https://doi.org/10.18778/8331-399-3.07

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Polish Tax Cases before the European Court of Human Rights

1. Introduction

It is a great pleasure to be invited to contribute a chapter to the Jubilee Book dedicated to Professor Włodzimierz Nykiel on his 70th birthday. Professor Nykiel, perhaps more than any other tax academic in Poland, has established links with other tax academics elsewhere in the European Union and in Third States, and has done much to advance cooperation between Polish tax academics and those elsewhere in the world. This short chapter is intended to acknowledge Professor Nykiel's contribution to the issue of legal protection of taxpayers' rights, and particularly the protection of taxpayers' rights under the European Convention on Human Rights (ECHR).[2]

In May 2008 Professor Nykiel convened one of the first conferences anywhere in Europe on the protection of taxpayers' rights, at the Biedermann Palace of the University of Lodz. Personally, it was a tremendous honour to be invited to attend and speak at that conference, and to visit for the first time the area of Poland from where my grandmother originated. The first day of the conference was dedicated to the topic of Taxpayer Protection, and resulted in an excellent book entitled *Protection of Taxpayer's Rights – European, International and Domestic Tax Law Perspective*.[3]

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[2] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended.

[3] W. Nykiel, M. Sęk (eds), *Protection of Taxpayer's Rights – European, International and Domestic Tax Law Perspective*, Oficyna, Warszawa 2009.

The book contains national reports on taxpayer protection in a number of countries in Europe and the rest of the world. It also contains a number of topical chapters dealing with specific issues, including the enforcement of taxpayers' rights under European Union law, the ECHR and taxpayer protection, and several issues concerning taxpayers' rights protection in Poland. At the time it was published, there were perhaps no more than half a dozen books in total on the protection of taxpayers' rights, so this was a major addition to the literature and to the development of interest in the whole question of protecting the rights of taxpayers.

This chapter considers the cases that have been decided by the European Court of Human Rights (ECtHR) emanating from Poland. By "tax cases" a broad approach is taken, and any cases that have tax issues at their core are regarded as falling within this classification. Thus, as will be seen, one of the cases discussed here concerns the freedom of expression of journalists writing about the motivation behind changes in tax law.

While it is difficult to be comprehensive, a search of the database of cases at the ECtHR[4] identified only five reported cases that might be regarded as tax cases and that have involved Poland. That is a relatively small number, even taking into account the fact that Poland only ratified the ECHR in 1993. One might easily find a much larger number of tax cases from other countries, such as Bulgaria, that ratified the Convention around the same time. It is a matter of pure speculation why there are so few cases that have derived from Poland. One possibility is that Polish tax law and Polish tax administration respect taxpayers' rights to such an extent that no cases have arisen. That is a very attractive thought, but virtually every tax system gives rise to issues of protection of taxpayers' rights, and it is hard to see why fewer issues would have arisen in Poland. A second possible explanation is that knowledge of the provisions of the European Convention are not well-known amongst tax practitioners in Poland: again that explanation is unlikely, particularly given that there seem to be a relatively large number of non-tax cases lodged before the ECtHR from Poland.[5] Another possibility, which may perhaps be a better explanation, is that there are several levels of courts and tribunals in Poland that can hear cases concerning taxpayers' rights, including the Constitutional Court. Not only is the requirement of exhausting domestic remedies likely to prevent many cases from being brought, but the different levels of adjudication create the possibility that a remedy will have been granted before the case might reach the

[4] The HUDOCS database.

[5] The country profile for Poland produced by the ECtHR, lists 1,721 applications concerning Poland lodged during 2020.

stage where it could be referred to the ECtHR in Strasbourg. Whatever the explanation, the fact that there are only five cases allows some discussion of each of them.

2. *Lewandowski* v. *Poland* (application No. 43457/98, decision of 15 June 1999)[6]

Lewandowski is not only the earliest case dealing with tax-related matters that came to the ECtHR from Poland, but it is also one of the strangest. On 29 January 1996, two bailiffs and an employee of a private security agency visited the applicant's flat in Gryfino in Poland with a warrant alleging that the applicant had failed to pay social security contributions in respect of his small business. The applicant was not at home, but his wife telephoned him and he informed the bailiffs that all outstanding social security contributions had been paid. The bailiffs and security agents left the flat. The next day the applicant went to the Gryfino Tax Office and presented a receipt showing that he had paid the social security contributions, and the employee responsible for his account admitted that the warrant had been issued erroneously and apologised to him. A day later the applicant complained to the District Prosecutor that the behaviour of the bailiffs had been such a threatening manner that the state of the health of his wife had deteriorated (one of the bailiffs had been armed). On 25 February (that is less than four weeks after the visit of the bailiffs), the applicant's wife died: he informed the District Prosecutor that in his opinion his wife's death had been caused by the stress resulting from the actions of the bailiffs. There then followed a series of actions by the District Prosecutor and by other officials. These included obtaining expert reports from medical experts who, in their opinion, concluded that it was impossible to establish the existence of a causal link between the bailiffs' action and the death of the applicant's wife. As a result, any investigation was ultimately dropped. The applicant complained through the hierarchy of prosecutors to the Prosecutor General, but the investigation was discontinued. At that point the applicant lodged a complaint before the ECtHR in Strasbourg alleging breach of Art. 2 ECHR (the right to life) as well as Art. 6 (right to a fair trial) arising from the investigation of the complaints by the prosecution.

The ECtHR dealt with the matter relatively briefly. Expert opinion delivered by two professors of medicine and a doctor established that it had

[6] ECtHR, decision, 15 June 1999, *Lewandowski* v. *Poland*, No. 43457/98.

been impossible to show a causal link between the visit of the bailiffs and the death of the applicant's wife less than a month later. The ECtHR very rarely makes its own findings of fact, and was constrained here by the evidence collected in the course of the investigation by the prosecutors showing no causal link between the actions of the bailiffs and the death of the applicant's wife. On that basis, the Court concluded there was no appearance of a violation of Art. 2. Article 6 was also not applicable because the case did not concern the determination of the applicant's civil rights and obligations, or a criminal charge. The Court declared the application inadmissible.

At this remove of time, it is impossible to determine exactly what did happen when the bailiffs and the security agent visited the applicant's flat. Clearly the applicant considered that the bailiffs had behaved in a threatening manner, and he objected to the fact that one of them was armed (apparently bailiffs were always armed with gas pistols during the execution of warrants). The applicant clearly considered that the action of the bailiffs had significantly contributed to his wife's death, and pursued the matter through various procedures in Poland. At the end of the day, however, medical evidence failed to support any causal link between the visit of the bailiffs and the wife's death.[7]

3. *WS* v. *Poland* (application No. 37607/97, decision of 15 June 1999)[8]

This case (and the one that follows) establish a rather more significant, general principle with regard to the ECHR. The applicant was a bookkeeper; in 1996 she was found liable for a "tax offence" by the Tax Office in that a) she had made book-keeping errors on behalf of a client for which she was liable to a penalty of PLN 300 (or 30 days imprisonment in default) and b) a penalty of PLN 100 (or 10 days imprisonment in default) for incorrectly calculating the value of a deduction for VAT purposes. She appealed against this to the Tax Chamber who dismissed her appeal, and then complained to the Minister of Finance who failed to answer the

[7] While it does not relate to Poland, there has been a disturbing increase in the number of cases reported before the ECtHR involving high-handed or threatening behaviour on behalf of the tax police, primarily in parts of Eastern Europe that were formerly part of the Soviet Union. It is purely speculative, however, to consider that similar conduct might have been involved in this case.

[8] ECtHR, decision, 15 June 1999, *WS* v. *Poland*, No. 37607/97. Interesting to note that this decision was issued on the same day by an identical Court to the *Lewandowski* case.

complaint. She then filed an application with the ECtHR alleging a breach of Art. 6 (right to a fair trial) on grounds that she had no access to a court to challenge the fine imposed against her.

Stopping there, the case involved relatively small fines but with potential serious consequences for the applicant. Aside from the fact that there was the possibility of going to prison in default of payment of the fine, there was also the reputational damage. Despite that, there was no possibility of access to a court. In terms of the ECHR, the question was whether she faced a criminal charge and, consequently, had a right to a court. The ECtHR on this point had already developed a three-factor test. The first factor was whether the offence was regarded as belonging to the criminal law within the law of the country concerned. In Poland, the tax offence was regarded as a fiscal offence, and certain provisions of the Criminal Code were applicable. That, however, was not the only factor. The second factor concerned the nature of the offence which, in this case, was of a technical and not of a criminal character. It did not require any criminal intent and was regarded as a tax offence and not a tax crime. In terms of the severity of the penalty, which was the third criterion, the pecuniary penalty was relatively low, and the offence was not punishable by imprisonment. Putting these points together, the ECtHR concluded that the applicant was not charged with a criminal offence and so did not fall within the scope of Art. 6.

This case is, of course, relevant for a much broader range of matters other than just tax matters. In many situations, regulatory fines are imposed without the possibility of an appeal to a court. Usually there will be some form of review, perhaps by an administrative committee (driving offences are an example). It is important in those cases to determine whether or not the matter involves a criminal charge, and this case is an example of the approach taken in connection with tax matters. It is highly instructive to compare this case with the next one discussed here.

4. *Szott-Medyńska* and others v. *Poland* (application No. 47414/99, decision of 9 October 2003[9]

The opportunity to review the decision in *WS* v. *Poland* arose some four years later in this case. The three applicants ran a small family business and the Tax Office found them guilty of a fiscal offence in failing to pay

[9] ECtHR, decision, 9 October 2003, *Szott-Medyńska* and others v. *Poland*, No. 47414/99. Two of the judges who sat in the *WS* v. *Poland* case also sat in this case.

a monthly income tax advance on wages. They were each made liable to a pecuniary penalty of PLN 250 (with 17 days imprisonment in default). They appealed to the Tax Chamber which dismissed their appeal: no further appeal was permitted. Once again, they complained under Art. 6 that no appeal to a court lay against the decision of the Tax Chamber.

The applicants sought to distinguish this case from *WS* v. *Poland* on the basis that the offence could be punishable by imprisonment (in default of payment). In fact, as explained, that was also a possibility in the *WS* v. *Poland* case.

The ECtHR applied the same three criteria as they had applied in *WS* v. *Poland*. In terms of the first criteria, the tax offence again belonged to the sphere of criminal law. In terms of the nature of the offence, the ECtHR took a different view and considered that the offence related to liability which was of general application to all citizens and not only to a particular group possessing a special status. Finally, in regard to the third criterion, the severity of the penalty, the Court noted that the penalty was quite small but it could be substituted by up to 30 days imprisonment in default of payment. On that basis, the ECtHR concluded that the penalties had a punitive character; they were sufficiently severe to conclude that they could be characterised as criminal. In contra-distinction to the decision in *WS* v. *Poland*, the ECtHR concluded that the applicants were charged with a criminal offence and that Art. 6 was, therefore, applicable.

There was, however, another aspect to the case. The Polish Government had argued that, even if there was no appeal to a court from the decision of the Tax Chamber, there was the possibility for the applicants to bring a constitutional complaint before the Polish Constitutional Court. The applicants had failed to bring such a complaint. The ECtHR concluded that, in failing to bring such a complaint, the applicants had failed to exhaust all domestic procedures. On that basis, therefore, their application was inadmissible.

There are two comments that one might make on this case. First, it seems very hard to distinguish this case from the case of *WS* v. *Poland*, except with regard to the second of the criteria based on the nature of the offence. In the *WS* case, the ECtHR concluded that the offence was of a technical nature and applied specifically to bookkeepers who had made mistakes with regard to their clients. In this case, the ECtHR concluded that it was a general offence applicable to all taxpayers who had employees and failed to make a payment of tax. It is hard to distinguish the case on the basis of the punishment, given that it appears to have been similar in both cases.

The second comment one might make is that the requirement to exhaust domestic remedies by making a constitutional complaint to the

Constitutional Court may well explain why so few tax cases have proceeded from Poland to the ECtHR in Strasbourg. The ECtHR acknowledged the somewhat limited competence of the Constitutional Court, but nevertheless concluded that a constitutional complaint is necessary to exhaust domestic remedies. That, of itself, is likely to deter many cases from proceeding to the ECtHR.

5. *Stankiewicz* and others v. *Poland* (No. 2) (application No. 48053/11, decision of 3 November 2015)[10]

In some respects this case is a little remote from the discussion of tax cases, but it does have a tax issue at its heart. The application was brought by three people: a journalist, the editor in chief, and the publisher of a daily newspaper entitled "Rzeczpospolita". In 2005, the newspaper ran a series of articles about a change to the Polish Tax Ordinance Act[11] which provided that evidence collected in criminal proceedings could be used as evidence in tax proceedings, but only after the criminal proceedings had been concluded. The articles alleged that this change was of substantial benefit to criminal groups, particularly "the petrol mafia", since criminal investigations for tax evasion could drag on many years, and the evidence could not be used in a tax case in the meantime. The amendment to the law had been advised by Ms DS who had given evidence before the Parliamentary Finance Committee and who was a well-known expert on tax law and a former senior civil servant. Claiming that the articles in the newspaper had damaged her reputation, she lodged a claim for the protection of personal rights against the three applicants. After various hearings in the Polish courts, her claim was upheld, and the three applicants were required to publish an apology to her and pay PLN 20,000 to a charity. The three applicants then brought a claim in Strasbourg alleging a breach of Art. 10 (the freedom of expression).

The case is essentially on the freedom of expression of journalists rather than on any content that is specific to tax matters. It was relevant that Ms DS was a former senior civil servant and involved in the legislative process, so she was a public figure who therefore knowingly exposed

[10] ECtHR, judgement, 3 November 2015, *Stankiewicz* and others v. *Poland* (No. 2), No. 48053/11.

[11] PL, Act of 29 August 1997 Tax Ordinance [*Ustawa z dnia 29 sierpnia 1997 r. Ordynacja podatkowa*], Official Gazette [*Dziennik Ustaw*] of 1997, No. 137, item 926, amended.

herself to public scrutiny. However, the ECtHR concluded that the Polish courts, including the Supreme Court, had not given sufficient weight to the role of the press as the "public watchdog", and therefore did not carry out a sufficiently careful balancing exercise between the right to impart information on the one hand and the protection of the reputation of others on the other. On that basis, the ECtHR found that there had been a violation of Art. 10 and ordered compensation equal to the amount paid to charity, plus an amount for non-pecuniary damage to each of the applicants for violation of their convention rights.

This case is an important one on the freedom of expression, and particularly the rights of journalists. It is not specifically a tax case, but it illustrates how tax issues can be seen in the wider context and give rise to decisions of the ECtHR establishing general principles. Of the tax cases relating to Poland before the ECtHR, this is the only case that has been held to be admissible and in respect of which an award was made in favour of the applicants.

6. *Formela* v. *Poland* (application No. 31651/08, decision of 5 February 2019)[12]

With the *Formela* case, the discussion returns very much to the core of tax issues. The applicant ran a business and was registered as a taxpayer for VAT purposes. During the early 2000s, he purchased goods from company K, which provided invoices which the applicant paid in full. The applicant claimed an input tax deduction in respect of the VAT shown on those invoices. Unfortunately, the copies of the invoices held by company K were stolen; company K promised to reconstruct the missing paperwork but failed to do so. Subsequently, the applicant also purchased services from company S, which supplied invoices showing an amount of VAT which the applicant paid. However, company S was not at the time registered as a VAT payer: it subsequently rectified that, voluntarily filed its outstanding VAT forms, and paid the VAT amount to the Tax Office.

In 2004, the applicant was subject to a tax audit which disclosed that company K no longer retained copies of the invoices (and had not

[12] ECtHR, judgement, 5 February 2019, *Formela* v. *Poland*, No. 31651/08. There is a small point to note here that the application was lodged with the ECtHR in June 2008, but the judgement was not given until February 2019. There is no obvious explanation for the long delay.

reconstructed the documentation) and that company S was not registered for VAT. As a consequence, the applicant was denied the VAT input tax deduction and required to pay over the VAT that he had wrongly deducted. The applicant appealed against the tax assessment decisions, but the assessments were upheld. It was noted that the applicant might have the possibility of a civil action against the suppliers for failing to comply with their VAT obligations as a consequence of which the applicant was unable to deduct the input tax.

The issue of restrictions on the deduction of input tax, and the denial of input tax deduction to VAT-registered taxpayers who have otherwise complied with their VAT obligations, has been the subject matter of other case law before the ECtHR and also the European Court of Justice.[13] Before the ECtHR the leading case on this was the case of *Bulves* v. *Bulgaria*.[14] As in those other cases, the applicant complained that the refusal to allow him to deduct input tax, despite the fact that he had complied with all his own VAT obligations, was a breach of Art. 1 of Protocol No. 1 of the ECHR (the right to enjoyment of possessions). He contended that the right to deduct input tax was a possession which had been denied through no fault of his own.

In this area, the ECtHR has gradually moved away from its judgment in *Bulves*. With regard to company S, the Court noted that there was a relatively straightforward verification mechanism by which the applicant could have found out that company S did not have a valid VAT registration at the time. The applicant had failed to use that verification mechanism and was, consequently, not able to claim that he had a legitimate expectation of the right to deduct input VAT.

With regard to company K, where the duplicate documentation had been stolen but not reconstructed by the company, the ECtHR carried out a lengthier analysis of the problem of input VAT deduction and the margin of appreciation enjoyed by states in implementing a tax system to prevent fraud or abuse. In particular, the ECtHR observed that the applicant had a civil remedy against company K for failure to reconstruct the documentation: the existence of that action sufficed to allow the ECtHR to conclude that the legislation maintained a fair balance between the protection of the applicant's rights to deduction and the demands of the general interest. On that basis, the ECtHR found that the claim under Art. 1 of the Protocol No. 1 was manifestly unfounded.

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[13] See, for example, from the EU, CJEU, judgement, 4 June 2020, *CF*, C-430/19 as one of the most recent cases discussing this issue.

[14] ECtHR, judgment, 22 January 2009, *Bulves* v. *Bulgaria*, No. 3991/03. Other cases include *Nazarev* and others v. *Bulgaria* (ECtHR, judgement, 25 January 2011, No. 26553/05); *Atev* v. *Bulgaria* (ECtHR, judgement, 18 March 2014, No. 39689/05); and *Euromak Metal Doo* v. *Former Yugoslav Republic of Macedonia* (ECtHR, judgement, 14 June 2018, No. 16839/14).

This judgement is in line with the more recent cases involving the denial of the deduction of input VAT. The Court seems to be well aware of the problems of missing trader fraud, and the concerns that governments have about the deduction of input tax. In essence, the question becomes whether the innocent trader should be required to bring an action against the supplier who has failed to comply with its VAT obligations, or whether the state should allow the deduction of input VAT (even if all conditions have not been satisfied) because the trader is otherwise innocent. In recent cases, the balance seems to have swung more in favour of denying the input tax deduction to the innocent trader, and requiring that trader to bring a remedy against the supplier who has failed to comply with VAT obligations. This case from Poland is an example of this trend in the ECtHR jurisprudence.

7. Concluding comments

An examination of the tax cases that have proceeded from Poland to the ECtHR in Strasbourg has provided an interesting opportunity to review a small number of cases, but ones that touch upon a number of different issues. The cases include a very unusual case on Art. 2 (the right to life), two contrasting cases on the limits of the scope of a criminal charge for the purposes of Art. 6, a case on Art. 10 and the freedom of expression of financial journalists with respect to reporting on a technical tax change, and finally a case in relation to the right to enjoyment of possessions and the deduction of input tax. Several of the cases have contributed to the development of ECtHR jurisprudence. Of the cases, the applicant was successful in only one of them – *Stankiewicz* – and that case has in many respects the least contact with the Polish tax system. The other cases demonstrate perhaps a rather draconian tax system with fines (and imprisonment for non-payment of those fines) for relatively minor errors in relation to tax compliance, and a strict VAT input deduction rule. However, in none of those cases was the applicant successful, so in none of those cases had the Polish tax legislation overstepped the limits set by the ECHR. That does not suggest in any way that there should be complacency about the protection of taxpayers' rights: the divergent results in connection with the imposition of small penalties for errors in completing tax returns suggests that a government should not sail too close to the wind on these matters.

Most of these cases date back to the time before Poland joined the European Union or soon afterwards. They mostly date before the

conference on taxpayer protection which Professor Nykiel organized at the University of Lodz in 2008. It would be nice to speculate that the small number of cases that have proceeded to Strasbourg from Poland might reflect a growing recognition of the rights of taxpayers and the need to respect those rights which Professor Nykiel championed by organizing that conference in 2008.

References

Nykiel W., Sęk M. (eds), *Protection of Taxpayer's Rights – European, International and Domestic Tax Law Perspective*, Oficyna, Warsaw 2009.

Abstract

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Keywords: protection of taxpayers' rights, tax cases, the European Convention on Human Rights, the European Court of Human Rights