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Tax penalty payment and the "ne bis in idem" principle

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Abstract

This paper deals with problems related to tax law with a special focus on legal regulation of the tax procedure contained in the Tax Procedure Code. Attention is paid in particular to tax penalty payments and the "ne bis in idem" principle.

Keywords: Public Law; Tax Law; Tax Procedure Law; Taxes; Tax Laws; Tax Procedure Code; Tax Penalty Payment.

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I. Introduction[1]

Following the change of social relations in 1989, the Czech Republic introduced a new system of taxes[2] and passed new procedure regulation in the form of a statute[3] (until then the legal regulation was contained in decrees[4]) with effect from 1 January 1993. At present, the "tax procedure" is also contained in a statute, namely the Tax Procedure Code which came into effect on 1 January 2011.[5] The scope of the current legal regulation[6] entitles me to state that it is a procedural legal regulation that could be marked as a codex. The provisions concerning the tax penalty payments are contained in the Part Four of the Tax Procedure Code, entitled "Consequences of Breach in Tax Administration", more specifically in its section 251. In addition to default interest (which is also a common sanction in the rest of Europe, reflecting the "price of money" that the state wants to obtain for a late tax payment), currently are in the Czech Republic taxpayers obliged to pay a considerably high amount of 20 % from the amount of the additionally assessed tax as determined by the administration in comparison with the last known (claimed) tax obligation.

The existing case law of the Czech criminal courts and of the Supreme Court was based on the legal opinion that a penalty payment imposed by the tax administration in a tax procedure constitutes no punishment, i.e. it is no sanction of criminal nature, so that even the

[1] This paper has been elaborated within the project "PROGRES Q02 – Publicization of Law in European and International Comparison" which is realized at the Faculty of Law of the Charles University in the year 2017.
[2] Act No. 212/1992 Coll., on the Tax System as amended.
[3] Act No. 337/1992 Coll., on Administration of Taxes and Fees, as amended (hereinafter the "Act on Administration of Taxes and Fees").
[4] Decree No. 16/1962 Sb., on Proceedings in Matters of Taxes and Fees, as amended.
[5] Act No. 280/2009 Coll., the Tax Procedure Code, as amended (hereinafter the "Tax Procedure Code").
[6] The Tax Procedure Code contains 266 provisions.

final (enforceable) decision of the tax administration does not create a "ne bis in idem"[7] barrier in relation to criminal sanctions for the same taxes-related non-compliant action (tax evasion) in respect of the penalty payment imposed by the tax administration.[8]

The Supreme Court made clear that penalty payment pursuant to Section 37b of Act No. 337/1992 Coll., on Administration of Taxes and Fees, has only a repairing (restoration) but no sanctioning character. According to its legal opinion, it is a financial sanction related to tax assessment, and therefore, it is, in essence, a pecuniary sanction for an incorrect tax claim, not a criminal sanction. Thus, penalty payment was imposed as a result of failure to comply with the obligation to file the tax return in the correct amount, which is borne by the tax entity having the primary responsibility for the tax return and its own tax assessment.

II. The core of the "ne bis in idem" principle

General Remarks

The "ne bis in idem" principle which prohibits a new prosecution of the accused person for the same act applies when a final decision has been taken in a particular case. It is therefore necessary to define certain terms. First of all, it is a question of the oneness of the actions, i.e. whether an act which was subject to a decision in a previous procedure is identical with the act for which he is being prosecuted in a second and prohibited criminal procedure. Further, there must also be addressed the identity of the accused in the original and in the second criminal proceedings. Lastly, the question to be answered is what decisions constitute an obstacle to the second procedure ("res iudicata"), how and when this happens and at what moment the decision comes into legal force and becomes legally effective. Force of res judicata is closely related to the "ne bis in idem" principle, this principle is actually the very effect of the force of res judicata, namely of its material aspect. The prohibition of further prosecution of the accused person for the same action is valid as long as there is an obstacle in the form of a final decision on the case. This prohibition is not being applied only after eliminating the obstacle (final decision) because then it is possible to continue the original proceedings. The obstacle must be removed in the relevant proceedings, which is another issue I am dealing with on the following pages.

Tax Procedure

The Supreme Administrative Court made a resolution of 19 February 2015, ref. No. 4 Afs 210/2014–28 in the legal case of applicant Odeř Agrar k. s., Identification Number: 26402637, with its registered office at Odeř 40, Hroznětín, represented by Ing. Jan Čapek, tax advisor at Ernst & Young, s. r. o., with its registered office at Na Florenci 2116/15, Prague 1, against the defendant: Odvolací finanční ředitelství (Appellate Financial Directorate), with its seat at Masarykova 31, Brno, by which it was in the framework of the proceedings on the appeal in cassation of the defendant against the judgment of the Regional Court in Plzeň (Pilsen) of 28 August 2014, ref. No. 30 Af 5/2013 – 41, decided to refer the case to the Extended Chamber of the Czech Supreme Administrative Court. The chamber stated: Although a penalty payment according to Section 37b of the Act on Administration of Taxes and Fees, respectively Section 251 (1) of the Tax Procedure Code, is a concept contained in the domain of tax law, from the point of view of an analysis of the case law of the European Court of Human Rights, and taking into account the principle of a democratic state governed by the rule of law which is based on respect for fundamental rights and freedoms and is

[7] **Ne bis in idem** is a legal principle meaning "not twice in the same [thing]", leading to the postulate that no legal action (decision, sanction) can be instituted twice in the same matter.

[8] See for instance the Resolution of the Supreme Court of 2 July 2014, ref. No. 5 Tdo 749/2014.

fulfilling its international obligations (Art. 1 of the Constitution[9]) it must be concluded that it constitutes a punishment sui generis. On the basis of all the foregoing considerations, the chamber found that the institute of penalty payments pursuant to Section 37b of the Act on Administration of Taxes and Fees in the wording effective as of 1 January 2007 has unlike the institute of the penalty payment pursuant to Section 63 of the cited law (in force until 31 December 2006) the nature of a punishment for payment delicts. Although the institute is included in the system of tax law, the court came in the view of all the considerations above to the conclusion that the said institute is of a criminal law nature and must be subject to the guarantees under Art. 40 (6) of the Charter[10] and Art. 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms[11].

The Extended Chamber of the Czech Supreme Administrative Court in its resolution of 24 November 2015, ref. No. 4 Afs 210/2014-57 (now widely discussed by academics and professionals) stated that **tax penalty payment** pursuant to Section 37b of the Act on the Administration of Taxes and Fees, in the version effective from 1 January 2007 to 31 December 2010, and Section 251 of the Tax Procedure Code **has the nature of a punishment**; this necessarily leads to the application of Art. 40 (6) of the Charter and Art. 6 and 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The ruling of the Supreme Administrative Court was initiated by a (three-member) chamber of the Supreme Administrative Court, particularly in the light of developments in the case law of the European Court of Human Rights concerning the nature of tax sanctions.

In addition, in my opinion it should be noted that, in view of the "ne bis in idem" principle, the existence of which is dealt with here, the relevant provision is not Art. 40 (6) of the Charter[12] referred to in the abovementioned resolution of the Supreme Administrative Court, but the provisions of Art. 40 (5) of the Charter[13] and also Art. 4 (1) of the Protocol No. 7 to the Convention which implies that *"no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he or she has already been finally acquitted or convicted in accordance with the law and penal procedure of that State"*. These provisions imply an obstacle in the form of the "ne bis in idem" principle, i.e. nobody may be prosecuted or punished repeatedly for the same act.

The issue of sanctions in tax law has been subject of frequent discussions many years ago, especially before the amendment to the Act on the Administration of Taxes and Fees No. 230/2006 Coll. with effect from 1 January 2007 that changed the sanction system in tax proceedings as a whole. It might be mentioned the rule in force until 31 December 2006 contained in Section 63 (3) of this act, it stated: *"Where a tax reduction has been discovered by the tax administration, the penalty payment shall be calculated in accordance with paragraph 2 at a double rate in the amount of 0.2 %. Penalisations of tax advances shall expire on the date of expiry of the period for filing the tax return or report relating to the tax period in which tax advances have been made. The penalty payment provided for under this*

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[9] Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic (hereinafter "the Constitution").

[10] Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., on the declaration of the Charter of Fundamental Rights and Freedoms as a Part of the Constitutional Order of the Czech Republic (hereinafter the "Charter").

[11] Statement of the Federal Ministry of Foreign Affairs No. 209/1992 Coll., on the Convention for the Protection of Human Rights and Fundamental Freedoms.

[12] Art. 40 (6): *"The question whether an act is punishable or not shall be considered, and penalties shall be imposed, in accordance with the law in effect at the time the act was committed. A subsequent law shall be applied if it is more favourable for the offender."*

[13] Art. 40 (5): *"No one may be criminally prosecuted for an act for which he or she has already been finally convicted or acquitted. This rule shall not preclude the application, in conformity with law, of extraordinary procedures of legal redress."*

provision shall be applied for a maximum of 500 days of delay; for each additional day of delay a penalty payment in the amount of 140 % of the discount rate of the Czech National Bank valid on the first day of the calendar quarter shall apply."

It was therefore clear that in case of additional tax assessment by the tax administration, the penalty payment amounted to an incredible 73 % p. a., which was criticized by many experts as totally disproportionate. The Supreme Administrative Court discussed the proportionality of the penalty payment in its judgment of 7 October 2008, ref. No. 2 Afs 94/2008-45, in which it expressed the following opinion: *"Therefore, it cannot be approved the authors' (L. Vorlíčková, O. Dráb: České daňové penále je nepřiměřené a v rozporu s evropskou Úmluvou o ochraně lidských práv a základních svobod, Právní rozhledy č. 17/2005, pp. 641–643) suggestion that the penalty payment rates, which, as mentioned above, are set in the amount of 18.25 %, 36.5 % respectively 73 % p. a. would be exceptionally high in case of privately negotiated interest compared to the price of money on the credit market."*

"In the first place, it is – as already mentioned above – necessary to take into account that the penalty payment is in the nature a penalty interest which must in order to fulfil its sanctioning function as discussed above (in particular the preventive and deterrent function and also retaliation for breach of law) be a burden for the person who is to pay it, and thus certainly noticeably higher than the usual price of money on the credit market. It cannot be overlooked that the highest of the three penalty payment rates amounting to 73 % p. a. and which in fact significantly exceeds the usual interest rate on loans in the Czech Republic for the existence of the market economy after 1989, applies only in situations where a tax evasion has been discovered by the tax administration (according to Section 63 (3), fourth sentence of the Tax Procedure Code). On the contrary, it shall not apply in the event that the tax has been additionally assessed based on additional tax return, additional accounts statement of the taxpayer or in the framework of the appeal procedure on the basis of adoption of the taxpayer's proposal in this procedure, the rate shall amount only to a quarter (18.25% a.), which does not differ in the order from the interest on the credit market; on the contrary, in some cases in the past it was even lower than this interest rate. The "standard" rate of penalty payment (36.5% p. a.) is, and in the past years has always been comparable to the amount of default interest required by commercial banks in case of breach of the obligation to repay the loan. This fact is a notoriety which is not necessary to prove with respect to Section 120 and Section 64 of the Code of Administrative Court Procedure[14] in connection with Section 121 of the Code of Civil Court Procedure[15]."

III. Opinion of the Supreme Administrative Court

The issue of penalty payment pursuant to Section 37b of the Act on Administration of Taxes and Fees (in the version effective from 1 January 2007 to 31 December 2010) was discussed by the Supreme Administrative Court in its several decisions, for example, in the judgment of 26 October 2011, ref. No. 9 Afs 27 2011- 68 and the judgement of 28 March 2014, ref. No. 5 Afs 28/2013-36. This court came to the conclusion that penalty payments cannot be considered as a sanction for an administrative offense and, therefore, principles of substantive criminal law should not be applied on them. However, the fourth chamber of the Supreme Administrative Court disagreed with the above-mentioned opinion and came to a different position as it considered the penalty payment under Section 37b of the Act on

[14] Act No. 150/2002 Coll., on the Code of Administrative Court Procedure.
[15] Act No. 99/1963 Coll., on the Code of Civil Court Procedure.

Administration of Taxes and Fees (in the version effective from 1 January 2007 to 31 December 2010) and under Section 251 of the Tax Procedure Code to constitute a criminal charge within the meaning of Art. 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and a punishment on which the provisions of Art. 40 (6) of the Charter must be applied. For this reason, the case was referred to the Extended Chamber of the Supreme Administrative Court, which decided on it in the manner mentioned above in this article.

Czech taxpayers in the Czech Republic are required to pay default interest (which is also a common "sanction" in the rest of Europe, reflecting the price of money that the state wants to obtain for the late tax payment) in case of additional tax assessment and in addition to that a penalty payment of 20 % from the amount of the additionally assessed tax. Interestingly, for example taxpayers in neighbouring Austria are obliged to pay default interest of only about 2 % and any other sanctions comes in place only if the case is dealt with in the criminal law. If we look closely on Austria for a while, criminal tax law issues are being comprehensively addressed there (including relevant institutes such as effective regret) in a separate special law on financial criminal law[16]. This law provides for criminal penalties for tax offenses and, depending on their gravity, also differs from the authority dealing with these offenses. In the case of a delict where the damage exceeds EUR 100.000 (under certain conditions EUR 50.000), the court is competent to hear the case. If the damage exceeds EUR 33.000 (in certain cases EUR 15.000), a specialized chamber established with some tax authorities is competent to hear the case. If the damage is lower, the matter is decided by a separate official (it is not necessary to point out that these authorities are independent in the decision-making process). However, in such a case it must be a criminal law matter – if there is nothing indicating that a crime has been committed, everything is assessed in accordance with the relevant tax laws and by from them resulting sanctions as for example the above-mentioned default interest of around 2%.

The Austrian approach, therefore, seeks to keep the punishing instruments in criminal law and gives less "repressive" instruments such as default interest to administrative and tax law. Only few will doubt that tax rules are among the most complex and that even professionals have a problem with them (it is actually questionable of how much the principle of "ignorance of law excuses no one" applies in tax law). This should also be reflected when considering punishment methods and related sanctions for breach of tax rules. Obviously, if a lower tax was originally paid, the taxpayer would then have to pay "something extra". However, it is questionable whether the very same default interest under the Tax Procedure Code in the amount of the repo rate set by the Czech National Bank increased by 14 percentage points (see Section 252 (2) of the Tax Procedure Code), is not too high because for private law relations is by a government decree[17] provided default interest amounting to the repo rate set by the Czech National Bank increased by "only" 8 percentage points.

Answering the question of whether there is a legitimate reason for such a different arrangement would cover a separate article, but the above-mentioned preferential treatment of the tax office before the "ordinary citizens" is at least very controversial.

The Supreme Administrative Court deals extensively in the decision mentioned in the introduction of this paper with the case-law of the European Court of Human Rights and its application to the case. It notes that: *"If the Extended Chamber based its considerations on*

[16] Bundesgesetz vom 26. Juni 1958, betreffend das Finanzstrafrecht und das Finanzstrafverfahrensrecht (Finanzstrafgesetz FinStrG), BGBl 1958/129 idF BGBl I 2015/163.
[17] See Section 2 of the Government Decree No. 351/2013 Coll.

the above analysis, it cannot agree with the view that the penalty payment is a flat-rate compensation for not paying taxes properly and on time. If the tax was not paid properly and on time, the economic damage to the public budgets is fully offset by default interest. Penalty payments serve as a deterrent to attempts of taxpayers reducing their tax obligations by providing incorrect data in their tax claims. Therefore, the above mentioned is in favour of the view of penalty payments as a "criminal" sanction."

In connection with the finding that tax penalty payment is a punishment, it has to be primarily discussed the application of the "ne bis in idem" principle, namely the prohibition of a new prosecution of the accused person for the same act. To that principle, the Supreme Administrative Court expressed itself indirectly in the same decision when it stated: *"The Extended Chamber is aware of the connection between the conclusion which it now takes in this matter and the question of double punishment of the same person for the same act, as well as the constitutional prohibition of such an approach (Art. 40 (5) of the Charter and Art. 4 of the Additional Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms). Moreover, the European Court of Human Rights has also expressed its fundamental opinion on the criminal nature of the tax penalty payment as a prerequisite for answering further questions, raised on the ground of the present cases, which related to the simultaneous or successively held tax and criminal proceedings. However, this question goes beyond the factual and legal framework of the case, and the answer to that question could mean a decision ultra vires as the Extended Chamber has no jurisdiction within the meaning of Section 17 (1) of the Code of Administrative Court Procedure and ultimately a violation of the constitutional principle formulated in Art. 38 (2) of the Charter that no one may be removed from his or her lawful judge. Even if it was asked, the Extended Chamber has no power to answer abstract questions without a proper connection to the factual and legal circumstances of a particular case heard by the Extended Chamber (see resolution of the Extended Chamber of 12 June 2007, ref. No. 2 Afs 52/2006-86, No. 1762/2009 Coll. of the Supreme Administrative Court).*

IV. Relation to the Criminal Code

The crucial question is how criminal courts can deal with the issue, as the above-mentioned conclusions of the Supreme Administrative Court cannot be neglected. It can be assumed that in case of criminal offense of tax, fee and similar obligatory payment evasion pursuant to Section 240 of Act No. 40/2009 Coll., the Criminal Code, as amended (hereinafter the "Criminal Code"), in a situation where a penalty payment was imposed in the previous proceedings for the same tax evasion, the criminal courts came to the conclusion that imposing a penalty payment in relation to the tax evasion that is being prosecuted has created a "ne bis in idem" obstacle and such prosecution has to be stopped. Indeed, the District Court for Prague 4 has already done so in its resolution of 10 June 2015, ref. No. 6 T 145/2014, as stated in paragraph 29 of the grounds of the resolution of the Extended Chamber of the Supreme Administrative Court of 24 November 2015, ref. No. 4 Afs 210/2014-57.

The previous case law of the Czech criminal courts and of the Supreme Court was based on the legal opinion that a payment penalty imposed by the tax administration in a tax proceedings means no punishment, i.e. it is no sanction of criminal nature so that even the final (enforceable) decision of the tax administration in which a penalty payment was imposed does not create a "ne bis in idem" barrier in relation to criminal sanctions for the same tax

non-compliant action (tax evasion).[18] In some cases, it was possible to argue with the difference of the acts, as one part was affected by tax or customs proceedings, and (part of) one act was the object of criminal prosecution (see for example the resolution of the Supreme Court of 7 March 2007, ref. No. 5 Tdo 223/2007). However, in relation to tax penalty payments, it is clear that it affects the cases in which is given the substance of the act of the criminal offense of tax, fee and similar obligatory payment evasion, so obviously there will be no doubt about the oneness of the act. In addition, the European Court of Human Rights in its judgment of 27 November 2014 in the case Lucky Dev v. Sweden (application No. 7356/10) which was the basis for the legal opinion taken in the resolution of the Extended Chamber of the Supreme Administrative Court of 24 November 2015, ref. No. 4 Afs 210/2014-57, found the "ne bis in idem" obstacle even in acquittal or non-prosecution of a tax criminal offense which established the acquittal of the charge for a tax offense, even though the tax penalty payment was imposed for the deficiencies in the bookkeeping and not for the tax evasion itself. It is clear from the judgment of the European Court of Human Rights that simultaneously held tax and criminal proceedings for the same act are not excluded, as the provision of Art. 4 (1) of the Additional Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms does not provide protection against lis pendens (pending lawsuit), however, two sanctions of a criminal nature for the same act are not admissible.

Conclusions of this decision and of the above-mentioned resolution of the Extended Chamber of the Supreme Administrative Court are therefore clear and their existence will also have to be dealt with by the criminal courts' case law, especially by the Supreme Court. This happened for the first time on 4 January 2017, when the Supreme Court ruled (ref. No. 15 Tdo 832/2016) that according to the case law of the European Court of Human Rights criminal prosecution of the accused person can be excluded under fulfilment of other preconditions also by the fact that he or she has already been affected by a decision in a different type of procedure than criminal proceedings under the Criminal Procedure Code. The legal classification of the proceedings in question cannot be the only relevant criterion for the applicability of the "ne bis in idem" principle, whereby the term of "criminal proceedings" must be interpreted in the light of the general principles relating to the corresponding concepts of "criminal charges" and "punishment" under Articles 6 and 7 of the Convention.[19] However, it must be a procedure which is materially criminal in nature and is conducted for offenses of a criminal nature. The Court set out in its case law three criteria for assessing whether an offense is a "criminal charge" under the Convention (also known as the so-called "Engel-criteria" according to the case Engel and Others v. The Netherlands, ref. No 5100/71, plenary judgment of 8 June 1976). The first criterion is the classification of an act under the applicable national law, i.e. whether the provision defining the offense falls into the domain of criminal law. However, this is only a relative criterion, since if the act is not classified as criminal offense in national law, the Court uses two further criteria. The second criterion is the nature of the offense in terms of the protected interest (general or particular), the addressee of the rule (potentially all citizens or only a certain group of persons with special status) and the purpose of sanction imposed for such offense (whether – at least in part – it is preventively repressive or merely reparative). The third criterion is the nature and severity of the sanction not actually imposed, but the sanction that could have been imposed for the particular offense in the given case. The last two criteria are basically alternative, i.e. fulfilment of just one

[18] See for example the resolution of the Supreme Court of 2 July 2014, ref. No. 5 Tdo 749/2014.

[19] Cf. KMEC, Jiří, KOSAŘ, David, KRATOCHVÍL, Jan, BOBEK, Michal. Evropská úmluva o lidských právech. Komentář. 1. vydání. Praha: C. H. Beck, 2012, p. 1408.

implies application of the Convention. Currently, the Court applies these criteria in such a way that if the second criterion shows the criminal nature of the offense, the third criterion has no relevance. On the contrary, if the offense does not appear to have criminal nature, the severity of the sanction imposed may, in effect, outweigh the assessment of the offense in favour of its criminal nature.[20]

Last but not least, it is also decisive for the scope of application of the "ne bis in idem" principle to reflect the problem of the oneness of the act which is the subject of two proceedings and decisions. That is why the European Court of Human Rights has been paying so much attention to this issue for a long time. It is one of the most discussed questions in the legal theory, which is not solved the same way in national jurisdictions. In relation to the application of Art. 4 of the Additional Protocol No. 7 to the Convention which establishes the "ne bis in idem" principle, it is a matter of solving what elements of act must be the same to preserve its oneness. In particular, the Grand Chamber of the Supreme Court agrees with the Supreme Administrative Court on the basis that if all the assumptions for qualifying the penalty payment as punishment are made (the so-called Engel-criteria), this conclusion cannot be changed by any partial difference of this institute from the traditionally conceived criminal sanction. The Extended Chamber of the Supreme Administrative Court stressed the existence of payment offenses the nature of which may not allow the application of any of the principles contained in the field of administrative law, namely those payment offenses, where the legal construction envisages an "automatic" sanction mechanism for breach of a specific obligation of the taxpayer. This is just the case of penalty payments under section 37b (1) of the Act on Administration of Taxes and Fees, respectively section 251 (1) of the Tax Procedure Code by which the principles of individualisation of the punishment cannot be applied without prejudice to the very criminal nature of this sanction. The Extended Chamber of the Supreme Administrative Court also dealt with understanding the penalty as accessory to the tax. According to its legal opinion, despite that this legal term was used originally in the Act on Administration of Taxes and Fees (Section 58) and is applied now in the Tax Procedure Code (Section 2 (5)), its meaning lies in defining the institutes of tax administration and its scope with the emphasis on the fact that the institutes listed here (in addition to penalty payments interests and fines, but not the costs of the proceedings) follow the fate of the tax. However, this is a procedural context that determines the scope of the tax authority, which is irrelevant to the substantive law nature of the penalty payment. Moreover, the sanctioning nature of the fine for late tax claim (systematically also included among tax accessories) was recently reviewed by the Czech Constitutional Court that assessed compliance of Section 250 of the Tax Procedure Code with the constitutional order.[21] Finally, nothing changes the conclusions made about the nature of penalty payment as a "criminal sanction" despite the fact it is not decisive for the imposition of penalty payment for what reasons the taxpayer has made false tax claims and that he is being imposed the sanction without proving fault liability, while the criminal offense of tax, fee and similar obligatory payment evasion does not affect the actual false claim on the amount of tax liability in the tax return itself, but only assumes the deliberate behaviour of the offender who shortens the tax or unlawfully obtains a tax advantage.

It is clear that the criminal offense of tax, fee and similar obligatory payment evasion affects only a certain part of the false tax claims concerning the amount of tax liability in the tax return, namely the cases in which the offender intentionally and unlawfully reduces his tax or obtains a tax advantage in the amount specified by law. Thus conceived criminal liability

[20] Ibidem; in detail see also the resolution of the Supreme Court of 30 July 2014, ref. No. 5 Tdo 587/2014, published under No. 40/2015 Coll. of the Supreme Court.
[21] Judgement of the Constitutional Court of 30 June 2015, ref. No. Pl. ÚS 24/14, No. 187/2015 Coll.

for the above-mentioned offense, however, in no way excludes that both payment delict and criminal offense of tax, fee and similar obligatory payment evasion were committed in a same act. From the point of view of the “ne bis in idem” principle, it should also be noted that the Convention does not prohibit proceedings in which punishments are imposed to be divided into different stages in which are gradually or concurrently imposed different sanctions for illegal activities of criminal nature. The Supreme Court does not deny that both proceedings (criminal proceedings in the criminal case in direct connection with the completed tax proceedings) in the Czech Republic are pursuing a complementary purpose and react not only in abstracto but in concreto to different aspects (administrative and criminal law) of the unlawful conduct. In this context, it is necessary to recall once again that the penalty payment is a compulsory sanction imposed directly by law if the tax administration makes a higher tax assessment, or if the tax deduction or tax loss is reduced otherwise than as stated in the tax return. In essence, it is a financial sanction for incorrectly made tax return (to the detriment of public budgets). It is not relevant how the tax liability was determined within the supervisory mechanisms of the tax administration, the only thing that matters is whether it happened or not. The reasons for this sanction, as well as the amount thereof, arise directly from the law, the tax administration is not given any discretion. In accordance with the conclusions contained in the judgement of the European Court of Human Rights in case A and B against Norway, it can be stated that administrative sanction serves primarily as a general deterrent in response to the fact that the taxpayer provided an incorrect or incomplete tax return. It has no diffractive aspect which is on the other hand characteristic of criminal sanctions and criminal convictions. The purpose of this sanction in the Czech Republic is primarily to ensure fulfilment of the duty of taxpayers to provide complete and correct information and to secure the basis of the state tax system as a prerequisite for the functioning of the state and society. It does not have a significantly stigmatizing character. On the other hand, there is no doubt that a penalty related to a subsequent conviction in criminal proceedings has such a nature because it serves not only to deter potential offenders, but it also has a considerably more punitive dimension in relation to the same unlawful act, which in addition requires fraudulent conduct (fraud of at least CZK 50,000), as a result of which a lower tax is charged to the taxpayer.

The present case of the accused L. P. heard by the Supreme Court demonstrates that both proceedings react to different aspects of the unlawful conduct and are complementary at the same time. After issuing additional payment notices of 11 November 2011 concerning the personal income tax for the tax period (calendar years) 2006 and 2007, the tax administration charged additional tax to the taxpayer L.P. on the basis of the tax inspection report dated 7 November 2011, ref. No. 29649/11/192931501541, while at the same time was established an obligation to pay a penalty payment. Pursuant to Section 147 (4) of Tax Procedure Code, the reason for additional payment assessment is considered in both cases the inspection report of 7 November 2011. The content of this report provides detailed insights into the procedural steps taken by the tax administration, the taxpayer and his agent during the tax inspection concerning proceeds from the sale of real estate in the mentioned tax periods. The tax assessment was based solely on the results of the tax inspection, the taxpayer did not submit the necessary documents for review even if he was called upon to do so, so the tax inspection report provided the grounds for the additional payment assessment. The tax office could respond to the shortcomings of the tax entity's claim just the way it did (i.e. by issuing the additional payment assessment and declaring the obligation to pay a penalty payment), it could not have taken into account the reasons for the incorrect tax claim (deliberate reduction of the tax liability). Such findings, on the other hand, were relevant for the law enforcement authorities in respect of which the tax authority had fulfilled its reporting obligation. The fraudulent nature of the conduct of the taxpayer has effectively been taken into account by the law enforcement authorities alone and, as a result, by the court which alone could have

imposed a penalty. The court could not, however, decide on the additional payment assessment and to impose a penalty payment. The Supreme Court rejected the appeal in that particular case and in the statement of reasons held that the application of a tax penalty payment is not always contrary to the "ne bis in idem" principle.

V. Opinion of the European Court of Human Rights

This issue has also been dealt with by the European Court of Human Rights by delivering a judgement of the Grand Chamber in the case of A and B v. Norway.[22] This judgement can be summarized as follows:

It has been pointed out that some aspects are not disputed between the Parties (i.e. the first and second applicant and the Government of Norway), such as the assessment of idem – the oneness of the conduct which has been affected in both tax and criminal proceedings, as well as the definition of the term of "final decision" having the force of res judicata. On the other hand, there was no consensus on the question whether for the purposes of Art. 4 of the Protocol No. 7, penalty payment shall be considered as a sanction of criminal law nature and there was also no same view as to the extent to which dual/parallel proceedings can be considered to be in accordance with Art. 4 of the Protocol No. 7. The European Court of Human Rights states that according to the legislative history the concerned Article was originally intended solely for the purposes of criminal proceedings and added that the "ne bis in idem" principle also has a direct link to Art. 6 of the European Convention (the right to a fair trial), whereby the European Convention must be understood and applied as a whole. The rule contained in Art. 4 of the Protocol No. 7 should, therefore, also apply to procedures where tax and criminal penalties are combined.

It also pointed out that possible divergent interpretations of Art. 4 of the Protocol No. 7 in the member states of the Council of Europe can be caused by the fact that it is not directly a part of the European Convention – on the contrary, this document was not adopted until 1988 (i.e. almost 40 years after the adoption of the European Convention) and some countries (e.g. Germany, the Netherlands, Turkey, the United Kingdom) have not yet ratified it.

The European Court of Human Rights also quoted some of its previous decisions:

- *Zolotukhin v. Russia* (2003) – in connection with this decision, the Court highlights in particular the fact that when assessing whether one single case is being subject to two separate proceedings, first of all it is necessary to examine the oneness of the facts (not only to compare the legal nature of the two delicts); this judgment also defines the term of finally completed proceedings for the purpose of assessing whether a case is being repeatedly heard – the final decision is one against which an ordinary appeal can no longer be lodged; finally, as an important aspect of this decision, the Court considers important that the rule contained in Art. 4 of the Protocol No. 7 requires not only a prohibition to be punished twice, but also to be prosecuted (tried or punished) twice.
- *Engel and Others v. the Netherlands* (1976) – criteria for determining when a delict can be marked for the purposes of the European Convention as criminal offense (i.e. what acts are of criminal nature for these purposes): 1. designation as criminal offense in the domestic law implies this designation also under the Convention; 2. alternatively, the nature of the act and the severity of the sanction (always if the sanction means restriction of personal freedom).

[22] Applications Nos. 24130/11 and 29758/11, judgement of 15 November 2016.

The Court also referred to its previous case law which allowed a combination of sanctions from two different proceedings:

- *R.T. v. Switzerland* (1993) – in this case the applicant was withdrawn his drawing licence in an administrative procedure and was also subject to a sanction (suspended term of imprisonment) imposed by a criminal court; however, since the Criminal Code allowed both sanctions for this act, the Court found that this was not a "repetition" of a sanction, but only a combination of permissible sanctions.
- *Nilsson v. Sweden* (2005) – in this case a driving licence was withdrawn and community service ordered to the applicant; however, withdrawing the driving licence was a result of multiple violations of law – one sanction was imposed as part of the other so that there was no repetition of sanctions.
- *Boman v. Finland* (2015) – in this case, the applicant's right was not violated as the second sanction (extension of the driving ban) was imposed as extension of the first one;

On the contrary, the Court found the violation of Art. 4 of the Protocol No. 7 in cases where there was no close time and material link between the two proceedings:

- *Nykänen v. Finland* (2014) – two separate proceedings which were interlinked and, moreover, the previously imposed sanctions were not taken into account;
- *Kapetanios and Others v. Greece* (2015), *Sismanidis and Sitaridis v. Greece* (2016) – in these cases the applicants were first found to be criminally liable for moral criminal offenses. Subsequently, without taking into account the exonerative judgments, the administrative authority imposed for the same act a significant fine on them, which was found as inconsistent with Art. 4 of the Protocol No. 7.
- *Tomasovic v. Croatia* (2011) and *Muslija v. Bosnia and Herzegovina* (2014) – an act was evaluated as administrative offense, then as a drug criminal offense; the subsequent proceedings were not interrupted and did not take into account the conclusions of the first.

It is also necessary to mention the judgment of the Court of Justice of the European Union on the case HANS ÅKEBERG FRANSSON (C-617⁄10) in which it comes to the following conclusion: *"In this connection, it is to be noted first of all that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance with declaration obligations in the field of VAT, a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties […]. These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person."*

With reference to the above case law the Court notes that it is possible to impose repressive (punitive) measures in both tax and criminal proceedings in accordance with Art. 4 of the Protocol No. 7. This article does not exclude parallel proceedings to be held as long as certain conditions are met. In order to assess they have been met, the State must persuade the Court that the two proceedings are connected with a sufficiently significant time and material link. In other words, it must be determined that these proceedings are somehow integrated and brought against the person concerned in a coherent way. This does not just mean that their

purpose is interconnected based on the time context, but also that the consequences of these proceedings are for the parties in a certain way proportionate and predictable.

Under these circumstances, the Court had no reason to doubt the compliance of the Norwegian legislation with Art. 4 of the Protocol No. 7. Furthermore, the Court found that **the two parallel proceedings were for the applicant in this case predictable** as he had to be aware of the fact that on the basis of his unlawful conduct, a tax penalty payment could be imposed upon him, as well as criminal proceedings can be brought against him. It is also clear that both proceedings were taken into account. The facts found within one proceedings were applied in the other. Out of proportionality reasons, the punishment also reflected the fact that a tax penalty payment has already been imposed.

In view of the aforementioned, the Court did not find any violation of the applicant's rights. Two different sanctions were imposed by two different authorities under two different procedures, between which there was a substantial time and material connection. They can be viewed as two complementary components of the Norwegian legal system of which purpose is to prevent failure to report an income in the tax return.

C o n c l u s i o n

So how to solve this situation? Based on the resolution of the Extended Chamber of the Supreme Administrative Court of 19 February 2015, ref. No. 4 Afs 210/2014–28 that more or less suggests certain direction, it would probably be advisable for the legislation to amend the relevant provisions of the Tax Procedure Code in a way that the tax authorities concentrate within the limits of their powers on proper tax collection and that the law enforcement authorities are authorized to punishments for deliberate tax evasion. A suggested amendment may therefore be the removal of the penalty payments from the Tax Procedure Code as the default interest itself is sufficient instrument enough to penalize the taxpayers. Another option is to keep the tax penalty payment in the Tax Procedure Code, but its imposition would only be considered after making sure that the result of any criminal proceedings does not constitute a “ne bis in idem” prohibition within the meaning of Art. 40 (5) of the Charter and Art. 4 (1) of the Protocol No. 7 to the Convention, Section 11 (1) f), g), h), (2) and Section 11a of the Code of Criminal Procedure. In other words, it would be possible to impose a tax penalty payment only after such a criminal prosecution and proceedings have been terminated. In this case, the imposition of a tax penalty payment would be tied to a prescription period that would not include the duration of the criminal proceedings. For the purpose of defining the boundary between the criminal proceedings and the administrative offense proceedings, a similar solution is now included in Section 20 (4) of Act No. 200/1990 Coll., on Administrative Offences, as amended. At the same time, the imposition of a penalty payment should not be an automatic mandatory consequence of any tax evasion, because it would otherwise be unnecessary in the light of both the existing and the expected case law concerning the “ne bis in idem” principle for the tax administration to comply with its reporting obligation according to Section 53 (3) of the Tax Procedure Code as the criminal prosecution concerning the criminal offense for which a penalty payment has been imposed could not even be commenced at all, or would have to be stopped with regard to the above-mentioned provisions.

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