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The criminal law implications of a default on payment of a fine for a fiscal offence or a fiscal transgression

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Summary: The content of this article concerns the controversial issue regarding the scope of application of Articles 185 and 186 of the Penal and Fiscal Code (PFC) regulating the substitute forms of enforcing the unpaid fine imposed for criminal fiscal acts. The author attempts to resolve whether the above-mentioned provisions of PFC shall be applied both to the cases of a default on payment and failure to enforce a fine imposed for fiscal offences and fiscal transgressions or only to fines imposed for fiscal transgressions. The paper concludes that Articles 45 and 46 of PFC in conjunction with Article 178 § 1 of PFC, and not specific provisions of Articles 185 and 186 of PFC, shall apply to unenforced fines imposed against perpetrators of fiscal offences. In order to eliminate basic interpretation discrepancies, which may lead to jurisdiction disparity and consequently to unequal treatment of perpetrators sentenced to a fine for criminal fiscal acts of a varied weight, the regulatory intervention may seem required here.

Key words: a fine imposed for criminal fiscal acts, substitute forms of enforcing the fine, the possibility to work off the fine, the substitution of the fine by detention, the issue regarding the scope of application of specific provisions of PFC to the fine imposed for fiscal offences, the issue regarding the scope of adequate application of PFC provisions to the fine imposed for fiscal offences.

Prawnokarne konsekwencje nieuiszczenia grzywny za przestępstwo skarbowe lub wykroczenie skarbowe

Streszczenie: Treść artykułu dotyczy kontrowersyjnej kwestii zakresu stosowania przepisów art. 185 i 186 k.k.s. normujących kwestię zastępczych form wykonania niezapłaconej grzywny orzeczonej za czyny karne skarbowe. Autor podejmuje próbę rozstrzygnięcia, czy wskazane powyżej przepisy k.k.s. stosuje się zarówno do przypadków nieuiszczenia i niewyegzekwowania grzywny orzeczonej za wykroczenia skarbowe oraz za przestępstwa skarbowe, czy tylko do grzywien orzeczonych za wykroczenia skarbowe. W artykule zawarta jest konkluzja, że do niewyegzekwowanych grzywien orzeczonych wobec sprawców przestępstw skarbowych

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odpowiednie zastosowanie mają art. 45 i 46 k.k.w. w zw. z art. 178§1 k.k.s. a nie przepisy szczególne art. 185 i 186 k.k.s. Celem usunięcia zasadniczych rozbieżności interpretacyjnych, które prowadzić mogą do niejednorodności orzecznictwej, a w konsekwencji do nierównego traktowania sprawców skazanych na grzywnę za czyny karne skarbowe o zróżnicowanym ciężarze gatunkowym - niezbędna wydaje się interwencja ustawodawcy.

Słowa kluczowe: grzywna orzeczona za czyny karne skarbowe, zastępcze formy egzekwowania grzywny, możliwość odpracowania grzywny, zamiana grzywny na zastępczą karę pozbawienia wolności, kwestia zakresu stosowania przepisów szczególnych k.k.s. do grzywny orzeczonej za przestępstwa skarbowe, kwestia zakresu odpowiedniego stosowania przepisów k.k.w. do grzywny orzeczonej za przestępstwa skarbowe.

1. Introduction

In the area of the enforcement of criminal law judgements pronounced in fiscal penal cases, it was assumed in Article 178 § 1 of PFC of 10 September 1999 (original text, Journal of Laws No. 83, Item 930, consolidated text Journal of Laws of 2017, Item 2226) that the provisions of the Executive Penal Code of June 6, 1997 shall apply (consolidated text Journal of Laws of 2018, Item 652) unless PFC provides otherwise.

With regard to the enforcement of fines imposed both for fiscal offences and fiscal transgressions, the provisions of Article 44 of PFC laying out about voluntary payment of the fine within 30 days, shall apply accordingly. If the sentenced person fails to comply with the above-mentioned obligation, the fine accruing to the Treasury is collected by means of execution.

In case of ineffective execution of the imposed fine, the provisions of the Executive Penal Code (EPC) and PFC provide the possibility of working off the fine in the form of community service, and in the event of refusal to work off the fine or evading working it off as declared or if the substitution of the fine by community service is impossible or inexpedient, then the substitution of the fine by detention.

The scope of applying the provisions of Articles 185 and 186 of PFC concerning ruling about community service as the substitution of the fine and deciding on the enforcement of the substitute detention, until the amendment of 16 September 2011 (Journal of Laws, Item 1431) which entered into force on 1 January 2012, was obvious and since this amendment was introduced the issue is still arousing considerable controversy and despite the passage of many years it is the reason for the dispute in the doctrine².

2. Amendment to the provisions of Articles 185 and 186 of PFC

Prior to the amendment, the provisions of Article 185 § 1 of PFC clearly indicated that if a person fined for a tax offence failed to pay the imposed fine on time and

² Cf. V. Konarska-Wrzosek, [in:] I. Zgoliński (ed.), Penal Fiscal Code. Comments, Warsaw 2018, p. 1031; J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik (ed.), Penal Fiscal Code. Comments, Warsaw 2018, Legalis/el., thesis 1 for Article 185 of PFC.

the fine could not be collected by means of execution, the court, upon prior consent of the sentenced person, could substitute the fine by community service specifying the type and duration of such a service. At the same time, the legislator emphasized that the period of community service lasted at least 7 days and at most 3 months and was expressed in days and months. The provisions of Article 186 of PFC, in turn, standardized the premises for substituting the unenforced and not worked off fine by substitute detention and the way of making appropriate calculations.

With a view to the general regulation of the provisions of Article 178 § 1 of PFC requiring the adequate application of the Executive Penal Code provisions to enforcing decisions concerning fiscal offences and fiscal transgressions, then unless the PFC provisions provide otherwise – it was clear that the provisions of EPC were applied to the case where the substitution of the fine imposed for a fiscal offence by community service was required, whereas the PFC provisions were applied to the substitution of the fine imposed for a fiscal transgression by community service. Likewise, the provisions of Article 186 of PFC concerning the substitution of the fine by detention were referred exclusively to unenforced fines imposed for fiscal transgressions. Article 46 of EPC in conjunction with Article 178 § 1 of PFC applied to unenforced fines for fiscal offences. Therefore, the interpretation of the above-mentioned provisions regarding the scope of application did not raise any doubts³.

3. Controversies over the scope of application regarding the regulations of substitute forms of enforcing imposed fines

The above interpretation of the regulations was disturbed when the legislator introduced the new wording of the provisions of Article 185 § 1 of PFC with the 16 September 2011 amendment. Based on its content, if the enforcement of the fine has proved ineffective or the circumstances of the case revealed that this enforcement would be ineffective, the court may replace the fine with community service, specifying the duration of such a service. The other part of the provision with the wording as follows: community service lasts at least 7 days, at most 3 months and shall be expressed in days and months – remained unchanged. Articles 186 § 2 and 3 of PFC concerning the method of calculating the unenforced or not worked off fine into substitute detention as well as specifying the maximum duration of detention remained basically unchanged. According to the wording of Article 186 § 2 of PFC, when ordering the enforcement of substitute detention, the court assumes that one day of detention equals a fine of 1/500th to 1/50th of the legal maximum of the fine. However, pursuant to the provisions of Article 186 § 3 of PFC, substitute detention shall not exceed three months and this penalty shall be expressed in days and months.

³ Cf. T. Grzegorzcyk, *Penal Fiscal Code. Comments*, Warsaw 2006, p. 672 and V. Konarska-Wrzošek, *Universalism of regulations of the Executive Penal Code and insufficient universality of the solutions in the area of working off the fine*, [at:] S. Lelental, G. B. Szczygiel (ed.), 10 years of validity of the Executive Penal Code, Białystok 2009, p. 439-440.

The justification of the bill passed on 16 September 2011 concerning amendment to the act – Executive Penal Code and the justification of some other acts suggests that the legislator has amended several penal acts including the laws of PFC, in order to “adapt the provisions of these laws within the scope of arbitrating and enforcing a fine and detention, to the proposed amendment draft to the Executive Penal Code law proposed in the bill, to ensure there is the identity of the premises for decisions taken on the basis of the regulations included in all these legal acts with regard to substitute forms of enforcing a fine”⁴. Additionally, the justification of the draft indicated that the amendment of Article 185 of PFC “is the consequence of repealing Articles 49 – 50 and the amendments proposed in Articles 45 – 48, 51 – 52 of EPC, which, in accordance with the general rule of Article 178 § 1 of PFC shall apply to the enforcement of the fine imposed for fiscal offences and transgressions”⁵.

There is no doubt about the fact that the amendment introduced by the legislator to the content of Article 185 § 1 of PFC *in principio* complicates the unambiguous and transparent interpretation of this provision.

Based on the amended content of Article 185 § 1 of PFC it is clear that the court can substitute a fine for a community service if the enforcement of the fine is ineffective or the circumstances of the case suggest it would be ineffective. Thus, this provision missed such important, with respect to the application of this regulation, specification of the act of the perpetrator on whom the court may impose a community service on account of the fine, causing reasonable interpretation problems resulting in doubts whether the provisions of Articles 185 and 186 of PFC should be applied only to the perpetrators fined for fiscal transgression as it has been so far or also to the perpetrators fined for fiscal offences⁶. Therefore, the question arises with regard to the legislator’s intentions. When making the above-mentioned amendment, was it intended to change the current rule expressed in the original wording of the afore-mentioned provisions of Article 185 and 186 of PFC by covering both perpetrators of fiscal transgressions as well as the ones of fiscal offences who did not pay the fine imposed on them which turned out to be unenforceable or perhaps there was not such an intention at all and the above interpretation issues were only affected in consequence of uncareful and unfortunate changes?

Some representatives of the doctrine are of the opinion that following the changes introduced by the legislator it should be recognized that the provisions of Article 185 of PFC and the related provisions of Article 186 of PFC apply both to perpetrators of fiscal transgressions and fiscal offences who did not comply with the obligation of paying the fine imposed on them⁷. Arguments for such an interpretation include in the first place the grammatical interpretation according to which the provisions of the law should be interpreted in accordance with their literal meaning. The above point of view can be also supported by the historical interpretation consid-

⁴ Justification of the draft act amending the Act – Executive Penal Code and some other acts – Print of the Sejm of the 6th term, No. 3961, p. 39-40.

⁵ Ibidem, p. 40.

⁶ Cf. P. Gensikowski, [in:] J. Lachowski (ed.), Executive Penal Code. Comments, Warsaw 2018, p. 255.

⁷ See J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, Code..., Legalis/el., Thesis 1 to Article 185 of PFC.

ering the original legislation of Article 185 of PFC in the context of the amendment introduced by the legislator in 2011 as well as of the formula of distinct emphasizing adopted in Chapter 23 of PFC, whether the given regulation applies also to fiscal transgressions or only to fiscal offences. It is indicated that such a restriction is not included either in the provisions of Article 185 of PFC or of Article 186 of PFC which means that according to the *lege non distinguente* principle, these regulations apply both to the cases concerning fiscal offences and fiscal transgressions⁸.

Thus, the question arises whether the above-indicated weighty arguments in favour of the presented standpoint undeniably justify the application of the provisions of Articles 185 and 186 of PFC both to fines imposed for fiscal transgression and unenforced and to unenforced fines imposed for fiscal offences?

It should be noted that pursuant to the provisions of Article 23 § 1 of PFC concerning fines for fiscal offences, the court specifies such a fine in daily rates. Specifically, when imposing this penalty, the court specifies the number of rates and the amount of one daily rate (with the lowest number of rate being 10 and the highest 720 unless the code provides otherwise). The provisions of Article 23 § 3 of PFC specify that a daily rate shall not be lower than 1/30th of the minimum remuneration or exceed four hundred times its value. Yet, based on the content of Article 48 § 1 of PFC concerning penalties for fiscal transgressions, it is clear that this fine can be imposed at the rate ranging from 1/10th to 20th times the amount of the minimum remuneration unless the code provides otherwise. It is clear from both regulations that in the Penal Fiscal Code a fine for fiscal offences is inflicted using the rate system whereas a fine for fiscal transgressions is expressed using quota. The regulations of the Executive Penal Code concerning the mode of substituting the unenforced fine for detention provided for in Article 46 § 2 of EPC allows, without any problem, to properly calculate the unenforced fine inflicted in the rate system because it indicates a strictly define conversion rate based on which one day of detention equals two daily rates of a fine. To illustrate, when the maximum penalty is imposed for a fiscal offence at the basic assessment, i.e. 720 daily rates (cf. Article 23 § 1 of PFC) – the perpetrator shall serve an imprisonment sentence of 360 days as substitute detention, which is within the maximum admissible limit of 12 months of substitute detention (cf. Article 12c of EPC) in the situation when such a penalty was also provided in the statutory penalty range (which is a common phenomenon in case of fiscal offences facing the likelihood of alternative-cumulative sanctions). If a fiscal offence for which the perpetrator was fined was not punishable with detention, then, when this term exceeded 6 months, if substituted for detention, the substitute penalty would need to be reduced to this level. In case of a fine of up to 360 daily rates, it would not be required to perform such a procedure. However, if the regulations contained in the provisions of Article 186 § 2 of PFC were applied to the unenforced fine imposed for a fiscal offence, the court, when ordering the enforcement of substitute detention, would have to assume that one day of imprisonment equals a fine ranging from 1/500th to 1/50th of the upper limit provided in the statutory penalty range. The fundamental ques-

⁸ J. Zagrodnik, [in:] L. Wilk, J. Zagrodnik, Code..., Legalis/el., Thesis 1 to Article 185 of PFC.

tion arises here, namely, what should the above-mentioned fractional values refer to? When dealing with fiscal offences, it seems clear that they should be referred to the upper limit of daily rates of a fine, comprising the maximum statutory penalty range, i.e. up to 720 daily rates. Taking the above assumption into consideration, it should be assumed that one day of substitute imprisonment can equal a fine amounting from 1.44 to 14.4 of a daily rate ($720 \text{ rates} : 500 = 1.44 \text{ rate}$, whereas $720 \text{ rates} : 50 = 14.4 \text{ rate}$). Another question is what criteria should the court follow when assigning a certain number of daily rates, falling into the mentioned range, to one day of substitute imprisonment within the above range? This is not indicated by the legislator in any way. Yet, the above-mentioned problem does not occur in the event of applying the regulations of Article 46 § 2 of EPC as the conversion rate is fixed (one day of detention is equivalent to two daily rates of a fine). Assuming that the court assigns the minimum number of rates, i.e. 1.44 rate to one day of substitute detention, the perpetrator imposed with 100 daily rates of a fine would have to serve 69.4 days of substitute imprisonment, whereas assuming the maximum conversion rate, that is, 14.4 daily rate, the number of days of substitute imprisonment to be served by the perpetrator instead of an unpaid fine would be 6.9. When inflicting a higher number of rates, e.g. 500 rates, the court, when substituting a fine for detention, would have to assess this number respectively – with the conversion rate of 1.44 rate – for 347.2 days of substitute imprisonment, and with the conversion rate of 14.4 rate – for 34.7 days of substitute imprisonment. The differences resulting from assuming minimum and maximum admissible conversion rates of daily rates of a fine into days of substitute detention are huge and the criteria are legally unspecified, which means that the discrepancies in their application in judicature practice may lead to significant legal inequality in respect of those penalized with a fine which has to be enforced in the form of a substitute detention. Bearing in mind the fact that having calculated the unenforced fine in daily rates converted for substitute detention we get the number of incomplete days; another question arises whether the number of days achieved should be rounded upwards or downwards? No answer is provided by the law either. It should be noted here that in case of rounding downwards the achieved number of days calculated on the basis of the minimum conversion rate amounting to $1/500^{\text{th}}$ of the upper limit provided in the statutory penalty range (i.e. the conversion rate of 1.44 rate), the court will not meet the requirements of the Act so that this minimum could be at least 1.44 rate, however, rounding the achieved number of days upwards will be unauthorized filling law gaps to the disadvantage of the perpetrator.

Having regard to the above-mentioned issue, it should be stated that although theoretically, it is possible to make recalculations of a fine imposed in daily rates for a fiscal offence pursuant to the provisions specified in Article 185 § 2 of PFC, nevertheless, they are unreliable and fairly dubious in terms of their practical application. What is more, they may lead to unequal treatment of individuals sentenced who evade paying the fine and possibly working it off due to the likelihood of adopting different conversion rates by the court (ranging from 1.44 rate to 14.4 rate) in identical cases and with respect to perpetrators of analogous characteristics. No such risk exists in case of applying the conversion method with regard to an unenforced fine for a fiscal

offence base on Article 46 § 2 of PFC as this provision operates a fixed conversion rate preventing courts from any discretion in this respect. It should be pointed out that there is no reason to treat substitute detention for fiscal offences in a different way than substitute imprisonment for an unenforced fine imposed for common offences. As far as social harm is concerned, it is justified for many reasons to apply a different regulation concerning the mode of converting an unenforced fine into substitute detention imposed for fiscal offences. Firstly, the regulation provided in Article 46 § 2 and 3 of EPC refers exclusively to offences and not to transgressions. It should be highlighted though that the issue of substituting an unenforced fine imposed for a common offence (in the original form and not in the form of community service) for detention is regulated by Article 25 §2 and 3 of the Code of Offences. Secondly, it should be emphasized that the penalty of substitute imprisonment in exchange for an unenforced fine imposed for a fiscal transgression should be correspondingly lower than in the event of any other offences, due to respectively lower weight of fiscal transgressions and the difference in the amounts of possible fines alike. This is the case with special and separate regulations concerning the substitution of fines inflicted for common offences contained in the Code of Offences.

The analysed provisions of Article 186 § 3 of PFC also suggest that substitute detention ordered to be enforced in exchange for an unenforced fine shall not exceed 3 months. This means that if this provision is applied to the penalty of substitute imprisonment, with higher fines it would have to be reduced to the limit of 3 months. Assuming that the above provision would also apply to the substitution of a fine imposed for fiscal offences, it should be considered that the upper limit of substitute detention adjudged to be enforced because of failing to pay or work off a fine, at the level of 3 months is too low. However, the maximum limit of 12 months of substitute imprisonment provided for in the provisions of Article 46 § 2 of EPC seems to be the most appropriate for criminal fiscal acts, and the period of 6 months for an offence not included in this kind of penalty range.

Adequately established differences between fiscal offences and fiscal transgressions and fines within the penalty range and then imposed for these offences or transgressions, can be also noticed within the scope of code regulations concerning the alternative of working off a fine, adopted in EPC and PFC. Pursuant to the provisions of Article 45 § 1 of EPC, if the enforcement of a fine not exceeding 120 daily rates turns out to be ineffective or the circumstances of the case clearly indicate that it would be ineffective, the court can exchange a fine for community service assuming that 10 daily rates are equivalent to one month of community service rounding upwards to one full month. This implies that in case of offences only a relatively small fine can be worked off up to 120 daily rates, whereas community service performed in exchange for a fine can be inflicted by the court in the range between 20 and 40 hours on a monthly basis, and when determining a concrete number of hours to be worked off by the perpetrator during a month, the court has to follow general directives indicated in Article 53 of the Penal Code, i.e. justice and preventive directives. With regard to the provisions of Article 185 of PFC which regulate the possibility of substituting an unenforced fine for community service, no limitations are provided

as to a fine which may be worked off, but they indicate that the period of community service shall be at least 7 days and at most 3 months, and the hour rate of community service in exchange for a fine shall range from 5 to 10 hours on a weekly basis. If we assume that the provisions of Article 185 of PFC regulating the issue of exchanging these penalties for community service apply to unenforced fines imposed for fiscal offences, we would have to recognize that the full range of this penalty can be subject to substitution, namely, as many as 720 daily rates of a fine. This would mean that a person imposed for a fiscal offence with 720 rates in its minimum amount (amounting to 1/30th of the minimum monthly wage in 2018⁹), that is, with a fine amounting to 50.400 pln and imposed with 720 rates in the maximum amount (amounting to 400 times 1/30th of the minimum monthly wage in 2018) that is, with a fine amounting to 20.160,000 pln, this person would always have at most 3 months of community service to work off in the maximum rate of 10 hours on a weekly basis. This, in turn, means that every penalty range, even the maximum one of a fine imposed for a fiscal offence, could be worked off by a fined person in exchange for this fine for 3 months, which would be equivalent to the enforcement of an imposed fine and would cause the annual period to start to run required in case of sentencing to a fine until an expungement proceeding by operation of law (cf. Article 107 § 4a of the Penal Code in conjunction with Article 20 § 2 of PFC). Besides, in accordance with the provisions of Article 185 § 2 of PFC, when ordering working off a fine the court shall specify the hourly range of community service on a weekly basis (ranging from 5 to 10 hours). If the court determines the duration of performing community service on a monthly basis, there remains the issue of how to convert service hours established in the law on a weekly basis, into the period of community service specified in the court's decision in months. Apart from this matter which is difficult to settle unambiguously, it should be emphasized that when converting a fine into community service pursuant to Article 185 of PFC – the fined person could work off every range of the fine (expressed in Polish zlotys, even with the value of several millions) performing the service at the maximum rate of ca. 120 hours. This does not appear to be a reasonable solution in the event of the substitute enforcement of fines imposed for fiscal offences, especially when considering the fact that in case of sentencing perpetrators for fiscal offences a fine is usually the only penalty that is inflicted. However, if applied to an unenforced fine in daily rates imposed for a fiscal offence based on applicable provisions of Article 45 § 1 and 2 of EPC in conjunction with Article 178 § 1 of PFC, first of all, it would be possible to work off relatively small fines (not exceeding 120 daily rates), and second of all, working off such a number of daily rates on the assumption that ten daily rates are equivalent to one month of community service, the person sentenced would have to work 12 months to work off this fine (and not 3 months as provided for in Article 185 of PFC), which seems to be much more reasonable and fair.

⁹ Cf. Regulation of the Council of Ministers of September 12, 2017 on the minimum remuneration for work and the minimum hourly rate in 2018 (Journal of Laws, Item 1747).

4. Conclusion

Splitting the opinions expressed by a large part of representatives of the criminal law doctrine seems perfectly justified with regard to the application of the provisions of Articles 45 and 46 of EPC in conjunction with Article 178 § 1 of PFC to working off the fines imposed for fiscal offences and to their exchange for substitute detention, as Articles 185 and 186 of PFC refer only to substitute forms of an unenforced fine inflicted for a fiscal transgression¹⁰. In addition to the rational arguments presented in this study, such interpretation is also supported by the term “penalized” mentioned in Article 186 § 1 Point 1 of PFC, and used in the Polish legal system consistently and exclusively with regard to perpetrators held liable and penalised for both common and fiscal offences¹¹. As far as the regulations concerning the perpetrators of fiscal offences found guilty are concerned, the term “sentenced” and not “penalized” is used.

With a view to the importance of the arguments used to support divergent views about the scope of application of Articles 185 and 186 of PFC, if it is necessary to exchange a fine imposed for criminal fiscal acts for community service or for substitute detention, it should be concluded that the intervention of the legislator is required in this respect in order to counteract unacceptable judicial differences in judicature practice.

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¹⁰ Cf. V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek, T. Oczkowski, J. Skorupka, *Law and penal fiscal proceedings*, Warsaw 2013, p. 497-500; T. Razowski, [in:] P. Kardas, G. Łabuda, T. Razowski, *Penal Fiscal Code. Comments*, Warsaw 2017, p. 1428-1429 and P. Gensikowski, [in:] J. Lachowski (ed.), *Code...*, p. 255.

¹¹ Cf. P. Gensikowski, [in:] J. Lachowski (ed.), *Code...*, p. 255.

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