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On the Issue of Excess Tax Arising Due to the Constitutional Tribunal’s Rulings

Abstract

One of the fundamental powers of the Constitutional Tribunal – granted by the provisions of the constitution – is to decide on the compliance of particular statutes with the Constitution of the Republic of Poland. The Tribunal’s rulings concern tax statutes as well, which implies specific consequences connected with the verification of the accuracy of tax settlements made under a challenged provision and leads essentially to excess tax being calculated. Such situations have not been uncommon recently, which justifies a more profound reflection on this issue in the context of rationality of verification of procedures regulated under the Tax Ordinance Act, which concern tax obligations arising from a declaration or a decision. It seems reasonable to put forward a thesis that the non-uniform nature of the Constitutional Tribunal’s rulings has not been considered to a sufficient extent in the provisions of this statute. This leads to certain practical problems with tax law, which will be outlined in this study.

Keywords: tax law, Constitutional Tribunal, excess tax, revision of tax proceedings

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Introduction

Pursuant to Art. 84 of the Constitution of the Republic of Poland,² everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by the relevant statute. The statute shall also regulate all of the essential structural elements of taxes (Art. 217). This leads to the conclusion that the statute is the main, primary source of tax law.³ A tax law formed in a hurry and without due diligence makes the legal framework include flawed, faulty regulations, whose non-compliance with the constitution is then found and announced by the Constitutional Tribunal.⁴ The situation suggests certain problems concerning the challenging of tax settlements made based on questioned provisions. The settlements are based either on self-calculation of tax as determined, in principle, in a relevant income statement submitted by taxpayers or on the decisions issued by tax authorities. If the CT questions the statute's provisions on the basis of which a tax obligation has been calculated, it results, basically, in excess tax payment (overpayment).

The provisions of the general tax law as defined in the act of 29 August 1997 – the Tax Ordinance Act⁵ – regulate the relevant procedures for claiming excess tax payment if the CT issues a ruling based on which a self-calculation of tax for settlement purposes has been or a tax decision has been issued. It is possible to put forward a thesis that the procedures were designed in order to divide the CT's rulings into positive verdicts, which would find a given examined provision compliant with the constitution, and negative verdicts, which would determine a given provision unconstitutional. The latter, so-called derogation decisions, eliminate provisions from the legal framework. The CT, however, abandoned this simple division, arguing already in 2001 that the issue in question was much more complex.⁶ It was thus necessary to distinguish verdicts having other consequences,

² Act of 2 April 1997 – the Constitution of the Republic of Poland (Journal of Laws No. 78, item 483) – hereinafter referred to as the constitution.

³ R. Dowgier, L. Etel (ed.), G. Liszewski, M. Popławski, S. Presnarowicz, *Prawo podatkowe. Zarys wykładu*, Białystok 2013, p. 46.

⁴ Hereinafter referred to as the CT.

⁵ Uniform text: Journal of Laws of 2018, item 800 as amended – hereinafter referred to as the TOA.

⁶ See more in: T. Woś, *Wyroki interpretacyjne i zakresowe w orzecznictwie Trybunału Konstytucyjnego*, "Studia Iuridica Lublinensia" 2016, 3(25), <http://studiaiuridica.umcs.pl> (access: 13.03.2019) and

especially interpretative verdicts. An interpretative verdict is a ruling whose conclusion points to the compliance or non-compliance of a given legal provision in a given meaning with the constitution.⁷

In recent times, the CT has been issuing interpretative verdicts regarding the provisions of tax statutes. These include, for instance, the CT's rulings concerning case SK 13/15⁸ and case SK 48/15⁹ regarding real estate tax, both dated 2017. Source literature points to problems underlying the occurrence of excess tax payments in connection with such rulings.¹⁰ The main issue here is that the body of the rulings issued by SAC contains a view on the application of procedures provided for in the Tax Ordinance Act regarding claiming excess tax payment also in the case of the CT's rulings other than derogation decisions.¹¹ The standpoint has been upheld in verdicts passed later on by provincial administrative courts.¹² It should be admitted, however, that given the significance of the issue, the number of rulings issued by administrative courts in this respect is not very impressive.

A. Olechno, *Wpływ orzecznictwa Trybunału Konstytucyjnego na stosowanie prawa podatkowego w Polsce*, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2013, 9, pp. 32–35.

⁷ T. Woś, *op. cit.*, p. 987.

⁸ The CT's verdict of 12 December 2017 (SK 13/15), Journal of Laws of 2017, item 2372. The CT has found Art. 1a section 1 item 3 in relation to Art. 5 section 1 item 1 letter a) of the Act of 12 January 1991 on local taxes and fees (uniform text: Journal of Laws of 2017, items 1785 and 2141) understood in a way that land subject to taxation by means of real estate tax can be categorised as land associated with conducting business activity if a natural person conducting business activity is a co-owner of this land to be non-compliant with Art. 2 in relation to Art. 64 sections 1 and 2 and Art. 84 in relation to Art. 32 section 1 of the Constitution of the Republic of Poland.

⁹ The CT's verdict of 13 December 2017 (SK 48/15), Journal of Laws of 2017, item 2432. The CT has found Art. 1a section 1 item 2 of the Act of 12 January 1991 on local taxes and fees (uniform text: Journal of Laws of 2017, items 1785 and 2141) to be non-compliant with Art. 84 in relation to Art. 217, in relation to Art. 64 section 3 of the Constitution of the Republic of Poland in the scope within which it makes it possible to recognise a built structure that meets the criteria of being a building – as provided for in Art. 1a section 1 item 1 of the quoted act – a non-building structure.

¹⁰ See: L. Etel, *Wyroki interpretacyjne Trybunału Konstytucyjnego a zwrot nadpłaty*, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2018, 3, pp. 22–28.

¹¹ In SAC's verdict dated 22 October 2014 (II FSK 457/14), LEX no. 1537519, it was argued as follows: "A Constitutional Tribunal's ruling leading to an overpayment – within the meaning of Art. 74 of the TOA – shall be considered not only a Constitutional Tribunal's verdict removing a particular provision from the existing legal framework but also a verdict that finds the provision unconstitutional in a given scope or when interpreted in a certain manner. In such circumstances, the condition to apply Art. 74 of the TOA is the occurrence of an overpayment as a result of an interpretation whose unconstitutionality has been proven by the Tribunal's verdict, assuming that following the interpretation the Tribunal finds constitutional (or ignoring the unconstitutional interpretation) would not have led to the occurrence of overpayment."

¹² See: verdicts passed by the provincial administrative court in Olsztyn, dated 5 December 2018: I SA/Gd 959/18, LEX no. 2603925 and I SA/Gd 960/18, LEX no. 2603797, and the doctrine quoted in their respective conclusions.

The later part of this study offers an attempt to discuss the subject matter of excess tax payments occurring in connection with the CT's rulings, including rulings other than derogation decisions. It is possible to suggest a thesis that the legal regulations applicable in this context need to be corrected in both the procedural and the material-legal area. The aim of this study is to point to the solutions available in this respect.

The procedure of claiming an overpayment

Basically, an overpayment is a tax paid in excess or unduly.¹³ The entitlement to claim an overpayment is a materialisation of the taxpayer's right to pay the due tax only in the amount provided for in the relevant applicable laws.¹⁴ The right in question is exercised mainly on the principles defined in the provisions of Art. 72–80 of the TOA.

The fundamental issue here is that there is no uniform procedure for claiming an overpayment. The procedural differences existing in this area involve mainly the manner of settling taxes, with a smaller significance of the reasons for the occurrence of the overpayment in question. The main procedure to claim an overpayment involves initiating proceedings in the area at issue by submitting an application for ascertainment of tax excess payment. The right to submit such an application is granted when the submitting party has taken advantage of self-calculation of tax, which implies the scope of tax obligations arising in accordance with what is defined in Art. 21 § 1 item 1 of the TOA. As tax is, in essence, calculated in the submitted income statement, the application for ascertainment of excess tax payment shall be submitted together with a corrected income statement. If the corrected income statement is found valid and unquestionable, the tax authority refunds the excess tax without issuing a decision of ascertainment of excess tax payment.¹⁵ Otherwise, the standard practice is to use a positive or a negative decision of ascertainment of excess tax payment.

The procedure for establishing an overpayment may not be initiated *ex officio*, which makes it fundamentally different from the establishment of an overpayment

¹³ Art. 72 § 1 item 1 of the TOA.

¹⁴ See more: M. Popławski, *Uprawnienia podatkowe. Procedura dochodzenia należności podatkowych od Skarbu Państwa lub jednostek samorządu terytorialnego*, Warszawa 2014, pp. 55–65.

¹⁵ Art. 75 § 4 of the TOA.

on the basis of Art. 74 of the TOA. Source literature¹⁶ argues that the tax authority is obligated to determine the overpayment in every case, except for overpayments:

- a) arising on the day of submission of an annual income tax return, of an annual statement regarding the special hydrocarbon tax, of an excise duty statement, of a statement of payments from profit for a given trading year¹⁷,
- b) arising in connection with a ruling of the CT or the Court of Justice of the European Union¹⁸;
- c) claimed following the procedure of ascertainment of an overpayment.

In practice, which is still not unquestionable¹⁹, the determination of an overpayment based on Art. 74a of the TOA involves also situations where tax decisions on the basis of which an obligation has been performed are eliminated from legal transactions.²⁰

Apart from the abovementioned procedures of establishing or determining an overpayment, Art. 74 of the TOA defines also a special procedure of claiming overpayments arising in connection with a ruling of the CT or the CJEU. In essence, the procedure is identical to that of ascertainment of excess tax payment. The difference lies in the basis for the submission of the application for refund and the obligation to calculate the amount of overpayment in the submitted application. This special procedure is, however, referred to in other provisions of the adopted tax ordinance regarding overpayments – in the scope of the refund deadlines²¹, the interest²², and the expiry of the right to submit an application for refund²³, establishing therefore a specific model of refund. It is thus possible to say that the applicable

¹⁶ See: L. Etel, a commentary to Art. 74a [in:], R. Dowgier, L. Etel (eds.), P. Pietrasz, M. Popławski, S. Presnarowicz, W. Stachurski, K. Teszner, *Ordynacja podatkowa. Komentarz*, Warszawa 2017, p. 617.

¹⁷ Art. 73 § 2 of the TOA.

¹⁸ Art. 74 of the TOA.

¹⁹ In SAC's ruling of 19 September 2013 (II FSK 2418/13), LEX no. 1557957, it was argued that the refund of an overpayment in the event a decision was revoked or found invalid was a material-technical activity and did not require a decision to be issued.

²⁰ See e.g. SAC's verdict of 9 May 2018 (II FSK 1640/16), LEX no. 2496963, where it was argued that "Removal of a final determining decision from legal transactions causes a state of uncertainty, which requires the tax authority to apply Art. 74a of the TOA and determine the amount of the overpayment arising in connection with the revocation of the said final decision." A similar view was presented in SAC's verdicts dated: 3 August 2018 (II FSK 2102/16), LEX no. 2547509 and 26 May 2017 (II FSK 380/17), LEX no. 2305073.

²¹ Art. 77 § 1 item 4 of the TOA.

²² Art. 78 § 5 of the TOA.

²³ Art. 79 § 2 of the TOA.

legal regulations provide for a specific regulation of the issues concerning claiming and having overpayments arising as a result of the CT's rulings refunded.

Refund of an overpayment on the basis of the application referred to in Art. 74 of the TOA

The right to submit an application for refund of an overpayment arising as a result of the CT's ruling is granted to taxpayers whose tax obligations have arisen as provided for in Art. 21 § 1 item 1 of the TOA. This concerns situations where a tax obligation arises by virtue of the law, without the need for a constitutive decision to be issued. But the rulings issued by administrative courts as well as the relevant source literature are found to argue that the procedure defined in Art. 74 of the TOA will not be applied in cases where there is a tax obligation arising in line with the provisions of Art. 21 § 1 item 1 of the TOA, but a decision correcting the said obligation (and determining the amount of the tax to be paid) has been issued in the case in question. Such a manner of interpretation can be justified by opposing Art. 74 of the TOA to the content of Art. 240 § 1 item 8 of the TOA, which offers a basis for challenging the final decision by way of resumption of proceedings.²⁴ As a result, claiming a tax paid unduly or paid in an amount in excess of the amount due on the basis of an issued decision requires that the decision in question be amended, revoked, or declared invalid. Otherwise the settlement regarding an overpayment would stand in contradiction to the content of such a decision.

The procedure defined in the very laconically worded Art. 74 of the TOA is based on an application for refund of an overpayment. Such an application shall include a calculated amount of the overpayment and shall be submitted additionally with a corrected income statement (if the taxpayer was obligated to submit a statement) or with an income tax notice (if the tax has been settled by the taxpayer).

²⁴ See: L. Etel, a commentary to Art. 74 [in:]; R. Dowgier, L. Etel (ed.), P. Pietrasz, M. Popławski, S. Presnarowicz, W. Stachurski, K. Teszner, op. cit., s. 614. It is difficult, however, to accept the justification for such a standpoint as expressed in SAC's verdict of 2 June 2015 (II FSK 1350/13), LEX no. 1774140, where it was argued that "Since the entitlement to submit an application for refund of an overpayment is granted only to those taxpayers whose obligations have arisen by virtue of the law, i.e. as defined in Art. 21 § 1 item 1 of the TOA, a taxpayer whose tax obligation has arisen on the basis of a declaratory decision is not granted the right to submit an application for refund of an overpayment since the provisions of Art. 74 of the TOA do not apply in this case." Contrary to what SAC claims here, a declaratory decision does not produce a tax obligation. But it appears that the bench has found that in the event a decision remains used in legal transactions, claiming an overpayment may be effective only if this decision is challenged.

As already shown, the provisions of Art. 74 correspond with Art. 74a of the TOA, in the light of which the amount of the overpayment is determined by the tax authority by way of a decision in cases not listed in Art. 73 § 2 and Art. 74. Thus, the legislator considers, in essence, the refund of an overpayment arising in connection with the CT's ruling a very simple procedure initiated by a taxpayer's application, one that does not require the tax authority to issue any decision on account of the presumed obviousness of the case. A fully legitimate application leads to a refund of the overpayment within 30 days of the date when the CT's ruling enters into force or of the date when the relevant normative act has been revoked or amended in full or in part if the application has been submitted before the CT's ruling entering into force.²⁵ The refund of an overpayment would then take on the form of a so-called material-technical activity. Yet, the presumed obviousness of cases concerning overpayments arising in connection with the CT's rulings is unfounded if we take into account that the basis for the submission of the application referred to in Art. 74 of the TOA may be not only derogation decisions but also interpretative decisions alike. This leads to a situation that given the lack of separate relevant provisions, the general procedures defined in the applicable tax ordinance govern the settlement of situations where a submitted application for refund of an overpayment is not legitimate or legitimate only partially.

According to Art. 207 § 1 of the TOA, the tax authority settles cases by way of decisions unless the provisions of the act in question stipulates otherwise. A special provision may therefore abolish the obligation to settle a case by means of a decision, but there is no such stipulation in Art. 74 of the TOA. If we compare Art. 74 of the TOA with Art. 77 § 1 item 4 of the TOA, we can conclude that in the event an application for refund is accepted in its entirety, the tax authority refunds the overpayment in question within 30 days of the date of submission of the said application, without issuing any decisions as part of material-technical activities.²⁶ But when there is dispute on the grounds of occurrence of or the amount of an overpayment, the case requires a decision to be issued on the basis of Art. 74 in relation to Art. 207 § 1 of the TOA.²⁷ In order to eliminate any interpretation-related doubt

²⁵ Art. 77 § 1 item 4a of the TOA.

²⁶ In the relevant source literature it is argued that a comparison of the content of Art. 74a and of Art. 75 § 3 of the TOA may lead to a conclusion that even if there has been a legitimate submission of an application for refund of an overpayment in relation to the CT's ruling, the situation does not exempt the obligation to issue a decision in the case in question – L. Eteł, *Wyroki interpretacyjne...*, op. cit., p. 23.

²⁷ This is an analogous situation to one that involves settling a dispute regarding the interest rate on an overpayment. The absence of a clear legal norm to issue a decision closing proceedings initiated by an application for refund of an overpayment may not preclude the general norm under

in the scope in question, it would be reasonable for the legislator to make use of an identical legal structure like the one in Art. 75 § 4 of the TOA, which determines that if a corrected return (statement) raises no reservations as to its correctness, the tax authority refunds the overpayment without issuing a decision ascertaining the occurrence of an overpayment. A correct application for refund of an overpayment shall be thus directly related to a clear legal basis confirming the absence of obligation to issue a decision in the case in question.

The non-specificity of the procedure of claiming overpayments based on Art. 74 of the TOA is best seen in cases where the tax authority questions the legitimacy of an application for refund of an overpayment. The issue has been regulated correctly and in much detail in the context of applications for ascertainment of an overpayment, but there are no analogous solutions for applications for refund of an overpayment. We can only presume that it was the common occurrence of applications for ascertainment of an overpayment, a procedure different from that which involves applying for a refund of an overpayment in relation to the CT's rulings, that contributed to the specification of the former procedure only. At present, there are no problems with establishing the procedure if an application for refund of an overpayment is illegitimate in full. A refusal to ascertain an overpayment makes a submitted corrected statement ineffective²⁸ and does not require determining the right amount of the tax obligation. Finding an application for refund of an overpayment legitimate only partially is a basis for issuing a decision pursuant to Art. 75 § 4a of the TOA. – ascertainment of an overpayment and for determining the correct amount of obligation in the scope in which the occurrence of the overpayment has to do with the change of the amount of the said obligation.

It would be rational to adopt the said solutions and implement them in the domain of applications for refund of an overpayment, but it is hard to find the legal basis to make it happen in the current legal landscape. I think that we should not rule out turning here to the analogy²⁹ that is not ruled out in the general tax law in the procedural domain.³⁰ The limits to the applicability of this analogy will not violate the rights granted to taxpayers, which means that the prohibition of application of restrictive analogy will be maintained.³¹ As already shown, claiming

Art. 207 § 1 of the TOA. – see more: R. Dowgier, *Wniosek o oprocentowanie nadpłaty*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2018, 6, pp. 24–32.

²⁸ Art. 81b § 2a of the TOA.

²⁹ A different view on the matter is offered by L. Etel, *Wyroki interpretacyjne...*, op. cit., p. 24.

³⁰ See: B. Brzeziński, J. Jezierski, *Z problematyki wykładni prawa podatkowego*, Łódź 1992, p. 159 and E. Smoktunowicz, J. Mieszkowski, *Źródła i wykładnia prawa podatkowego*, Białystok 1998, p. 99 and R. Mastalski, *Stosowanie prawa podatkowego*, Warszawa 2008, p. 126.

³¹ Zob. R. Mastalski, op. cit., p. 125.

a refund of an overpayment on the basis of Art. 74 of the TOA is very similar to the procedure of ascertaining an overpayment based on Art. 75. The difference lies basically only in the circumstances, i.e. the reason for the occurrence of the overpayment. Since the procedure applied in questioning applications for refund of an overpayment is not regulated, there appears a sort of structural gap that can be bridged by adopting an appropriate analogy. In consequence, an application for refund of an overpayment should be considered in the same way and with the same legal effects as an application for ascertainment of an overpayment. This would lead to a conclusion that a refusal to refund an overpayment would not necessitate questioning a submitted corrected statement by way of separate additional proceedings (regarding the establishment of the amount of the tax obligation in question) (an analogy to Art. 81b § 2a of the TOA). Only a partial consideration of an application for refund with a corrected statement would make it possible, in turn, to issue a ruling identical to that referred to in Art. 75 § 4a of the TOA, i.e. apart from determining the amount of the overpayment to be refunded, it would also involve determining the amount of obligation in the scope in which the occurrence of the overpayment has to do with the change of the amount of the said obligation. In the remaining scope, the decision in question should include a settlement regarding the refusal to refund the overpayment. And Art. 81b § 2a of the TOA could be applied here in the context of a corrected statement.

Lastly, it should be also borne in mind that the right to submit an application for refund of an overpayment expires after the limitation period of the tax obligation.³² Taking into consideration the substantial time necessary for the CT to examine cases, the practical application of the provision may lead to situations, where it is impossible to question a defective tax settlement based on regulations found to be non-compliant with the constitution. Such a solution requires a critical review. It seems more reasonable to associate the right to submit an application for refund of an overpayment not with the expiry of the tax obligation, but with the issuance of the CT's ruling – like in the case of resumption of proceedings, which will be discussed below. The regulations being in force may cause situations where it may be impossible to claim a refund of a tax paid in excess based on a provision which the CT has found non-compliant with the constitution. The stabilising function of the institution of expiry does not seem a sufficient argument in this case.

³² Art. 79 § 2 of the TOA.

Overpayment resulting from a revocation or an amendment of a decision in relation to a ruling of the CT

If there has been a final decision (of determining or ascertaining type) issued in a tax-related case, it is possible to challenge it by means of one of the so-called extraordinary procedures. These procedures are an exception to the principle of permanence of final tax-related decisions as expressed in Art. 128 of the TOA. As long as a decision is not challenged, it needs to be acknowledged that the tax obligation arising therefrom exists in the amount ascertained or determined in the decision in question. This can be inferred, respectively, from Art. 21 § 1 item 2 of the TOA, according to which a tax obligation occurs when the decision ascertaining its amount is served, and Art. 21 § 3 of the TOA, according to which the amount of tax is not calculated or is calculated incorrectly, the tax authority determines the amount of the tax obligation in its decision.

In Art. 240 § 1 item 8 of the TOA, one of the listed reasons to resume tax-related proceedings is the issuance of a decision on the basis of a regulation that has been found non-compliant with the constitution by the CT. This means that no procedure of decision verification has been provided for for such cases – unlike in the case of self-calculation of the amount of tax in the submitted statement. A model which involves applying one of the extraordinary procedures (resumption of proceedings) to final decisions has been adopted, assigning it directly to the CT's rulings by means of reasons defined in Art. 240 § 1 item 8. The notion of inconsistency of regulation with the constitution has been made use of here, but the categories of the CT's rulings have not been specified, though. Like in the case of application of Art. 74 of the TOA, however, the line of argument offered in rulings issued by administrative courts is that the basis to resume proceedings may include both rulings directly removing normative acts from the existing legal transactions and rulings on legislative abandonment.³³ The view should be accepted. It would be unacceptable to adopt a solution where the taxpayer would be granted different ranges of rights to claim excess tax payments arising in relation to the CT's rulings depending on whether the tax obligation arises from a statement or a decision. We would be dealing with exactly such a situation if the basis for resuming proceedings were derogation verdicts only.

³³ See: SAC's resolution dated 16 October 2017 (I FSK 1/17), LEX no. 2371605 and the literature quoted therein, as well as the verdicts passed by the provincial administrative court in Olsztyn, dated 5 December 2018: I SA/Gd 959/18, LEX no. 2603925 and I SA/Gd 960/18, LEX no. 2603797, and the doctrine quoted in their respective conclusions.

The right to resume proceedings in relation to the CT's verdict is granted to the party to the proceedings. The solution is identical to the procedure of initiating proceedings regarding a refund of an overpayment pursuant to Art. 74 of the TOA. The request shall be filed within one month of the date the CT's ruling enters into force.³⁴ It is the only time frame limiting the right to challenge decisions. Thus, unlike in the case of claiming overpayments based on Art. 74 of the TOA, there are no contraindications for a resumption of proceedings to concern a decision regarding an expired tax obligation. It is important to emphasise the adopted essential differences in the limitation of rights to claim overpayments depending on whether the CT's ruling affects a given issued tax decision or whether there has been no such decision issued in a given case. I believe that a solution which associates the time frame for the initiation of the procedure of settlement verification with the date of the CT's ruling entering into force – and not with the date of expiry of the tax obligation – is much more reasonable. As argued earlier in this study, a solution of this type makes it possible to consider – in most cases – the impact of the CT's ruling on the domain of the applicable tax law. There may be an exception to this principle in the context of resumption of tax-related proceedings. Pursuant to Art. 245 § 1 item 3 letter b) of the TOA, the tax authority will refuse to revoke a currently valid decision if it finds that there occurs a reason listed under Art. 240 § 1 item 8, and that a new decision adjudicating on the subject matter in question could not be issued on account of the expiry of the limitation periods. In such an event, the tax authority refusing to revoke a given decision shall point in the operative part of its ruling to the occurrence of the reason defined in Art. 240 § 1 item 8 of the TOA and to circumstances preventing the revocation of the said decision. Such a ruling (prejudication) gives the taxpayer means to pursue their rights by way of civil action. If a decision is not revoked, we may not speak of occurrence of an overpayment within the meaning of Art. 73 of the TOA but of potential damage occurring as a result of activity of a public functionary, with the damage possible to be redressed only by way of civil action.³⁵

The above reveals another difference between claiming overpayments related to the CT's rulings, depending on whether they result from a 'decisionless' correc-

³⁴ Art. 241 § 2 item 2 of the TOA.

³⁵ Pursuant to Art. 417¹ § 2 of the act of 23 April 1964 – the Civil Code (uniform text: Journal of Laws of 2018, item 1025 as amended), hereinafter referred to as the CC, if the damage has been caused as a result of issuance of a legally binding ruling or a final decision, it is possible to seek the redress thereof once such a ruling or decision are officially found to be inconsistent with the law unless provided for otherwise by separate regulations. This applies also to cases when a legally binding ruling or a final decision has been issued on the basis of a normative act inconsistent with the constitution, a ratified international treaty, or a statute.

tion of self-calculated tax or whether they arise from a decision being amended or revoked. In the former case, the legislator blocks the right to claim an overpayment after the expiry of the limitation period, and the refusal to resume the proceedings regarding the case in question makes the legitimacy of the submitted application not subject to substantive evaluation at all.³⁶ This, in consequence, eliminates the option to claim one's overpayment by way of tax-related proceedings. Is it possible then for the taxpayer to pursue civil action in a way similar to the abovementioned case of occurrence of an overpayment resulting from a decision being revoked after the resumption of the relevant proceedings? This seems highly doubtful, and the scope of this study is too limited to provide an in-depth analysis of the matter at issue. It is true that Art. 417¹ § 1 of the CC³⁷ offers a basis to pursue civil action to seek redressal of damage suffered by the injured party as a result of the so-called normative injustice, but this requires proving the existence of a causal relationship between this injustice and the identified damage. If the CT finds that a regulation on the basis of which a taxpayer has calculated the due tax by themselves is inconsistent with the constitution, it will be not enough to assert liability against the Treasury.³⁸ The consequences of normative defectiveness (a normative act's inconsistency with the law) have to be sufficiently specified by the injured party for the existence of an adequate causal relationship to be established. And while it is quite simple to prove that such a relationship exists when the application of the law takes the form of a defective decision being issued, it may be necessary to examine the circumstances specific to a given case in other situations.³⁹ It should be also acknowledged that designing legal norms is not related to any specific acts of public authorities towards an individual. This means that it is impossible to assume that public authorities have actually acted against the individual in question.⁴⁰

³⁶ See: SAC's resolution dated 11 November 2015 (I FSK 515/14), LEX no. 1772819.

³⁷ Pursuant to Art. 417¹ § 1 of the CC, if damage is caused by a legislative act, remedy thereof may be demanded once it has been declared non-compliant with the constitution, a ratified international treaty or a statute in the course of appropriate proceedings. The CT's verdict concerning the inconsistency of a given regulation with the constitution is a prejudication within the meaning of the regulation in question – see: the judgement of the Court of Appeal in Warsaw of 10 October 2017 (I ACa 1042/16), LEX no. 2402434.

³⁸ See more: M. Safjan, *Odpowiedzialność odszkodowawcza z tytułu bezprawia normatywnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, 67(1), pp. 13–34.

³⁹ *Ibidem*, p. 31.

⁴⁰ The view was expressed by the Supreme Court in its ruling of 30 May 2003 (III CZP 34/03), "Prokuratura i Prawo" 2004, 2, p. 30.

The interest on an overpayment occurring in connection with a ruling of the CT

While we should accept the separate regulation of procedures of claiming overpayments related to the CT's rulings, which depend on the presence or absence of a tax-related decision issued in a given case, it should follow a similar time frame and produce similar effects. These effects in the case of occurrence of an overpayment include mainly an obligation to refund such an overpayment together with the relevant interest. In the current legal landscape, calculating the interest – in the case in question – is based, however, on completely different criteria assigned to the procedure of Art. 74 and Art. 240 of the TOA.

In the case of overpayments covered by an overpayment refund application submitted pursuant to Art. 74 of the TOA, it has been stipulated that they are subject to interest from the date their occurrence.⁴¹ The end date for interest calculation depends on the date of submission of such an application for refund of an overpayment. If the application is submitted before or within 30 days of the CT's relevant ruling coming into force, the interest will be calculated until the date of overpayment refund. If the application is submitted after the set date, the overpayment is subject to interest calculated until the 30th day of the CT's ruling entering into force. It should be added, by the way, that a specific indication of the period for which the interest is calculated is based on an assumption that the tax authority refunds the overpayment within the period of 30 days as defined in Art. 77 § 1 item 4 and 4a of the TOA.⁴² There is no regulation an additional right to interest could be derived from, e.g. in the case when the taxpayer has not received their refund for several months although they have submitted their application for refund of excess tax as required.

In the case of applications for refund of an overpayment, the legislator has adopted a solution according to which the CT's ruling shall result in interest being calculated each and every time. I find this solution fully legitimate when the CT's verdict is overruling in nature. But the case is different if the verdict is only interpretative. In practice, this leads to a situation where a taxpayer who has self-calculated the tax to be paid, which means they have interpreted the relevant regulation (which has appeared to be unconstitutional later on) individually, may

⁴¹ Art. 78 § 5 of the TOA.

⁴² The period runs from the date of submission of the application referred to in Art. 74 or from the date when the CT's ruling enters into force or from the date when the relevant normative act has been revoked or amended in full or in part if the application has been submitted before the CT's ruling entering into force.

demand to have the overpayment refunded with interest. The solution stands clearly in opposition to the principles of charging interest on an overpayment resulting from a corrected tax return, which has no relationship with the CT's rulings. A defective statement that has been corrected later on by the taxpayer in connection with e.g. a resolution of the SAC, submitted with an application for ascertainment of an overpayment, does not result in an obligation to charge interest unless the overpayment is not refunded within the set deadline.⁴³ Even in this case, however, the interest is calculated from the date of submission of the application for ascertainment of an overpayment, and not from the date of occurrence of any such overpayment.

I believe that only derogation verdicts of the CT should result in charging interest from the date of occurrence of an overpayment. In the case of interpretative verdicts, it would be necessary to consider whether the tax obligation the regulation subject to the CT's verdict concerns has been calculated by the taxpayer individually or whether it has been established or determined by means of a decision of the tax authority. Only in the latter case should a decision's defectiveness lead to the payment of an interest charged on an overpayment from the date of occurrence thereof. A tax creditor should not be obligated to pay an interest as a result of a taxpayer's wrong interpretation of the relevant applicable regulations. This is particularly gross in situations where an overpayment is related to the TC's ruling concerning provisions of a statute, and the tax creditor is a local government unit that has no impact on the law developed at the central level.

The above principle fits well into the body of legal solutions applied to overpayments occurring as a result of a decision being revoked or amended. Pursuant to Art. 78 § 3 item 1 of the TOA, the interest on overpayment in such events is guaranteed from the date of occurrence of the overpayment only when the tax authority has contributed to the occurrence of the reason for the amendment or revocation of the relevant decision.⁴⁴ The principle will also find application in the context of a resumption of proceedings pursuant to Art. 240 § 1 item 8 of the TOA, i.e. in relation to the CT's ruling. Court rulings seem, however, to offer a view according to which the TC's revocation of a regulation that has functioned based on presumed constitutionality and has been applied in practice by tax authorities may not be considered a circumstance to which a given tax authority "has contributed" within

⁴³ Art. 78 § 3 item 3 of the TOA.

⁴⁴ See more: R. Dowgier, *Przyczynienie się organu podatkowego do powstania przesłanki zmiany lub uchylecia decyzji jako warunek oprocentowania nadpłaty*, "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2015, 4.

the meaning of Art. 78 § 3 item 2 of the TOA.⁴⁵ I think the situation will be different in the case of interpretative decisions. If an error made by a tax authority issuing such a decision involves an unconstitutional interpretation of the relevant regulation, it should be assumed that there has actually been a contribution to the reason for the revocation of the decision in question. The regulation that served as the legal basis for the decision has functioned in the existing legal framework, but it has been incorrectly interpreted by the tax authority, which has been expressed in this authority's ruling. And it does not matter which authority or court has proven the defectiveness of the interpretation adopted by the tax authority.⁴⁶ A drawback of such a line of argument, fully justified in the light of the currently applicable regulations, is the fact that it leads to situations where a further derogation verdict is less favourable to the taxpayer than an interpretative verdict. Only the latter, assuming that its effect is the tax authority's contribution to the occurrence of the reason for an amendment or a revocation of a decision, leads to the refund of an overpayment including an interest calculated from the date of the occurrence of the said overpayment.

Conclusion

The discussion on the impact of the CT's rulings on the principles of claiming tax overpayments, as presented in this study, lead us to the conclusion that the legal regulations currently applicable in this domain are significantly defective. The main issue here is that a procedure of refund of tax overpayments (Art. 74 of the TOA) has been distinguished in the tax ordinance in force without a sufficient justification, while it would be enough to claim any such overpayment on the basis of an application for ascertainment of an overpayment. Making this procedure more uniform (i.e. accepting the CT's rulings as the basis for the submission of applications for ascertainment of an overpayment) would help bridge the gap in the area of the provisions regulating the activity of tax authorities in situations of partial or total illegitimacy of applications for refund of an overpayment. The reasonableness of such a solution is supported by the draft of the new tax ordinance law developed by the Codifying Commission of the Universal Tax Law. It standardises the procedure of claiming tax overpayments – instead of an application for refund

⁴⁵ See: SAC's verdicts dated: 4 August 2017 (II FSK 909/17), LEX no. 2349750 and 15 March 2016 (II FSK 3467/15), LEX no. 2002138.

⁴⁶ A decision may be revoked both in appeal proceedings and before an administrative court.

of an overpayment and an application of ascertainment of an overpayment, the draft provides only for an application for ascertainment of an overpayment.⁴⁷

Claiming an overpayment when there is no tax decision, following a uniform procedure, does not mean that there should be no particularities taking the reason for the occurrence of any such overpayment into account. The matter should be significant in two ways – first, when it comes to the time frame for seeking the ascertainment of an overpayment and, second, when it comes to the principles of charging interest. It is therefore necessary to make it possible to claim an overpayment resulting in connection with the TC's ruling, regardless of whether the overpayment results from an incorrect self-calculation or a defective decision, also after the expiry of the limitation period – provided that a relevant application is submitted within the period counted from the day of the said ruling becoming effective. It seems that the period of 3 months would be sufficient in this situation.⁴⁸

As for the area of the interest on overpayments occurring in connection with the CT's rulings, it would be also reasonable to standardise the principles of charging/calculating thereof, regardless of whether a given overpayment arises from a corrected self-calculation of the tax to be paid or from a decision being challenged. I am positive that in the case of derogation decisions, the interest charged on an overpayment should be calculated from the date of its occurrence, respecting the mechanism limiting its calculation, depending on the date of submission of the relevant application. The concept proposed by the Codifying Commission of the Universal Tax Law appears to be an acceptable measure here. It stipulates that the interest is guaranteed from the date of occurrence of the overpayment on condition of submission of an application for ascertainment of an overpayment or an application for resumption of proceedings – within 3 months of the date the CT's ruling becomes effective or for a period from the occurrence of the overpayment to the date of expiry of 3 months from the date the CT's ruling becomes effective if the application has been submitted within the set deadline (Art. 205 § 1 of the draft).⁴⁹ The rule is favourable to taxpayers since it does not divide the CT's rulings into different categories. Of course, it is possible to raise arguments already mentioned in this study, i.e. arguing for the necessity to consider the legal effects of situations where

⁴⁷ Cf. Art. 186 § 1 of the draft of the new tax ordinance act – see: L. Etel et al., *Nowa ordynacja podatkowa. Z prac Komisji Kodyfikacyjnej Ogólnego Prawa Podatkowego*, Białystok 2017, p. 291.

⁴⁸ Such a solution regarding an application for ascertainment of an overpayment is provided for in Art. 212 § 1 of the draft of the new tax ordinance law developed by the Codifying Commission of the Universal Tax Law. If the CT's ruling affects the correctness of a final decision, it has been found legitimate to challenge such a decision by way of resumption of tax proceedings (Art. 444 § 1 item 8 of the draft), maintaining the 3-month period for submitting an application for resumption.

⁴⁹ *Ibidem*, p. 308.

there has been no act of application of the law in the form of a decision differently than in the case of situations where a taxpayer has calculated the tax to be paid (and paid it) individually. However, uniformity in this respect seems to be of relevance from the point of view of legal certainty. We should hope that the draft developed by the Codifying Commission of the Universal Tax Law, which eliminates some of the discussed problems with interpretation of the CT's rulings and serves as the basis for the draft of the new tax ordinance law proceeded on at the Ministry of Finance, becomes a binding law in the future.⁵⁰

⁵⁰ As for the day of this text being written, the draft, labelled as UD409, after being approved by the Standing Committee of the Council of Ministers, was passed to the Legal Committee – <https://legislacja.rcl.gov.pl/projekt/12314054/katalog/12523416#12523416> (access: 13.03.2019).