of citizen's trust in public authority; we can even talk about a particular trap set for citizens, because from the content of art. 527 and n. of THE Civil Code it is not clear that they apply to tax obligations; consequently, the standards of a democratic state of law are violated (Article 2 of the Constitution).

5) The application of Actio Pauliana in this area is intended as a remedy for the inaction of tax authorities; it is worth noting, however, that they have an entire arsenal of other means and privileges provided by law, such as the possibility of initiating administrative enforcement proceedings, in which public authorities are privileged; besides, before starting administrative enforcement, a solvency safeguard procedure can be started.

The Constitutional Tribunal did not share the opinion of the Ombudsman, and in its judgment of 18 April 2018 (K 52/16) it ruled that art. 527 of the Civil Code, to the extent that it is applicable by analogy (*analogia legis*) to the protection of public law interest, is consistent with the Polish Constitution, and in particular with its Article 2, which states that the Republic of Poland is a democratic state of law that implements the principles of social justice.

2.2. The autonomy of tax law and the division of the legal system into public law and private law

Some of the above arguments against the use of Actio Pauliana to tax obligations are an expression of a certain attitude that has existed for years in Polish doctrine and in judicial decisions, characterized by a kind of absolutization of the division into public and private law.[12] This applies particularly to those arguments that refer to the autonomy of tax law. The authors of this text do not deny its existence and, as a consequence, the specificity of tax law. Before using a civil law arrangement, it is often necessary to consider whether this specificity is a legitimate obstacle to its application. Nevertheless, one cannot forget about the value of cohesion and uniformity of the legal system. The Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court have often emphasized this value. As E. Łętowska notes, the autonomy of tax law and even of the entire public law is understood in the Polish doctrine "in an extensive way"[13]. One can often observe resistance to the possibility of using such institutions of civil law provenance in the public sector as unjust enrichment [14], interest for delay [15], assignment of receivables [16], deduction, Actio Pauliana or even tort liability[17]. E. Łętowska points out that such attitude can be observed in relation to the broadly understood public sector, "even in the area not regulated by tax law (or public law)". Quite often, rather superficial arguments are expressed about the impossibility of using the arrangements of civil law provenance in the public-law area, "regardless of what is to be understood by public-law area." As a consequence, the author writes "about a broadly understood wall of autonomy".[18]

It has long been observed that the division into public and private law is reflected in the division of the legal sciences. There is often a kind of internal disintegration of legal sciences and the lack of interdisciplinarity, even in this narrow scope, i.e. between detailed legal sciences. This

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[11] The Act of 29 August 1997, Dz. U. 2017, item 201.

[12] See on this subject H. de Wall, Die Anwendbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht, Tübingen 1999, p. 13, n. 36.

[13] See E. Łętowska, Zwrot nadpłaconej akcyzy, czyli między zasadą effet utile i redukcjonizmem interpretacyjnym sądów krajowych, (Cz. 1) (Return of overpaid excise, i.e. between the principle of effet utile and interpretational reductionism of national courts, (Part 1)) [in] Europejski Przegląd Sądowy (European Judicial Review) 2011 No. 12, p. 6.

[14] See E. Łętowska, Return…, p. 5 i n.

[15] See R. Szczepaniak, W zaklętym kręgu podziału na prawo publiczne i prywatne (In a vicious circle of division into public and private law), [in] Studia Prawa Prywatnego (Private Law Studies) 2015, No. 3, pp. 52 and n.

[16] See R. Szczepaniak, Sens i nonsens podziału na pawo publiczne i prywatne (na kanwie uchwały SN) (Sense and nonsense of the public and private law division (on the basis of the resolutions of the Supreme Court), [in] Państwo i Prawo 2013, No. 5, p. 31 and n..

[17] Resolution of the Supreme Court of January 8, 1992, III CZP 138/91, Orzecznictwo Sądów Polskich 1992 No. 7-8, item 173.

[18] E. Łętowska, Return…, p. 6.

attitude corresponds to the assumption of the dichotomy of the division into public and private law. It seems, however, that the rejection of this assumption is methodologically more fruitful.[19]

The case in question is in fact an exemplification of a much broader issue. This is about the place of the Civil Code in the entire legal system. In particular, two attitudes compete: an integrational attitude, characterized by emphasizing the fact that the law that is in force is a coherent system and a disintegrational one, consisting in the creation of dichotomous divisions. We argue that the problem lies in a certain attitude, not a constructional obstacle. There is no constructional obstacle preventing Actio Pauliana from being applied to tax obligations. This is demonstrated by examples from other legal systems.

Perhaps the most significant one from the Polish perspective is the French case. The way Actio Pauliana is placed in the Polish legal system, namely not in a separate bill but in the Civil Code, is modeled on the so-called French system.[20] In France, the use of Actio Pauliana arrangement regulated in art. 1167 of CC with regard to tax obligations does not raise any objections. It is also very characteristic that these matters are subject to the jurisdiction of civil courts including the Civil Chamber of the Court of Cassation (*Cour de Cassation*). It is worth noting that in the French system the division into public and private law is extremely strongly emphasized. This feature of French law also has a direct impact on the judicial decisions and on the applicable substantive law. Throughout the twentieth century, the French Council of State (*Conseil d'Etat*) as the highest administrative court has taken over the competence to consider the affairs of the broadly understood public sector including many matters which in other legal systems are recognized as of civil law nature. The most important example of this is the problem of tort liability of public authorities. The Council of State ruled out the possibility of applying the Civil Code, arguing that the specificity of public entities prevents the use of solutions of classical civil law. Over decades, the Council of State has developed a number of separate regulations using the special law of judges ("droit prétorien"). This applies in particular to the aforementioned issues of tort liability for damages as well as public contracts. This process of limiting the use of the Civil Code, however, does not refer to applying Actio Pauliana in the public sector, which is still treated as a classical civil law issue.[21]

Returning to the Polish legal system, it should be noted that for opponents of using Actio Pauliana in the area analyzed, the main argument is based on the assertion that it is unacceptable to use civil law solutions in tax law by analogy to the detriment of the obligated entities. However, the basic question is whether it is really about tax law, and about acting to the disadvantage of obligated entities.

In our opinion, we are not dealing here with the application of tax law in the proper sense of the word. It is not about the regulation of the rules determining how tax obligations are established, determined and expire; neither is it about regulating obligations of taxpayers and collectors of individual taxes. The use of Actio Pauliana is not included in the regular scope of tax law application. Consequently, the argument that prohibits the use of analogy in tax law to the disadvantage of private entities is faulty.

In the justification of the judgment of 1 June 2011[22], the Supreme Court allows the application of art. 527 and n. of the Civil Code to tax liabilities and convincingly explains that, by making such a decision, it does not violate the generally applicable tax law prohibiting the use of analogy to the disadvantage of entities obliged to pay public levies. This is because there is no extension by analogy of the tax obligations of citizens and their organizations, but only the possibility of enforcing the existing tax obligations.

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[19] See R. Szczepaniak, Węzłowe problemy stosowania prawa prywatnego w sektorze publicznym (The Problems of the Application of Private Law in the Public Sector) [in] Ruch Prawniczy Ekonomiczny i Socjologiczny 2016, No. 4, pp. 112-113.

[20] See M. Pyziak-Szafnicka, [in] System Prawa Prywatnego (Private Law System), edited by Z. Radwański, volume 6, edited by A. Olejniczak, Warsaw 2009, p. 1227.

[21] See the judgments of the Court of Cassation: Cour de Cassation, 19 avril 1972, no. 70-12579; 16 juillet 1991 nr 89-17756 and no. 90-13286 ; 3 octobre 2000, nr 98-17798; 20 décembre 2000 n. 98-19343 and no. 99-10338; 12 octobre 2010, no. 09-16754.

[22] II CSK 513/10, LEX no. 960505.

Taking into account the above remarks on the unity of the legal system, the existence of certain inter-branch legal institutions, on the role of civil law as so-called universal law, as well as special significance of the Civil Code in the legal system, which can in part be derived from the very essence of the Code[23], one can defend the view that Actio Pauliana is not only a civil law institution but a certain inter-branch mechanism. The special significance of the Civil Code consists in the fact that its individual provisions are also directly applicable outside civil law, are treated as the general principles of the entire legal system, or as an externalization of these principles. As a consequence, it can be questioned that, in the case of Actio Pauliana, we deal exclusively with a civil law institution and with a classical legal analogy (*analogia legis*).

In the theory of law, both in Poland and in other European countries, the cases of functional and expanding interpretation are distinguished from *analogia legis*, even though the authors admit that the distinction is difficult to be conducted accurately.[24] In very general and simplistic terms, the classical interpretation, unlike *analogia legis*, is a regular interpretation based on the meaning of given words.[25] In this regard, it should be noted that the application of art. 527 of the Civil Code to tax obligations is by no means an example of a clear departure from the literal meaning of the words used in these provisions. One can obviously hardly claim any mistakes in the reasoning of those lawyers who argue that tax liabilities are not a correlate of claims as it is understood in civil law.[26] Nevertheless, the fundamental question arises whether the existence of a claim as understood by the Civil Code is a relevant element of the provisions contained in art. 527 of the Civil Code. In my opinion, the most important elements of this regulation include a kind of *modus operandi* consisting in the debtor performing a legal action, as a result of which a third party benefited to the detriment of the creditor. Whether the claim is of public-law or private-law nature essentially does not affect the functioning of Actio Pauliana; the legal qualification is secondary.[27] In fact, we deal with similar cases when considering such issues as tort liability, deduction or unjustified enrichment, which are called inter-branch mechanisms of the legal system. For example, in the case of the tort liability regime the *modus operandi* or the action causing damage is the most important premise. It is irrelevant whether we assign the civil law or public law character to such action. It is no different in the case of unjust enrichment.

M. Pyziak-Szafnicka expressed her view with regard to the deduction. In her opinion, "from the very formula adopted in art. 498 of the Civil Code saying that 'when two persons are both debtors and creditors against each other', no limitation can be derived as to the nature of debts and claims subject to deduction. In particular it is difficult to draw a conclusion on the application of deduction only in civil law relations".[28] The author draws attention to the significance of the judgment of the Polish Constitutional Tribunal of 10 July 2000[29], in which it supported the broad understanding of the term "civil law relationship", referred to in art. 1 of the Civil Code and art. 1 of Code of Civil Procedure, for the implementation of the constitutional right of the individual to court

[23] In the justification of the judgement of October 18, 1994 (K 2/94, 1994, Orzecznictwo Trybunału Konstytucyjnego No. 2, item 36), the Constitutional Tribunal emphasizes the special place of the legal codes in the system of statutory law. It makes a distinction between the codes and the so-called ordinary acts. Terms and concepts used by the codes are treated as model terms and it is presumed that other laws provide them with the same meaning. It is indisputable that both axiology and the law-making technique treat the codes in a special way. It should be noted that in that judgment the Constitutional Tribunal deemed as incompatible with the Constitution of the Republic of Poland, those provisions of tax law which introduced different principles of liability of partners for tax liabilities of the company in relation to the principles regulated in the then Commercial Code.

[24] See Z. Ziembiński, [in] A. Redelbach, S. Wronkowska, Z Ziembiński, Zarys teorii państwa i prawa (Outline of the State and Law Theory), Warsaw 1994, pp. 208 and n.; L. Morawski, Wstęp do prawoznawstwa (Introduction to jurisprudence), Torun 1998, p. 189. In another work, Z. Ziembiński writes, however, that " *analogia legis* is a way of interpreting particular provisions of the Act". See Z. Ziembiński, Logika praktyczna (Practical Logic), Warsaw 1990, p. 232; H. de Wall, Die Anwenbarkeit privatrechtlicher Vorschriften im Verwaltungsrecht, p. 53.

[25] […] „normale" Auslegung innerhalb des Wortsinnes", See H. de Wall, op. cit. p. 53, footnote 1.

[26] See P. Machnikowski, Gloss to the judgment of the Supreme Court of 16.04.2002, pp. 90-92.

[27] A similar position is expressed by the Supreme Court in the judgment of January 27, 2016. II CSK 149/15, LEX No. 2010213, writing "The tax authority is not a creditor within the meaning of art. 527, as public-law receivables do not have the characteristics relevant to the subjective right. However, this does not, in principle, preclude the protection of the institution provided for in that provision for their protection".

[28] M. Pyziak-Szafnicka, Potrącenie w prawie cywilnym (Deduction in civil law), Kraków 2002, p. 39.

[29] SK 12/00, Orzecznictwo Trybunału Konstytucyjnego 2000, No. 5, pos. 143.

protection. As a consequence, the author is in favor of direct application of the deduction provisions in the public sector, when explicit legal provisions or the nature of a public law claim do not prevent this.

Let us add that the very term "creditor" is also used in the legal system with regard to the tax authority (tax office), which is proved by the Polish law on administrative enforcement proceedings.[30]

Therefore, emphasizing the civil law nature of the obligation as the main argument against the application of Actio Pauliana to tax obligations is another example of the absolutization of the division into public and private law.

Even though, a view has been expressed in the legal literature that from the very fact that it is not about a civil law obligation one can derive far-reaching substantive arguments against the application of Actio Pauliana to tax obligations.[31] Referring to German literature, B. Brzeziński and M. Kalinowski claim that the State is not entitled to any subjective rights over individuals. As a result, a public authority can only undertake what the law explicitly permits, and what falls within its scope of competence. It seems, however, that in such arguments one can notice manifestations of the absolutization of the division into public and private law. Indeed, both in foreign and Polish literature, it has been repeatedly emphasized that the rights which serve public entities cannot be considered solely in terms of classical civil law. However, one should not approach the problem in an excessively routine manner, putting it in the framework of dichotomous divisions, such as public and private law. In the judicial decisions of such Polish courts as the Constitutional Tribunal, the Supreme Court or administrative courts, we can often come across a compromise position. What is emphasized is not so much the assumption of the lack of existence of subjective rights such as property or claims on the part of public entities, but rather the particular nature of these rights.[32] Their nature consists in the fact that the rights are used by public entities to perform public tasks, and not to pursue private interests. Public entities do not have such private interests.[33] As a consequence, a public entity cannot, e.g., justify a specific way of disposing of the property owned bringing up the owner's autonomy of will or the freedom of contract.[34] It does not mean, however, that in pursuing the public interest, the State, other legal entities of the State, or a local government unit cannot, as a general rule, use instruments provided in the civil law. The public interest can also be pursued in forms typical of civil law. Each case should be considered in depth and individually taking into account the specificity of these entities.

As M. Safjan rightly observes, the essence of the problem of the division of the legal system into public and private law is primarily to answer the question, what types of social relations are and should be subjected to a method of regulation appropriate to public law (imperative method, assuming subordination) and what type of relationship should be subject to private law (taking into account the equivalence and autonomy of entities), and not what kind of relations should be included in a descriptive sense into private or public law.[35] At the same time, we should note that

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[30] See the Act of June 17, 1966, i.e. Dz. U. 2017, item 1201.

[31] B. Brzeziński, M. Kalinowski, Dopuszczalność…. p. 105 and n.

[32] For example, in the judgment of October 21, 2008 (P. 2/2008, Orzecznictwo Trybunału Konstytucyjnego 2008 No. 8A, item 139, the Constitutional Tribunal emphasizes that their property cannot be treated only in civil-law aspects. Although the Constitutional Tribunal reminded that the concept of "property" as it appears in the Constitution has a certain autonomous meaning, especially in relation to public law entities. However, even then, the Constitutional Tribunal emphasized that by shaping the property law of public entities by means of private law instruments, the legislator must maintain the basic standards governing civil law transactions in a democratic state of law. These civil-law standards belong to the principles of a democratic state of law. Furthermore, interfering in the right to property and other property rights cannot be excessive and unjustified, and in particular cannot infringe the essence of these rights (Article 31 (3) of the Constitution).

[33] Supreme Court in the justification of the resolution from 4.02. 1993, stated: "a commune as a local self-government community of residents of the commune, created by law, has no" private "interests, even if it operates in the forms provided for civil law entities." See Resolution of the Supreme Court of 4.02.1993. III AZP 35/92, Samorząd Terytorialny (Local Self-Government) 1994 No. 4, p. 69, with the accepting comment of Z. Czarnik.

[34] See R. Szczepaniak, Gloss to the judgment of the Supreme Administrative Court of 17 May 2017. I OSK 2937/16, Orzecznictwo Sądów Polskich 2018, No. 3, pp. 146 and n.

[35] See M. Safjan, [in] System Prawa Prywatnego (Private Law System), edited by Z. Radwański, Volume 1 ed. M. Safjan, Warsaw 2007 p. 41; likewise, U. Stelkens, The public – private law divide. Annual Report 2010, [in] Ius Publicum Network Review, November 2011, p. 3.

contract is the essence of the civil law regulation method. This method is characterized by the primacy of the self-regulation mechanism, whose natural environment are the relations between autonomous entities. That is why, the main, almost constitutional importance of the application of civil law to public entities focuses around the contract. Such legal institutions as the regime of tort liability, unjust enrichment, deduction or Actio Pauliana are to a much lesser extent, if at all, an expression of this mechanism of self-regulation. They are, by their very nature, certain universal "inter-branch, subsidiary instruments of restitution"[36] as well as the repartition of goods or duties. Their use should be excluded only by virtue of special provisions. The affinity of Actio Pauliana and the tort liability regime emphasized in Polish and foreign literature is remarkable.[37]

It should also be taken into consideration whether the provisions of the Tax Ordinance Act, as is sometimes claimed, exclude the application of Actio Pauliana to tax obligations. Proponents of this view cite the provisions of Chapter 15 of this Act, relating to the so-called liability of third parties for tax obligations. Chapter 15 of the Tax Ordinance enumerates certain persons who are legally responsible along with the taxpayer. However, attention should be paid to the structural differences of the liability regime for third parties for tax obligations and for Actio Pauliana. In the first case, it is the responsibility of certain persons, essentially with their entire assets, for tax obligations jointly and severally with the taxpayer. In addition, Chapter 15 of the Tax Ordinance Act refers generally to persons who are not covered by the provision of art. 527 of the Civil Code, referring to the institution of the Actio Pauliana, such as a divorced spouse, a family member cooperating in a business, the purchaser of an enterprise (irrespective of whether they obtained a material gain or loss as a result of the acquisition), partners of partnerships, figurehead, members of the board of a legal person, liquidators of companies. In addition, the liability of a third party for tax obligations on the grounds of the Tax Code is settled by public authorities, which is indeed a manifestation of a certain privilege towards private entities. They have competences comparable to those enjoyed by independent courts.[38] On the other hand, in the case of Actio Pauliana common courts decide on the ineffectiveness of civil law transactions made by a taxpayer with third parties. In fact, these are completely different legal solutions.

It is worth noting that the issue of completeness of tax law regulations was already considered in Poland on the basis of the prerequisites of refunding the overpaid tax.[39] The courts expressed the view that failure to mention the reasons for refunding the overpaid tax in art. 71 - 72 of the Tax Ordinance does not mean that such premises cannot be derived from other regulations, including the provisions of the Civil Code on unjust enrichment. This view is currently dominating.[40] As noted by E. Łętowska, in order to accept such a position, it was necessary to "break the widespread belief that the provisions of the Tax Code on the overpayment form an exclusive legal regime allowing restitution".[41]

I do not see any obstacles for a similar argument to be used with regard to Actio Pauliana. To sum up, the regulation contained in Chapter 15 of the Tax Ordinance does not provide a convincing argument against the application of Actio Pauliana with respect to tax obligations.

The claim that the admissibility of the complaint in the case of tax obligations is to defend slowly acting tax authorities, which did not use other options such as a safeguard measure regulated in the Tax Ordinance, is not entirely convincing. It should be noted that a dishonest taxpayer

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[36] See M. Grochowski, E Łętowska, Czemu może dziś służyć bezpodstawne wzbogacenie? (What can unjust enrichment serve today for?) [in] Współczesne problemy prawa zobowiązań, (Contemporary problems of contract law), ed. A. Olejniczak, J. Haberko, A. Pyrzyńska and D. Sokołowska, Warszawa 2015, pp. 213 and n..

[37] M. Pyziak-Szafnicka, System…, p. 1230.

[38] See justification of the judgment of the Supreme Court of 28 October 2010. Orzecznictwo Sądu Najwyższego 2011 No. 1 item. 23; Biuletyn Sądu Najwyższego 2010 No. 12 item. 17. See P. Kaminski, Egzekucja należności publicznoprawnych w kontekście uwzględnienia przez sąd powszechny skargi pauliańskiej (Enforcement of public law claims in the context of a common court complaint of Actio Pauliana, [in] Palestra 2018 No.3, p. 20.

[39] See Łętowska, Zwrot nadpłaconej akcyzy…, (Return of overpaid …) , p. 7.

[40] See the resolution of the full composition of the Chamber of Commerce of the Supreme Administrative Court of 22 June 2011. I GPS 1/11, Orzecznictwo Naczelnego Sądu Administracyjnego i Wojewódzkich Sądów Administracyjnych, 2011 No. 5, item 93. See also R. Szczepaniak, Gloss to the judgment of the Supreme Administrative Court of 2 April 2015. II FSK 719/13, Orzecznictwo Sądów Polskich 2016, No. 9, pp. 1125-1128.

[41] See E. Łętowska, Zwrot nadpłaconej akcyzy…(Return of overpaid…), p. 5.

(debtor) attempting to make an ineffective future execution is always a few steps ahead of a private and public creditor. A private creditor may also try to take advantage of certain safeguards, but this does not weaken the significance of the Actio Pauliana arrangement.

One should also answer the question whether genuinely important ethical arguments, including constitutional axiology, militate in favor of refusing to apply the Actio Pauliana institution to tax obligations. According to the opponents of the application of Actio Pauliana with regard to tax obligations, the constitutional principle of citizen's trust in public authority is violated as a result of such application; in their opinion, one can even speak of a certain trap set for citizens. Irresistibly, however, the question arises whether it is worth making constitutional arguments to defend the interests of the taxpayer and a third party in this case. After all, in the overwhelming majority of cases, the use of Actio Pauliana is an instance of collusion between a dishonest taxpayer and a third party, who in addition receives a material benefit without a real and equivalent reciprocal benefit. If a third party fulfilled an equivalent benefit for the debtor, which represents a real, not just an illusory or simulated asset value, one could not speak of acting to the detriment of any creditor, either public or private. This type of behavior often meets the conditions of an offence consisting in limiting or excluding the possibility of satisfying the creditor (Article 300 of the Criminal Code). It is difficult to reasonably defend the view that such action of the debtor and the third party deserves protection. In addition, it is the creditor who must prove before the court the existence of such premises as (1) the infringement of his rights as a result of a legal action between the debtor and a third party, (2) obtaining a financial gain by the third party, (3) the debtor's action with the awareness of its being detrimental to the creditor, (4) the knowledge of a third party or lack of due diligence on its part. The latter premise relating to a third party does not need to be demonstrated in cases where a third party was in a close relation with the debtor, e. g., a relative, or where an entrepreneur remained in permanent business relations with the debtor.

3. Actio Pauliana in German tax law

3.1. Sources of law

The action of the debtor against the creditors is subject to challenge, unlike in Polish law, not pursuant to the provisions of the Civil Code, but under the Act of 5 October 1994.[42] This law (AnfG) grants the creditor two options of protection: court action (§ 13 AnfG) and allegation (§ 9 AnfG). Effective use of one of these instruments results in a claim for the restoration of the situation enabling the creditor the enforcement of monetary benefits from the object, divested by the debtor, pursuant to the provisions of the execution (i.e. §§ 803 et seq. ZPO).[43] This goal of the act is, of course, one of the key arguments in favor of allowing the use of AnfG in tax proceedings, which will be discussed later. In the event of the loss of the object transferred by the debtor to the property of a third party, the restitution obligation includes all the values obtained in return for it as well as the resulting benefits.[44] The third party is treated as an enriched party, who knew about the lack of a legal basis for the benefit (§ 11 subsection 1 sentence 2 AnfG).

AnfG does not give the creditor the law-forming right but the claim of a non-contractual obligation towards the so-called a third party (*Anfechtungsgegner*).[45] The content of this relationship is the duty for the third party to behave as if the debtor's item was still in the property of that debtor. Thus, the third party is obliged to tolerate the execution carried out by the creditor with regard to this particular item.

The claim may be lodged by the creditor in the form of an action (action for the liquidation of the creditor's conduct or a counterclaim against a third party) or - at the stage of enforcement

[42] Gesetz über die Anfechtung von Rechtshandlungen eines Schuldners außerhalb des Insolvenzverfahren (BGBl. I s. 2911), recently amended by Art. 16 Restrukturierungsgesetz of 9. 12. 2010 (BGBl. I p. 1900), further defined asAnfG.

[43] Justification of act project - BT-Drucks. 12/3803, p. 58.

[44] H.-P. Kirchhof [in]: Münchener Kommentar zum AnfG, C.H.Beck, Münich, 2012, § 11 nb. 1.

[45] L. Haertlein [in]: J. Kindl, C. Meller-Hannich, H.-J. Wolf (red.), Gesamtes Recht der Zwangsvollstreckung, C.H.Beck, Münich, 2015, Vorbemerkung zu §§ 1 ff AnfG, nb. 5.

proceedings - as an opposition claim or as a suit for preferential gratification. In a situation when a third party files claims against an item belonging to the debtor's assets, the creditor may defend itself with an allegation under § 9 AnfG.

AnfG is in the opinion of the courts, also of financial judiciary, an act of civil law. It belongs to the so called civil law regulations on challenging legal action (*zivilrechtliches Anfechtungsrecht*).[46] Civil courts including the Federal Tribunal (Bundesgerichtshof – BGH) have also ruled that legal disputes whose object are claims resulting from the creditor's challenging actions performed by the debtor are of a civil law nature.[47] The same opinion is represented in the literature.[48] Hence, a claim derived from AnfG is of civil law character.

3.2. Legal basis for the use of AnfG in the enforcement of tax liabilities

In spite of the definitely civil law character of the AnfG act, there is no doubt as to the admissibility of the use of AnfG by tax authorities to protect the tax claims of the tax authorities against the debtor's actions, which are aimed at preventing their satisfaction.[49] This does not mean, however, that no doubts can be found in this respect. Nowadays, the direct basis for allowing tax authorities to reach for AnfG is the provision of § 191 subsection 1 s. 2 AO [50]. It has the following wording:

[1]Wer kraft Gesetzes für eine Steuer haftet (Haftungsschuldner), kann durch Haftungsbescheid, wer kraft Gesetzes verpflichtet ist, die Vollstreckung zu dulden, kann durch Duldungsbescheid in Anspruch genommen werden. [2]Die Anfechtung wegen Ansprüchen aus dem Steuerschuldverhältnis außerhalb des Insolvenzverfahrens erfolgt durch Duldungsbescheid, soweit sie nicht im Wege der Einrede nach § 9 des Anfechtungsgesetzes geltend zu machen ist; bei der Berechnung von Fristen nach den §§ 3 und 4 des Anfechtungsgesetzes steht der Erlass eines Duldungsbescheids der gerichtlichen Geltendmachung der Anfechtung nach § 7 Abs. 1 des Anfechtungsgesetzes gleich. [3]Die Bescheide sind schriftlich zu erteilen.	[1] Liability can be brought, on the basis of a liability decision, to the individual, who by law is responsible for tax obligations (debtor under liability), and on the basis of the decision to tolerate the enforcement of the person who is obliged by law to tolerate enforcement. [2] Challenging actions due to the claims arising from tax and legal relationships takes place on the basis of a decision to tolerate enforcement, unless it is based on an objection pursuant to § 9 of the Act on appealing against debtor's legal acts to the detriment of creditors; when calculating the deadlines referred to in § 3 and § 4 of the Act, the issuance of a decision ordering the abolition of execution is the same as the judicial challenge of the debtor's legal acts to the detriment of the creditors referred to in § 7.1 of the Act. [3]Decisions are made in writing.

The second sentence is crucial to the current practice, which was introduced to § 191 subsection 1 of the Act of 22.12.1999.[51] The possibility of questioning the legal acts of a tax debtor is therefore a result of the legislator's intentional action.

§ 191 subsection 1 sent. 2 AO authorizes the tax creditor to issue an administrative decision [52] ordering a third party, who obtained an advantage from the property of the debtor as a result of

[46] e.g. BFH, resolution of 12.12.2014 (VII B 112/14), BeckRS 2015, 94314, nb. 7; BGH, judgment of 29/11/1990 (IX ZR 265/89), NJW 1991, 1061.

[47] BGH judgement of 29 November 1990 (IX ZR 265/89), NJW 1991, 1061.

[48] M. Huber, Anfechtungsgesetz, C.H.Beck, Münich, 2000, § 7 Rn. 19; Ch. Paulus in: B. Kübler, H. Prütting (ed.), Insolvenzordnung, RWS-Verlag, Köln, 2018, § 13 AnfG Rn. 10.

[49] BGH, judgment of 29.11.1990 (IX ZR 265/89), NJW 1991, 1061; BGH, judgment of 3.3.1976 (VIII ZR 197/74), NJW 1976, p. 967.

[50] AO 1977 = Abgabenordnung (Tax Ordinance) of 16 March 1976 in the wording of 1 October 2002 (BGBl. I S. 3866; 2003 and S. 61), as last amended by Art. 6 of the Act of 18 July 2017 (BGBl. I S. 2745).

[51] Gesetz zur Bereinigung von steuerlichen Vorschriften - Act on the arrangement of tax provisions of December 22, 1999 (BGBl. I 1999, 2601).

[52] About the character of Duldungsbescheid, e.g. K. Tipke, W.H. Kruse (ed.), Abgabenordnung, Verlag Dr. Otto Schmidt, 1983, § 191 nb. 26.

the act performed to the detriment of the creditor, to tolerate the enforcement carried out to satisfy the tax debt (the so-called Duldungsbescheid). In addition, a tax creditor may raise the objection referred to in § 9 AnfG against a third party.

In principle, the whole institution of Actio Pauliana is based on the condition that the third party's obligation to tolerate the execution of the object brought about by the act made to the detriment of the creditors. There has not been any major disagreement over the position that the obligation to tolerate executions may also result from private law provisions.[53] Moreover, the tax administration's resorting to the private law does not change the claim from AnfG into a public-law claim.[54]

3.3. The situation before the introduction of § 191 subsection 1 sent. 2 AO

Before the second sentence was introduced to § 191, the issue of the application of the AnfG regulations was the subject of lively discussion.

It was questionable whether the basis for issuing the decision ordering a third party to tolerate the execution (Duldungsbescheid) in general could result from AnfG regulations. In addition, there were doubts as to whether the tax administration could bring an action to the common court under § 13 of AnfG.

With regard to the first issue, some of the literature allowed administration to operate on the basis of civil law (AnfG) instead of a decision.[55] It was believed that civil law provisions of AnfG regulate the material side of the decision (first of all they determined who the decision should be addressed to), and § 191 AO decides only on the formal side of the decision.[56]

The Financial Court also agreed with this view (Bundesfinanzhof, BFH).[57] In its opinion, there was no reason to limit the catalog of means of operation of the tax administration. Nor would it be justified for the source of the obligation to tolerate executions to be limited to tax acts only. BFH argued that § 191 AO transforms the civil-legal obligation arising from AnfG into a tax-law obligation with the result that the taxpayer does not have to assert its rights under civil law but under an administrative decision issued on the grounds of public law.[58]

This view was also accepted by the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG)[59] and the Federal Tribunal (Bundesgerichtshof, BGH). The latter also stated that the civil law nature of the claim resulting from AnfG does not change even when it is made by the tax authority in order to enforce a claim arising from a tax claim.[60] Other courts, in turn, have recognized that since AnfG requires submission of a declaration of will, the administrative decision replaces this declaration.[61]

The Financial Court (Finanzgericht, FG) in Munich and the Financial Court for Schleswig-Holstein acted against this rather dominant trend. Both courts referred in detail to the construction of Actio Pauliana in the AnfG approach. They also noted that the decision ordering the toleration of executions can only be issued if the third party is obliged to it by law ("kraft Gesetzes"). According to the courts, AnfG does not generate such an obligation. In their opinion, the claim under § 7 AnfG is aimed at restitution of a thing by a third party to the debtor whose activity was challenged (Rückgewähranspruch). Thus, AnfG does not directly generate the obligation to tolerate the

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[53] BFH, judgement of 31.5.1983 (VII R 7/81), NJW 1983, 2160 = BeckRS 1983, 22006524; K. Tipke, W.H. Kruse, AO (1983), § 191 nb. 2; R. Halaczinsky [in] K. Koch, R.-D. Scholz (ed.), Abgabenordnung, Heymanns Carl, Köln, 1996, § 191 nb. 2.

[54] BGH, judgement of 29.11.1990 (IX ZR 265/89), NJW 1991, 1061.

[55] R. Halaczinsky in K. Koch, R.-D. Scholtz (ed.), AO (1996), § 191 nb. 2.

[56] A. Kramer, Der finanzbehördliche Duldungsbescheid zur Durchsetzung anfechtungsrechtlicher Rückgewähransprüche, [in] Deutsche Steuer-Zeitung 1993, pp. 361 (362).

[57] Eg. BFH, judgement of 29.3.1994 (VII R 120/92), BeckRS 1994, 22011045 and earlier decisions: BFH, judgment of 2.3.1983 (VII R 120/82), BStBl II 1983, 398 [obsolete due to the repeal of § 419 BGB]; judgment of 31.5.1983 (VII R 7/81), BStBl II 1983, 545; judgment of 10/02/1987 (VII R 122/84), BStBl II 1988, p. 313.

[58] cf. BVerwG, judgment of 07.07.1989 (8 C 85/87), NJW 1990, 590.

[59] BVerwG, decision of 28.6.1990 (8 B 64/90), NJW 1991, p. 242.

[60] BGH, judgment of 3.3.1976 (VIII ZR 197/74), NJW 1976, 967; judgment of 29/11/1990 (IX ZR 265/89), NJW 1991, p. 1061.

[61] FG Berlin, judgment of 3.2.1983 (IV 7/81), EFG 1984, 8 (9).

execution referred to in § 191 AO for the third party who has obtained the item from the debtor.[62] The obligation to tolerate execution by a third party is only a further consequence of this claim, which is not enough to recognize that AnfG could be a substantive legal basis for issuing an administrative decision.[63] Similarly to the view expressed by part of the authors, the court recognized that § 191 AO regulates only the formal side of the claim.[64]

However, the Munich court did not question the possibility of issuing a decision ordering the toleration of executions by a third party under certain civil law provisions [65] or under § 77 AO in force at that time.[66] However, the court emphasized the fundamental difference between these regulations and AnfG. Unlike AnfG, the regulations referred to by the court assumed that the item being object of the potential execution, is still in the debtor's property, and the persons required to tolerate the execution were - at most - entitled to use and manage this item.[67] Meanwhile, the essence of AnfG is that the item subjected to the execution is not part of the property of the debtor, but the property of a third party.[68] The purpose of AnfG is to create such a legal situation that although a third party has in principle effectively acquired the item, it must behave in such a way as if it had not obtained the item, i.e. as if the item had not left the debtor's property.

The Financial Court also questioned the claims of the creditor's rights under civil law provisions by administrative and legal means. In its opinion, such claims can only be enforced through a civil lawsuit.[69] Justifying this position, it pointed out that the decision issued pursuant to § 191.1 AO is a discretionary decision.[70] Such decisions are subject to examination only in terms of the correctness of administrative discretion on the part of administrative authorities. The administrative discretion granted to the tax administration authority applies only to the question of whether to issue a decision (Entscheidungsermessen) and not what decision to make (choice between the decision to tolerate execution by a third party and the third party liability decision, the so-called Auswahlermessen).[71] Meanwhile, in civil proceedings, it is necessary to verify the existence of the grounds of the claim arising from AnfG to challenge the debtor's legal action. Therefore, the assessment of the same factual situation could be quite different, depending on whether the route to administrative or common (civil) courts is opened. Kilger also noted that two different routes (civil law and administrative law) should not function for one and the same claim.[72] The above views of financial courts have found recognition in civil law literature. This position was supported, among others, by M. Huber, who stated that the procedures based on AnfG are allowed only by way of civil law action.[73] He added that the wording used in § 7.1 AnfG [74] results in the fact that tax authorities could not claim tax debts by questioning the debtor's actions on the basis of AnfG by means of an administrative decision.[75] Other proponents of this view have put forward arguments, including those concerning conflict-of-law problems in the event of a decision to

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[62] Inaczej J. Kilger, Keine Gläubigeransfechtung durch Duldungsbescheid des Finanzamts, Betriebsberater 1988, pp. 2440 (2441).

[63] Also M. App, Die verfahrensrechtliche Stellung des Anfechtungsgegners bei der Gläubigeranfechtung durch das Finanzamt, Betriebsberater 1983, pp. 309 (310).

[64] FG München, judgment of 16.10.1981 (VIII 311/78), EFG 1982, 227 (228); FG Schleswig-Holstein, judgment of 25.9.1984 /V 85/83), EFG 1985, 211 = ZIP 1984, 1275.

[65] J. Kilger, Keine Gläubigeransfechtung…, pp. 2440 (2441) lists here: § 419 BGB [no longer binding] and §§ 25, 138, 171 para. 1,173, 176 HGB .

[66] W. Gerhardt, Gläubigeranfechtung durch Duldungsbescheid des Finanzamtes, Zeitschrift für Wirtschaftsrecht 1983, 1301 (1303); J. Kilger, Keine Gläubigeransfechtung…, pp. 2440 (2440); contrary to A. Kramer, Der finanzbehördliche Duldungsbescheid zur Durchsetzung anfechtungsrechtlicher Rückgewähransprüche, [in] Deutsche Steuer-Zeitung 1993, pp. 361 (362).

[67] For example, a user, guardian, carer, representative of the estate.

[68] FG Schleswig-Holstein, judgment of 25.9.1984 /V 85/83), EFG 1985, pp. 211 (213).

[69] FG München, judgment of 16.10.1981 (VIII 311/78), EFG 1982, pp. 227 (228); FG Schleswig-Holstein, judgment of 25.9.1984 /V 85/83), EFG 1985, 211 = ZIP 1984, 1275.

[70] FG München, judgment of 16.10.1981 (VIII 311/78), EFG 1982, 227 (229).

[71] Finanzgericht München, judgment of 28.2.2008 (5 K 1557/07), nb. 22; Finanzgericht Münster, judgment of 21.4.2010 (6 K 3248/08), nb. 72.

[72] J. Kilger, Keine Gläubigeransfechtung…, pp. 2440 (2443).

[73] M. Huber, Anfechtungsgesetz, C.H.Beck, Münich, 2000, § 7 nb. 18; *id.*, Das neue Recht der Gläubigeranfechtung außerhalb des Insolvenzverfahrens, Zeitschrift für Wirtschaftsrecht 1998, pp. 897 (901).

[74] gerichtliche Geltendmachung = court proceedings.

[75] M. Huber, Das neue Recht der Gläubigeranfechtung außerhalb des Insolvenzverfahrens, [in] Zeitschrift für Wirtschaftsrecht 1998, pp. 897 (902).

tolerate executions and the opening of bankruptcy proceedings. Still others stressed that in a situation when in the event of the loss of the object of execution, a third party is obliged to restitute the value obtained in its place, the entirety of the third person's property is opened to the claim of the tax creditor. In fact, this gives tax authorities the possibility of enforcing tax debts from persons who are connected with the debtor only by a legal transaction that could lead to the creditor's prejudice.[76] The third party would therefore become a new debtor.

Some authors are inclined to favor the thesis that the issue of an administrative act based on AnfG was unacceptable until the 1999 amendment, because there was no provision that would transform the civil law obligation into a tax-law obligation.[77] However, it was a completely isolated opinion - the vast majority believed that §191.1 AO is precisely a provision that transfers civil law institutions to tax law.[78]

BFH accused the Munich Financial Court of not having captured the essence of the claim arising from AnfG. Indeed, the third party's obligation to tolerate the enforcement results directly from the statutory liability relationship that arises when there are indicia that authorize the creditor to challenge the debtor's activities.[79] At that time § 9 AnfG[80] did not limit tax administration organs in issuing decisions on the basis of AnfG, because § 191 AO was a *lex specialis* to AnfG. In addition, AnfG did not exclude administration activities in other forms.[81]

Therefore, until the amendment of 1999, the dominating position was that tax administration authorities have wide powers to question the debtor's legal actions taken against the tax creditors, both in the form of an administrative decision, as well as in the common court complaint.

3.4. Constitutional and legal doubts

Some of the objections against the tax administration described above may be considered as an issue of the compliance with the Basic Law (Grundgesetz, GG). It should be noted, however, that the practice of administrative bodies resulting from the extensive interpretation of § 191 AO and AnfG has never been subject of a thorough examination by the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG). Therefore, the following analysis will be rather difficult to compare with the constitutional dispute which took place in Poland. Nevertheless, it is worth knowing what doubts were raised in connection with the activity of tax administration authorities regarding the use of Actio Pauliana in order to enforce tax receivables.

1) Violation of Article 101 section 1 sent. 2 of GG. Pursuant to Article 101 section 1 sent. of 2 GG, nobody can be deprived of the right to examine their case by a formally established court. This universal right is intended to ensure, in particular, that court decisions are not made arbitrarily, but by a court established on the basis of objective criteria and on the basis of sufficiently certain circumstances as well as a prejudice-free assessment of a judge and taking into account the positions of the parties as far as possible.[82]

Doubts regarding this issue resulted from the fact that the interpretation enabling the tax authorities to use both civil law (an action and allegation based on AnfG) and administrative measures (decision on the obligation to tolerate execution (*Duldungsbescheid*) under § 191.1 AO in connection with AnfG), limited the scope of protection of a third party due to the unfavorable general jurisdiction and other course of the court instances. When issuing an administrative decision, the tax authority programmed appealing proceedings which was favorable to it for two reasons. Firstly, the administrative decision was appealed to the financial court, locally competent

[76] W. Gerhardt, Gläubigeranfechtung durch Duldungsbescheid des Finanzamtes, [in] Zeitschrift für Wirtschaftsrecht 1983, pp. 1301 (1306).
[77] B. Schwarz, W. Dumke (red.), Abgabenordnung, Haufe 2009, § 191 nb. 69.
[78] W. Dänzer-Vanotti, Nochmals: Gläubigeranfechtung durch Duldungsbescheid des Finanzamts, Betriebsberater 1989, pp. 885 (885).
[79] BFH, judgment of 2.3.1983 (VII R 120/82), BStBl. 1983 II, 398 (399).
[80] Anticipating that the debtor's actions are challenged by a creditor's action against a third party.
[81] BFH, judgment of 2.3.1983 (VII R 120/82), BStBl. 1983 II, 398 (399).
[82] BVerfG, resolution of 30.4.2003 (1 PBvU 1/02), NJW 2003, 1924 (1924).

for the seat of the tax administration authority.[83] For those living outside the jurisdiction of the local court, this meant the burden associated with participating in the proceedings. Secondly, it is less advantageous for the applicant to pursue the proceedings before the financial courts than proceedings before the ordinary courts, because the financial courts have only two instances in Germany.[84] Thus, the complainant has fewer opportunities to question unfavorable decisions.

Proceedings before financial courts are also disadvantageous for a third party because the financial court determines the facts of its own motion. Therefore, it acts both in favor of the complainant (determines the lack of premises to challenge the debtor's legal action) as well as to his detriment (it may conclude that there are prerequisites for challenging the transaction). Thus, a third party is forced to act, which would not necessarily be the case in civil proceedings, where the plaintiff must prove the circumstances in favor of the claim.

The unconstitutionality of issuing administrative decisions based on AnfG was also justified in such a way that the choice between an administrative decision and an action creates for the tax administration authority the possibility of making different decisions in similar factual states, shaping the situation of entities in an identical situation differently and unjustifiably.[85]

The Federal Constitutional Court (BVerfG) assessed, however, that deducing from the civil law (AnfG) the obligation to tolerate the creditor's satisfaction does not violate the fundamental right resulting from Article 101 section 1 sent. 2 of GG, as there is no obstacle to the fact that AnfG (which generates the obligation to tolerate executions by a third party) may also be considered a statute within the meaning of § 191 AO.[86] The Constitutional Court found the violation of the right to a fair trial to be excessively unlikely and rejected the complaint at the pre-trial stage.[87]

2) Violation of the principle of equality. In the above exchange of opinions one can notice the source of further doubts - this time concerning the use of AnfG in fiscal proceedings, in particular claims to a common court, in connection with the principle of equality (Art. 3 GG).

According to some of the authors, such an interpretation of § 191 AO favors tax administration authorities. The situation of the tax authority is more advantageous, even because the public entity acts simultaneously both as a creditor and enforcement authority.[88] The violation of the principle of equality can also result from an unfavorable solution for other creditors questioning the effectiveness of the debtor's actions in civil proceedings. Other creditors who are limited only to proceedings before common courts must enforce their rights through a lengthy lawsuit. Meanwhile, the tax administration authorities issuing an administrative decision can quickly obtain a writ of execution and, in this way, make ineffective the long action of a creditor who does not have the status of an administrative body.[89] A creditor other than an administrative authority (a "civil law creditor") would be de facto deprived of its right resulting from Actio Pauliana not only in the economic dimension (the claims of the tax creditor could in economic terms relate to the whole subject of the debtor's action), but also in the legal dimension.[90] A creditor who is competitive against a tax creditor cannot in this case challenge a third party's act by means of Actio Pauliana consisting in the issuance to the tax creditor of the object of the contested activity. Disposing of the object by a third party is in this case effective against the "civil law" creditor.

BVerfG did not have the opportunity to comment on this matter. On the other hand, BVerwG expressed the conviction that the privilege of tax authorities is justified by the need to protect the public interest in the effective collection of taxes and ordering all taxpayers to be treated equally.[91]

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[83] W. Gerhardt, Gläubigeranfechtung durch Duldungsbescheid des Finanzamtes, Zeitschrift für Wirtschaftsrecht 1983, pp. 1301 (1302).
[84] M. Huber, Anfechtungsgesetz, C.H.Beck, Münich, 2000, § 7 nb. 18; Finanzgericht as a court of first instance and Bundesfinanzhof (BFH) as a court of second instance.
[85] W. Gerhardt, Gläubigeranfechtung…pp. 1301 (1302).
[86] BVerfG, resolution of 18.3.1991 (2 BvR 135/91), Juris.
[87] Interpretation BVerfG decision confirmed by BFH, verdict from 1.3. 2004 (VII B 255/03), BeckRS 2004, 25003329 and earlier by BFH, judgment 29.3.1994 (VII R 120/92), BeckRS 1994, 22011045.
[88] W. Gerhardt, ZIP 1983, pp. 1301 (1302).
[89] M. Huber, Anfechtungsgesetz, § 7 nb. 18.
[90] J. Kilger, Keine Gläubigeransfechtung…, pp. 2440 (2443).
[91] BVerwG, decision of 28.6.1990 (8 B 64/90), NJW 1991, 242 (243).

Similarly, some authors did not share the constitutional doubts. Referring to the well-established judgements of BVerfG, they recalled that the principle of equality can be infringed only if one group of recipients of this right is treated differently from another group, although there are no differences between them which due to their importance would justify different treatment. Consequently, they concluded that it is in the fiscal interest of the German state that tax administration authorities could themselves issue enforcement titles and implement them.[92]

3) Violation of Article 20 section 3 GG. The literature also includes arguments that the interpretation which gives the tax administration the right to challenge the debtor's legal transactions also under AnfG leads to violation of the principle of administration activities within the limits and on the basis of law (Article 20 section 3 of the GG). It leads to the extension of the application of the already very widely interpreted provisions on liability for fiscal obligations.[93] Since the provision of § 191 AO in its previous wording (from before 1999) did not expressly authorize to issue an administrative decision on the basis of AnfG, such administrative power could not be granted. Therefore, based on the wording of § 191 section 1 AO, one should limit the scope of the administration to a civil law action, if the basis for challenging the debtor's legal action was a civil law provision. However, BVerfG did not find violations of the rule of law in the practice of the tax authorities. It considered that the appeal route in tax proceedings satisfies the requirements of the state of law in a sufficient way (Art. 19 (4) sentence 1 GG).[94]

3.5. Amendment of § 191 subsection 1 AO and its effects

The above doubts led to the amendment of the provision of § 191 section 1 AO in 1999 and the introduction of the second sentence, which entitles tax administration authorities to question the debtor's legal transactions on the basis of a decision to tolerate enforcement (*Duldungsbescheid*). The decision is not issued when the tax creditor may raise an allegation based on § 9 AnfG. However, the amendment itself also raised doubts in the civil law literature. Indeed, it was pointed out that it was in contradiction to the newly introduced changes in AnfG.[95] It was argued that the AnfG amendment (introduction of § 13 AnfG in its current wording)[96] limited the ability of action of tax administration authorities to bring lawsuits to ordinary courts. In the meantime, surprisingly, the legislator justified the need for changes in the scope of § 191 AO by the uncertain legal status.[97] The effect of the amendment is the empowering of tax administration authorities to issue decisions ordering a third party to tolerate execution regarding an item which was transferred to the third party by the debtor (Duldungsbescheid) under § 3 of the AnfG. In addition, they may raise the objection referred to in § 9 AnfG. However, the admissibility of the tax creditor filing a claim to ordinary courts referred to in § 13 AnfG is seen in an ambiguous way.

1) Rules for issuing a decision ordering a third party to tolerate executions (Duldungsbescheid)

Premises for issuing an administrative decision. Issuing an administrative decision ordering a third party to tolerate the satisfaction of the tax creditor from the property obtained by the third party from the debtor, is based on the civil law conditions indicated in § 3 et seq. of AnfG, even though it is an administrative act within the meaning of 35 VwVfG[98].[99]

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[92] W. Dänzer-Vanotti, Nochmals: Gläubigeranfechtung…,pp. 885 (887).
[93] FG Schleswig-Holstein, judgment of 25.9.1984 /V 85/83), EFG 1985, 211 (212).
[94] BVerfG, decision of 12.9.1983 (1 BvR 1161/83; 1 BvR 1162/83), Juris.
[95] Colloquially about change M. Huber, Gläubigeranfechtung durch Duldungsbescheid – oder: Die unglaubliche, aber wahre Geschichte einer Kehrtwendung des Gesetzgebers, Zeitschrift für Wirtschaftsrecht 2000, pp. 337 (338).
[96] "Wird der Anfechtungsanspruch im Wege der Klage geltend gemacht, so hat der Klageantrag bestimmt zu bezeichnen, in welchem Umfang und in welcher Weise der Anfechtungsgegner das Erlangte zur Verfügung stellen soll." = "If the claim leading to challenge the debtor's legal action is filed in the form of an action, the plaintiff's conclusions shall specify the extent and manner in which the third party is to make the object of the increment available."
[97] Justification of the amendment in Bundestag print (BT-Drucks.) Nr 14/1514, p. 48.
[98] Act of 27.7.2006 (IX ZB 141/05), NZI 2006, 585.
[99] Cf. OLG Celle, act of 6.8.2012 (13 W 64/12), NZI 2012 822.

Pursuant to § 3 section 1 sent. 1 of AnfG a legal transaction that the debtor had made in the previous 10 years, with the intention of harming the creditors, can be challenged if the other party of the transaction knew of the debtor's intention at the time of its execution. Demonstration of knowledge of the third party can take place through evidence and circumstantial evidence and inference from experience.[100]

A tax authority which, under § 191 AO, was granted the right to issue imperious acts is always a creditor.[101]

In addition, for the transaction to be challenged it is required to be performed with a real detriment to the creditors. This is the case, for example, when the tax authority cannot seize the debtor's property under an enforcement order against the debtor.[102]

The tax authority may demand that the debtor's transactions be challenged, provided it has any title against the debtor. Administrative decisions are also such titles and they give rise to the obligation to pay a sum of money, e.g. tax decisions.[103]

Having a temporally enforceable decision also entitles the creditor to challenge the debtor's transactions. In this case, pursuant to § 14 of AnfG, the enforceability of the judgment determining the transaction as ineffective with respect to the creditor depends on whether the decision issued against the tax debtor becomes final. This rule also applies to the decision ordering the third person to tolerate enforcement decision issued on the basis of § 191.1 AO.[104] In such a decision, its execution depends on the finality or non-suability of the decision setting the amount of the tax liability. Such a clause is treated as a condition within the meaning of § 120. 2 No. 2 AO.[105]

2) Direct effects. The application of AnfG also includes the effects specified in AnfG, including the consequences resulting from § 11 AnfG.[106] This provision requires a third party to tolerate the execution carried out by a tax creditor in order to perform the tax obligation.

Pursuant to § 7 of AnfG, the content of the obligation relationship is the obligation of a third party to return what has been disposed of by the debtor under the contested legal act (Rückgewähranspruch).[107] In principle, however, this is commonly understood as the obligation to tolerate the execution carried out by the tax creditor with regard to the items in question.[108] The object of enforcement should therefore be treated as if it were still in the debtor's assets. The third party is obliged to tolerate the execution of this object by the creditor.[109]

If the object of the challenged transaction is lost, destroyed, damaged or its value is reduced, the creditor may demand the surrogate which was obtained in place of the item.

3) Systemic effects. As a consequence of the authorization of tax administration authorities to issue decisions on the basis of AnfG, tax administration authorities and financial courts apply and interpret regulations of a civil law nature.[110] At the same time, administrative discretion is applied because § 191 section 1 sent. 1 of AO does not prescribe but authorizes the tax authority to issue a decision on the tolerance by a third party of the enforcement addressed to the subject of the challenged legal transaction (*Entscheidungsermessen*).[111] The authority correctly uses administrative discretion, if it indicates the correct legal basis (§ 191.1 AO and § 4 section 1 AnfG)

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[100] M. Huber, Anfechtungsgesetz, § 3 nb. 32 ff.
[101] BVerwG, judgment of 25.1.2017 (9 C 30/15), NJW 2017, 2637.
[102] Cf. e.g. BGH, judgment of 26.4.2012 (IX ZR 74/11), BGHZ 193, 129, nb 12.
[103] BGH, judgment of 3.3.1976 (VIII ZR 197/74), BGHZ 66, 91 = NJW 1976, 967
[104] BGH, judgment of 3.3.1976 (VIII ZR 197/74), BGHZ 66, 91 = NJW 1976, 967; U. Koenig, J. Intemann, Abgabenordnung, Münich, 2014, § 191 nb. 136.
[105] FG Köln, judgment of 11.10.2017 (9 K 1566/14), BeckRS 2017, 131499, nb. 29 with further indications on the judgment of BFH from 31.5.1983 (VII R 7/81), judgment of BFH from 9.2.1988 (VII R 62/86), judgment of FG Stuttgart of 9.4.1987 (IX 282/82).
[106] BFH, judgment of 30.3.2010 (VII R 22/09), NZI 2010, 917, nb. 13-14.
[107] BVerwG, decision of 28.6.1990 (8 B 64/90), NJW 1991, 242 (242).
[108] A. Kramer, Der finanzbehördliche Duldungsbescheid zur Durchsetzung anfechtungsrechtlicher Rückgewähransprüche, Deutsche Steuer-Zeitung 1993, 361 (361); *W. Dänzer-Vanotti*, Nochmals: Gläubigeranfechtung durch Duldungsbescheid des Finanzamts, Betriebsberater 1989, 885 (885).
[109] BFH, judgment of 2.3.1983 (VII R 120/82), BStBl II 1983, 398 [obsolete due to the repeal § 419 BGB]; BFH, judgment of 10.02.1987 (VII R 122/84), BStBl II 1988, 313; BVerwG, decision of 28.6.1990 (8 B 64/90), NJW 1991, pp. 242 (242).
[110] Por. BFH, decision of 12.12.2014 (VII B 112/14), BeckRS 2015, 94314 nb. 7.
[111] Finanzgericht Münster, wyrok z 21.4.2010 (6 K 3248/08 AO), nb. 72; Finanzgericht München, judgment of 28.2.2008 (5 K 1557/07), nb. 22.

and shows that there are no other options to satisfy the debt owed to the tax debtor.[112] However, the only action the financial court is entitled to take is to examine whether the decision is unlawful due to the fact that the authority has decided to issue a decision against a third party (§ 102 FGO[113]).[114]

4) Conditions for raising an objection (Paragraph 9 of the AnfG). The allegation on the basis of § 9 of AnfG is of defensive nature and can be filed by the tax administration in a situation where, after execution seizure, a third party (party of the transaction made to the detriment of the creditor) brings an action against the execution (§ 771 ZPO) or an action for a privileged satisfaction (§ 805 ZPO).[115] In this way, the tax authority may refuse the third party's claims making its own allegation that the transaction performed is to its detriment.

The allegation is submitted in the form of a procedural writ and its content should clearly indicate that the tax authority disputes the transaction between a tax debtor and a third party to the detriment of the tax creditor. The tax authority's successfully raising the objection results in resolving the case to the disadvantage of a third party.

5) The admissibility of filing of an action under §§ 11, 13 AnfG by the tax authorities. Amendments to § 191 subsection 1 AO did not, however, fully explain the situation regarding the admissibility of filing of an action under §§ 11, 13 AnfG by the tax creditor. Referring to the older case law of BFH, some commentators find that fiscal authorities continue to be entitled to choose the form of questioning the debtor's transaction (action or administrative decision). It seems, however, that the new case law aims at limiting the tax administration to administrative-law forms of action, pointing to the amended wording of §191 section 1 of AO.[116] The justification for the inadmissibility of a civil lawsuit is that there is no need for legal protection (*Rechtsschutzbedürfnis*) for the tax administration authority, which, however, has the right to issue a decision.[117]

4. Conclusions. Final remarks

Generally, the view that Actio Pauliana can be used with regard to tax obligations prevailed both in Poland and Germany, even though both the doctrine and the judicial decisions made similar objections to its application. Nevertheless, differences between the Polish and the German model are significant. Only recently, after the judgment of the Constitutional Tribunal of April 2018, the admissibility of Actio Pauliana to tax obligations was finally settled in Poland. On the one hand, this state of affairs is the result of tax law autonomy, which is strongly emphasized in the Polish doctrine and judicial decisions. On the other hand, it is the result of the fact that the Polish legislator has not regulated this issue yet. In Germany, after the amendment of § 191 subsection 1 AO of 1999, there is finally no doubt that the tax administration can operate on the basis of AnfG. Unlike Poland, however the German doubts concerned forms (administrative decision and/or action to court) in which tax administration authorities could act.

The problem is how to use an institution of civil law provenance in the public sector: is it to be used directly, by way of *analogia legis*, or perhaps by *analogia iuris*, and thus as a general principle of the entire legal system. Another question that must be asked is what effects arise from its use, whether the institution of civil law provenance applied in the public sector, and especially in such areas as tax administration, still retains its civil law character or whether it becomes an institution of public law, that is only an equivalent of a civil law institution. As is well-known, we deal with this kind of phenomenon in legal systems of European countries, e.g. the institution of a public law contract as a separate arrangement with regard to the civil law contract. It seems that the

[112] Finanzgericht Münster, judgment of 21.4.2010 (6 K 3248/08 AO), nb. 69.; previously BFH, judgment of 31.5.1983 (VII R 7/81), BStBl. II 1983, 545; judgment of 10.2.1987 (VII R 122/84), BStBl. II 1988, 313.
[113] Finanzgerichtsordnung (Act on proceedings before financial courts) as published on February 28, 2001 (BGBl. I S.422, 2262, 2002, and S. 679), as last amended by Art. 5 of the Act of 8/10/2017 (BGBl. I S. 3546).
[114] Finanzgericht München, judgment of 28.2.2008 (5 K 1557/07), nb. 21.
[115] H.-P. Kirchhof [in] Münchener Kommentar zum AnfG, C.H.Beck, Monachium, 2012, § 9 nb. 8.
[116] BVerwG, judgment of 25.1.2017 (9 C 30/15), NJW 2017, 2637; OLG Celle, act of 6.8.2012 (13 W 64/12), NZI 2012 822; likewise, BGH, decision of 27.7.2006 (IX ZB 141/05), NZI 2006, 585 nb. 8.
[117] A. Kramer, Der finanzbehördliche…, pp.361 (363).

Polish solution is "more uniform" in the civil-law sense, i.e. its application to tax obligations is subject to the entire civil law mechanism, including civil lawsuits. An identical solution exists in France. The German solution is more hybrid, which is due to the introduction of a solution typical of public law in the form of a unilateral act, which is an administrative decision, into the civil law institution of Actio Pauliana.

The problems mentioned above are the result of the division into public and private law that is deeply rooted in the European continental legal culture. The autonomy of tax law represents a detailed expression of this division. The so-called absolutizing of this division, i.e. exaggerated emphasizing of its significance is not uncommon.[118]

The above presentation of the Polish and the German solution also leads to the conclusion that in the application of the institutions of civil law provenance in the public sector there often appear problems of constitutional weight. It seems that the essence of the matter is not to qualify the institution in the group of civil law or public law institutions, but to decide whether the arrangement is compliant with the standards of the law, and in particular whether it will protect the individual constitutional rights (e.g. the right to a fair trial - Article 6 of the European Convention on Human Rights and Fundamental Freedoms).The analyzed issue proves that the above-mentioned European standards of the rule of law can be implemented both with the use of classical civil law instruments and those typical of administrative law (administrative decision). Both in the Polish and German doctrine and judicial decisions the prevailing view is, that the solutions adopted in these countries do not violate these standards.

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[118] See M. W. Hesselink, *The new European Private Law*, Kluwer Law International, 2002, p. 11 and n.; M. W. Hesselink, *The Structure of the New European Law*, [in] Electronic Journal of Comparative Law, 2002 December**,** p. 8 and n.; C. Semmelmann, The Public-Private Divide in the European Union Law or an overkill of functionalism, Maastricht European Private Law Institute, Working Paper 2012 No. 12, p. 1 : "That is why it is worth paying attention, in European legal thought shaped by the analysis of EU law, an increasingly skeptical in relation to the concept of dichotomous division of the legal system into public and private law attitude is currently prevailing. Gradual departure from formalism, dogmatism and positivism characterized by the creation of dichotomous divisions and classification towards a pragmatic and functional attitude can be observed."

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List of abbreviations

AnfG. Anfechtungsgesetz
AO. Abgabenordnung (Ordynacja podatkowa)
BB. Betriebsberater
BeckRS. Beck-Rechtssache
BFH. Bundesfinanzhof (Federalny Trybunał Finansowy)
BGB. Bürgerliches Gesetzbuch
BGBl. Bundesgesetzblatt (Federalny Dziennik Ustaw)
BGH. Bundesgerichtshof (Trybunał Federalny)
BStBl. Bundessteuerblatt

BVerfG. Bundesverfassungsgericht
BVerwG. Bundesverwaltungsgericht (Federalny Sąd Administracyjny)
DStRE. DStR-Entscheidungsdienst
DStZ. Deutsche Steuer-Zeitung
EFG. Entscheidungen der Finanzgerichte
FG. Finanzgericht (Sąd Finansowy)
FGO. Finanzgerichtsordnung
GG. Gundgesetz
HGB. Handelsgesetzbuch
InsO. Insolvenzordnung (Prawo o upadłości)
nb.. numer boczny
NJW. Neue Juristische Wochenschrift
VwVfG. Verwaltungsverfahrensgesetz
ZIP. Zeitschrift für Wirtschaftsrecht

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