
ON MUTUAL RELATIONS BETWEEN THE TAX FRAUD UNDER ARTICLES 56 AND 76 FPC AND A CRIME OF FRAUD UNDER ARTICLE 286 CC

ŁUKASZ PILARCZYK *

The article aims to explain the nature of relations between Articles 56 and 76 of the Fiscal Penal Code (FPC) and Article 286 of the Criminal Code (CC). The prohibited acts referred to there are often called “tax fraud” in literature, which suggests they are similar to the crime of fraud under Article 286 CC. It also suggests a possibility of concurrence of provisions between Articles 56 and 76 FPC and Article 286 CC, which raises a question whether in case of the commission of prohibited acts against broadly understood tax obligations a perpetrator may be liable under Article 286 CC instead of relevant provisions of the Fiscal Penal Code. It should be added that the answer to this question raises doubts in the doctrine as well as in the Supreme Court judgements, which justifies a need for discussing this issue.

First of all, the analysis will cover Article 56 FPC which refers to a prohibited act that many authors¹ call “tax fraud”. However, P. Kardas and G. Łabuda disapprove of a possibility of recognising this act as fraud because there is a lack of result in the form of deception,² which is typical of a crime under Article 286 §1 CC. In fact,

* MA, Department of Criminal Law, Faculty of Law and Administration of Adam Mickiewicz University in Poznań

¹ T. Grzegorzczuk, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2009, p. 294; L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2014, pp. 279–280; R. Kubacki, A. Bartosiewicz, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2010, p. 304; W. Kotowski, B. Kurzepa, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2007, p. 270; V. Konarska-Wrzosek, T. Oczkowski, J. Skorupka, *Prawo i postępowanie karne skarbowe* [Fiscal penal law and procedure], Warsaw 2013, p. 216; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2012, p. 215.

² Or taking advantage of an error or inability to adequately understand undertaken steps (compare, J. Bednarzak, *Przestępstwo oszustwa w polskim prawie karnym* [Crime of fraud in the Polish criminal law], Warsaw 1971, p. 25 ff).

the crime under Article 56 FPC consists in the fact that a taxpayer submitting a tax return or a declaration to a revenue office or another entitled body states untruth or conceals the truth, or does not fulfil the duty to inform about the change of data, which exposes a due tax amount to depletion. Thus, it is not necessary to deceive an entitled body to match the features of this prohibited act. However, the feature of this kind is referred to in Articles 76, 87 and 92 FPC and only in connection with those prohibited acts it is possible, in the authors' opinion, to potentially use the term "tax fraud". Therefore, the act prohibited under Article 56 FPC constitutes just fraud *sensu largo*,³ and that is why, it seems unjustified to call it "tax fraud". There is a fundamental difference between the features of this crime and fraud discussed above.

It is necessary to ask a question: what should be the legal classification of a perpetrator's behaviour if the commission of the act under Article 56 FPC results in a form of deception of an entitled body? Indeed, it is undoubtedly necessary to agree with the above-mentioned opinion that this result occurrence is irrelevant to liability under Article 56 because it is not included in the features of this prohibited act. But can we, in such a situation, consider attributing the commission of ordinary fraud to a perpetrator if such a result, typical of this prohibited act, occurs in this situation?

The answer to this question might be the second argument concerning the lack of all elements typical of "ordinary" fraud in the features laid down in Article 56 FPC, which is based on P. Kardas's opinion that an activity leading to depletion of a due tax amount because of the provision of data that are not in conformity with facts does not constitute disadvantageous disposal of property, because then only the due tax to be paid to the State Treasury is reduced and it is not a part of its property yet. In such a situation, we cannot speak about fraud because there is no result in the form of the disadvantageous disposal of property caused by deception of the aggrieved, which must be attributed to fraud. In a situation characterised in Article 56 FPC, there are no disposing activities on the part of the employees of revenue offices. What we deal with is only the depletion of a due tax amount as a result of providing untruth in a tax return.⁴ According to this author,⁵ the only possible classification of the behaviour consisting in depletion of a due tax amount by providing a tax return or a declaration containing untrue data is under

³ P. Kardas, G. Łabuda, *Kryminalizacja oszustwa podatkowego w prawie karnym skarbowym* [Criminalisation of tax fraud in fiscal penal law], *Prokuratura i Prawo* No. 3, 2003, pp. 61–62; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks... [Fiscal...]*, pp. 215–216. By the way, it must be indicated that there is an opinion that, based on fiscal penal law, it is possible to develop an autonomous definition of fraud (L. Wilk, *Szczególne cechy odpowiedzialności za przestępstwa i wykroczenia podatkowe* [Specific features of liability for tax-related crimes and misdemeanours], Katowice 2006, pp. 74–75).

⁴ P. Kardas, *Prawnikarne aspekty uchylania się od wykonania zobowiązania podatkowego w podatku VAT – oszustwo skarbowe czy oszustwo klasyczne?* [Penal aspects of VAT liability evasion – fiscal fraud or classical fraud?], *Prokuratura i Prawo* No. 5, 2006, p. 45. For more on the disadvantageous disposal of property under Article 286 CC, see e.g. A.N. Preibisz, *Niekorzystne rozporządzenie mieniem jako znamię oszustwa (art. 286 §1 k.k.)* [Disadvantageous disposal of property as a feature of fraud (Article 286 §1 CC)], *Prokuratura i Prawo* No. 10, 2005, p. 63.

⁵ P. Kardas, *Prawnikarne aspekty...* [Penal aspects...], p. 47.

Article 56 FPC, which does not require an occurrence of a result in the form of disposal of property. Thus, there is no occurrence of the features of an ordinary type of fraud under Article 286 CC.

As far as this argument is concerned, it can be assumed that we deal with a situation where a revenue office is deceived by a perpetrator about the correct tax amount that should be paid, and because of that it does not undertake steps to obtain the amount that is actually due. Thus, a question arises whether a disadvantageous disposal of property may be treated as omission. If so, in the situation specified in Article 56 FPC (if a revenue office was deceived about the amount of tax liability), we would theoretically also deal with the features of a crime of fraud under Article 286, provided a revenue office abandoned vindication of the due tax liability not knowing about its existence,⁶ which would suggest concurrence of the provisions of Article 56 FPC and Article 286 CC. Answering the question, it is necessary to indicate that in judgements, a very broad interpretation of the concept of "disadvantageous disposal of property" is adopted: "every activity that is disposal of property concerning all property rights as well as liabilities influencing a financial situation that results in general deterioration of the aggrieved person's financial situation is disadvantageous disposal of property as a feature of a crime of fraud."⁷ Still, can we say that a failure to perform some activities resulting from a lack of knowledge may be considered "disposal of property"? It is pointed out in literature that it is possible to be approved of. An example of that can be a contractor desisting from business as a result of misleading him by a business partner or the postponement of debt settlement by a creditor who is not aware that it is time for its settlement because a debtor unlawfully deceived him.⁸ This broad interpretation of the features of the prohibited act under Article 286 CC is justified by the need for the broadest protection of the legal interest in the form of property and reliability of economic turnover.⁹

⁶ Although, one can have doubts whether it is possible to speak about omission in a situation where someone is not aware that she/he is committing it because she/he does not know about some circumstances of the actual state. The Appellate Court in Katowice draws attention to that in its judgement of 21 February 2014 file No. II AKA 409/13 (Krakowskie Zeszyty Sądowe No. 6, 2014, item 136): "Analysing the actual state in this case on the part of the aggrieved, it is necessary to state that the behaviour of competent authorities' representatives was passive and limited to receipt of tax (VAT) returns from the accused and then entering the tax amounts settled in accordance with tax returns into books. In order to recognise disposal of property, there must be a conscious act that may take the form of omission that, in accordance with legal regulations, results in disposal of one's own or somebody else's property. In the case under examination, the competent authorities remaining in passive unawareness did not make such disposal of property". A gloss of disapproval of that judgement by J. Duży, P. Kołodziejski, *Przegląd Sądowy* No. 4, 2015, pp. 131–137.

⁷ Supreme Court ruling of 3 April 2012, file No. V KK 451/11, LEX No. 1163989.

⁸ For more, see: T. Oczkowski, *Oszustwo jako przestępstwo majątkowe i gospodarcze* [Fraud as property-related and economic crime], Kraków 2004, p. 66.

⁹ A.N. Preibisz, *Niekorzystne rozporządzenie...* [Disadvantageous disposal...], pp. 70–71; similarly, W. Cieślak, *„Rozporządzenie mieniem” jako znamię wymuszenia rozbójniczego (art. 211 k.k.)* ["Disposal of property" as a feature of extortion (Article 211CC)], *Palestra* No. 11–12, 1995, p. 54; differently: the Supreme Court ruling of 24 June 2015, file No. I KZP 2/15, OSNKW No. 7, 2015, item 56, where it was directly indicated that: "Statutory authorisation of a revenue office

Although one can have objections to the above-mentioned conception, it is necessary to state that the next argument presented by P. Kardas and G. Łabuda, differentiating the features of the prohibited act under Article 56 FPC and Article 286 CC, does not seem to be convincing at all because, in the light of the above, a revenue office in the analysed situation would disadvantageously dispose of property and match the features of Article 286 CC.

On the other hand, J. Duży and P. Kołodziejski are representatives of an opinion that in a situation of submission of an unreliable tax return in order to avoid tax obligation, there is disadvantageous disposal of property. They draw attention to the fact that perpetrators' behaviour also covers other actions, *inter alia*, a series of activities aimed at deceiving revenue authorities,¹⁰ which is to result in disadvantageous disposal of the property of the State Treasury, and thus results in the occurrence of the feature typical of fraud under Article 286 CC. They rightly note¹¹ that in a situation of depletion of a due tax amount, we do not deal with a taxpayer's free disposal but with a situation where she/he should submit a tax return being in conformity with the actual state and, documenting real business transactions that are subject to tax at a certain level; it is not him or her who disposes of the due tax amount because she/he cannot do this – these are revenue authorities who can. As a consequence, we deal with disadvantageous disposal of property if revenue authorities are deceived about the amount of due tax. It also seems to be absolutely justified that the authors draw attention to the fact that disposal of property covers a broad catalogue of activities that simply lead to deterioration of the financial situation of the property rights holder, that is why it is justified to assume that we also deal with it in the situations described here.¹²

In order to present arguments for their conception, its authors use the analogy to the court fraud¹³ committed in a situation where false heirs submit untrue declarations based on which a court issues a judgement on the acquisition of rights to inheritance, which harms some heirs. However, this analogy seems to be unjustified because in this type of situations we deal with a court's active behaviour in the form of issuing a judgement confirming the acquisition of rights to inheritance. This situation is different from checking the correctness of a tax return where revenue authorities conduct silent positive verification of a tax return and do not initiate proceedings to establish the correct amount of tax liability. There is no obvious active conduct that we observe in case of court fraud, which can be recognised

(a body of fiscal control) to abandon checking the calculation of tax in a tax return (...), in which a taxpayer reduced a due tax amount, excludes that body from matching the features of Article 286 §1 CC in the form of making that body disadvantageously dispose of property by abandoning the collection of due tax."

¹⁰ J. Duży, *Wina sprawców oszukańczych uszczupień podatkowych a kwalifikacja prawna* [Guilt of perpetrators of fraudulent tax depletion versus legal classification], *Prokuratura i Prawo* No. 7–8, 2012, p. 50.

¹¹ J. Duży, P. Kołodziejski, *Glosa do wyroku Sądu Apelacyjnego w Katowicach z dnia 21 lutego 2014 roku, (sygn. II AKa 409/13)* [Gloss on the Appellate Court in Katowice judgement of 21 February 2014 (file No. II Aka 409/13)], *Przegląd Sądowy* No. 4, 2015, p. 134.

¹² J. Duży, P. Kołodziejski, *Glosa...* [Gloss...], p. 135.

¹³ *Ibid.*, p. 134.

as disposal of property. An authority's failure to initiate proceedings is something different from initiating proceedings by a court and issuing a decision, which the authors wrongly refer to one another, although only one type of this behaviour is active in nature. They alternatively indicate that it may lead to appropriation if a taxpayer and not a revenue office disposes of property on their own.¹⁴ We would deal with appropriation of liability, which seems to be doubtful because such legal classification would occur in case of all prohibited acts specified in the Fiscal Penal Code consisting in settlement of tax in a depleted amount. Such multiplication of provisions, which might be used to penal assessment of those acts, must raise theoretical and axiological doubts and, that is why, this conception should be definitely rejected.

Despite the above-mentioned doubts about P. Kardas's arguments concerning the lack of the features of disadvantageous disposal of property on the part of revenue authorities in the act under Article 56, it is necessary to state that he is right that the concurrence of prohibited acts under Article 56 FPC and Article 286 CC is not possible, which results from the diversity of the interest legally protected by those provisions. As this author rightly indicates, in case of fiscal crimes, tax obligations constitute this type of legally protected interest that differentiates those prohibited acts from fraud under Article 286 CC, which does not protect the property of the State Treasury against attempts implemented with the use of the provisions of public law, including especially financial law regulating the issues connected with the financial interests of the State in the area of budgetary income from public contributions.¹⁵ Thus, Article 286 CC will protect the property of the State Treasury but it will take place only in case when, e.g. the State Treasury takes part in the turnover in the same way as other market entities. As a result, in case of infringement of tax obligations, it is necessary to state that they are penalised by the provisions of the Fiscal Penal Code and because of that excluded from the application of regulations of Article 268 CC, as it refers to another type of a legally protected interest. The application of Article 268 CC would also be purposeless in case of acts consisting in different violations of tax obligations in the situation where there is a special regulation directly referring to such acts that was introduced to the Polish legal order, i.e. the Fiscal Penal Code. Thus, violating tax obligations towards the State Treasury cannot match the features of the crime of fraud because of a lack

¹⁴ *Ibid.*, p. 137.

¹⁵ P. Kardas, *Prawnokarne aspekty...* [Penal aspects...], pp. 47–48. For more on this issue, also see: P. Kardas, G. Łabuda, *Zbieg przepisów kryminalizujących klasyczne oszustwo oraz oszustwo skarbowe* [Concurrence of provisions criminalising classical fraud and fiscal fraud], [in:] J. Majewski (ed.), *Zbieg przepisów i zbieg przestępstw w polskim prawie karnym. Materiały II Bielańskiego Kolokwium Karnistycznego* [Concurrence of provisions and concurrence of crimes in the Polish criminal law: Material of the 2nd Bielańskie Criminal Colloquium], Toruń 2006, p. 131, where it is rightly emphasised that in case of fiscal crimes, there is a lack of a specific element of freedom to decide on the part of the aggrieved that matches the features of Article 286 CC because a revenue office is obliged by law to act in a special way; therefore, the difference between the object of protection under Article 286 CC and crimes specified in FPC lies here: if there is a lack of this element of freedom to decide on the part of the aggrieved, we deal with a situation in which the provisions of FPC, not CC, protect the property of the State Treasury because public law norms are protected.

of an adequate legally protected interest, property of the State Treasury, connected with settling tax obligations, which is an interest that the legal norms of Article 286 CC do not protect.¹⁶

This statement seems to be extremely important if we take into consideration that, based on Article 56 FPC, a question arises whether its features match providing of untruth in a tax return as far as the amount of VAT is concerned, which results in groundless reduction of the amount of that tax that should be paid to the revenue authority.¹⁷ It is indicated that tax returns are usually completed based on invoices that are either totally false or provide unreliable information documenting business operations that have actually taken place. Of course, such a prohibited act can also be committed, e.g. without the issue of any invoices but by referring to business operations not documented by any invoices when completing tax returns.¹⁸

According to P. Kardas,¹⁹ filling in tax returns in the way that is not in conformity with the actual state based on invoices unreliably documenting real economic operations matches the features of the fiscal crime under Article 56 FPC and this does not constitute a doubtful issue in the doctrine and judicial decisions. However, the situation is different in case of false invoices and the procedure of groundless increase in the amount of calculated tax, which results in the depletion of the amount of due tax. There are opinions²⁰ that such situations should be treated not as ones matching the features of the prohibited act under Article 56 FPC but the features of fraud under Article 286 CC. The argument for this thesis is that in such a situation we deal with a fictitious economic operation that does not result in tax liability, thus this situation cannot be subject to interest and intervention of tax authorities. Those authorities cannot act to establish tax liability resulting from this operation. Thus, the interest in the form of tax obligation has not been violated so we cannot say that the features of the prohibited act under Article 56 FPC are matched.

Discussing this opinion, it is necessary to state that its authors not accidentally refer to the concept of a legal interest in order to prove that they are right. Just having a look at the features of the crime under Article 56 FPC does not give grounds for such an opinion. The provision penalises, inter alia, the act of providing untruth or concealing the truth when submitting a tax return, which results in tax depletion, and this also refers to a VAT return that is based on previously issued false invoices documenting calculated tax. Thus, such a tax return contains untrue data and, as a result, the tax settled is smaller than it should be. Therefore, we deal with its obvious depletion. Seemingly, in such a situation the features of the prohibited act under Article 56 FPC are matched, however, the authors of the above opinion object stating that there is no violation of the interest in the form of tax obligation as the

¹⁶ A similar situation concerns other crimes against property in Chapter XXXV CC, e.g. the crime of appropriation.

¹⁷ For more, see: P. Kardas, *Prawnokarne aspekty...* [Penal aspects...], p. 36 ff.

¹⁸ *Ibid.*, p. 37, footnote no. 32.

¹⁹ *Ibid.*, p. 38.

²⁰ For instance, J. Duży, *Wina sprawców...* [Guilt of perpetrators...], pp. 56–58; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks...* [Fiscal...], p. 218.

operation documented in invoices is a fictitious event and is not connected with this obligation.²¹

Attention must be drawn to the fact that Article 56 FPC is placed in the FPC chapter classifying crimes against tax obligations and settlements connected with grants and subsidies. Therefore, we see a clear indication that tax obligations (indicated in a plural form) constitute an interest legally protected by those provisions,²² which does not seem to be a controversial issue. However, the title of the chapter does not read: "crimes against a tax obligation", which indicates that not only a tax obligation laid down in Article 4 of the Tax Law (TL), which is an unspecified obligation to make a pecuniary contribution in connection with an event laid down in those Acts,²³ is an interest legally protected by the provisions of this chapter. Thus, the provision protects various types of tax obligations, not only those connected with pecuniary contributions. For example, Article 61 FPC penalising unreliable bookkeeping does not require that there are features of any results in the form of a failure to pay due tax. A perpetrator's behaviour is penalised regardless of the fact that she/he has settled due tax. Thus, it is not necessary to violate a tax obligation under Article 4 TL to match the features of this act, so fiscal crimes and misdemeanours classified in this chapter must be also against other tax liabilities.

Therefore, particular obligations laid down in the Acts on taxation and imposed on taxpayers or tax collectors are legally protected interests. It is not only a tax obligation under Article 4 TL. In the light of Article 56 FPC, the main tax obligation infringed is providing untrue data in a tax return or a declaration, which seems to result clearly from the content of this provision.²⁴ It is necessary to indicate that providing untrue data based on fictitious invoices as far as calculated tax is concerned leading to reduction in due tax undoubtedly infringes that obligation, thus violates the interest legally protected by this provision. Therefore, in this situation, there are no grounds for adopting a legal classification under Article 286 CC because there are features of the act under Article 56 §1 FPC. Moreover, it is necessary to highlight that even if the issue of false invoices does not in itself create a tax obligation under Article 4 TL, the reduction in due tax as a result of taking the

²¹ J. Duży, *Wina sprawców...* [Guilt of perpetrators...], pp. 56–58.

²² Similarly: S. Baniak, *Prawo karne skarbowe* [Fiscal Penal Code], Warsaw 2006, p. 196 ("the object of protection under Article 56 consists in compliance with tax obligations"); R. Kubacki, A. Bartosiewicz, *Kodeks...* [Fiscal...], p. 305: ("the object of protection (...) consists in compliance with obligations imposed by substantive fiscal law"); F. Prusak, *Kodeks karny skarbowy. Komentarz* [Fiscal Penal Code: Commentary], Warsaw 2011, p. 236. For more on this issue, also see: L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks...* [Fiscal...], pp. 261–266, describing the object of protection of the provisions placed in this chapter of FPC as: "a group of different legal interests connected, obviously in a certain way, with the fiscal interest of the revenue creditor".

²³ Similarly, A. Bartosiewicz, *Wyłudzenie zwrotu podatku VAT* [Obtaining VAT refund under false pretences], Głosa No. 4, 2005, pp. 104–106. In the author's opinion, "the term 'tax obligation' laid down in Article 53 §30 FPC is included in the term 'tax obligations' used in the title of Chapter 6 of Part I FPC", and he indicates absurd consequences of the adoption of a different interpretation.

²⁴ Similarly, F. Prusak, stating that the basic tax obligation protected by this provision consists in an obligation to provide tax information on time (F. Prusak, *Kodeks...* [Fiscal...], p. 237).

data from those invoices into consideration when completing tax returns results in depletion of the amount of pecuniary contributions that should be paid to the State Treasury, which seems to be also a violation of the tax obligation under Article 4 TL if the contribution laid down in this provision is not settled in the full amount. It does not mean, therefore, that a tax obligation under Article 4 TL is not infringed or that those fictitious economic operations documented by invoices do not result in any tax liabilities. If they are taken into consideration in tax returns, they obviously influence the amount of tax liability to be settled. There are no grounds, though, for adopting a legal classification of Article 268 CC, as it has been indicated above, especially because the property of the State Treasury is not the object of its protection in the area of tax obligations.

P. Kardas²⁵ is of the same opinion and states that there are no grounds for differentiating penal consequences of depletion of VAT based on false and unreliable invoices. If there is a VAT obligation on the part of a perpetrator and she/he declares a higher calculated tax in a given period than the real amount (which causes depletion of due tax), it does not matter whether the groundless calculation of tax was based on unreliable or false invoices. The consequence is the same: depletion of the amount of tax that should be paid to the State Treasury. This stand deserves full approval.

The author is also right to point out that Article 108(1) of the Act on value added tax undermines the sense of the division into unreliable and false invoices.²⁶ In accordance with this provision, in case a legal person, an organisational unit that does not hold its own legal identity or a natural person issues an invoice indicating an amount of tax, she/he is obliged to pay that tax. Therefore, even in case of an issued invoice documenting an economic operation that is not real, there is an obligation to pay a tax amount indicated in the invoice. From this point of view, it is not important whether obtaining a tax refund under false pretences takes place as a result of the use of "empty" invoices or only unreliable ones but documenting real economic operations. The issue of a false invoice results in the obligation to pay tax on the one hand, and on the other hand, a legal relation that is a possibility of deducting calculated tax (and, hence, an obligation to calculate tax in adequate amount in the given period).

²⁵ P. Kardas, *Prawnokarne aspekty...* [Penal aspects...], pp. 39–41.

²⁶ P. Kardas, *O wzajemnych relacjach między przepisem art. 76 §1 k.k.s. a przepisem art. 286 §1 k.k.* [On mutual relations between the provision of Article 76 §1 FPC and the provision of Article 286 §1 CC], *Prokuratura i Prawo* No. 12, 2008, pp. 13–16; similarly, P. Kardas, *Prawnokarne aspekty...* [Penal aspects...], pp. 40–41, footnote no. 39; justification for the resolution of seven judges of the Supreme Court of 30 September 2003, I KZP 22/03, OSNKW 2003, No. 9–10, item 75, pp. 19–20. For more on the issue of doubts about the interpretation of Article 108(1) of the Act on value added tax, see A. Błachnio-Parzych, *Glosa do postanowienia Sądu Najwyższego z dnia 10 lipca 2013 r., sygn. II KK 20/13* [Gloss on the Supreme Court ruling of 10 July 2013, file No. II KK 20/13], *Palestra* No. 1–2, 2015, pp. 129–130; J. Duży, *Falszerstwo intelektualne faktury a uszczuplenie podatku od towarów i usług* [Invoice-related intellectual fraud versus depletion of value added tax], *Przegląd Sądowy* No. 11–12, 2009, pp. 161–163; J. Duży, *Znaczenie regulacji art. 108 ust. 1 ustawy o podatku od towarów i usług dla karnoprawnej oceny oszukańczych uszczupleń podatkowych* [Significance of the regulation of Article 108(1) of the Act on value added tax for penal assessment of fraudulent tax depletion], *Przegląd Sądowy* No. 1, 2012, p. 68.

Therefore, it cannot be reasonably stated that the issue of a false invoice is not connected with the inception of rights and obligations on the part of the taxpayer and, that is why, it should not be the subject to fiscal penal law. As a consequence, it is necessary to point out that every time a false invoice is issued we deal with the infringement of the provisions of tax law and, as a result, with the occurrence of the features of crimes under Article 62 §2 or §5 FPC. On the other hand, depletion of due tax (Article 56 FPC) or a refund of tax (Article 76 FPC) based on a false invoice should be taken into consideration whenever it results from an issued invoice, regardless of whether it is a false or unreliable invoice, provided the submitted tax return contains untrue data. In such a case, a perpetrator may become richer at the State Treasury's expense. This, all the more, indicates groundlessness of differentiation of false and unreliable invoices based on fiscal penal law. It is hard to understand why in case of issuing a false invoice, depletion of the amount of tax should be classified as a prohibited act under the Criminal Code (Article 286) and the issue of an unreliable invoice should be classified as a prohibited act under the Fiscal Penal Code (Article 56 FPC), in spite of the fact that there are practically no differences between the two legal events.

The issue of the object of protection is more complicated when we take into consideration opinions of authors who believe that a prohibited act consisting in depletion of due tax by completing a tax return based on false invoices is a crime against property²⁷ because it is an activity aimed at obtaining financial benefits at the State Treasury's expense. In accordance with this opinion, depletion of due tax as an act detrimental to property should be classified based on the provisions of the Criminal Code, namely Article 286, as a crime against property because this behaviour infringes property, i.e. the interest that is legally protected. The basic aim of perpetrators' activities is to obtain financial benefits. Other legally protected interests, as e.g. tax obligations, are also infringed but only as a result of a potential intention; perpetrators decide to violate tax obligations but, first of all, they want to obtain financial benefits and this is their direct intention.²⁸ Potential infringement of some tax obligations taking place when a prohibited act is committed only constitutes a side effect of perpetrators' action (the main result is damage to the State Treasury property) and is not the reason for undertaking criminal activities.²⁹

Regardless of whether Article 268 CC protects the State Treasury property in the above-discussed situations of non-settlement of tax liability (as it has already been mentioned, in the author's opinion it does not), it must be noted that the representatives of the above opinion are completely wrong to differentiate between the two situations: first, where a perpetrator acts in order to obtain financial benefits, and second, where a perpetrator aims to avoid a tax liability by non-settlement of due tax amount. It is obvious that if someone provides untrue data in a tax return

²⁷ J. Duży, P. Kołodziejki, *Glosa...* [Gloss...], p. 133. A similar opinion by J. Duży, *Wina sprawców...* [Guilt of perpetrators...], p. 59.

²⁸ J. Duży, *Wina sprawców...* [Guilt of perpetrators...], p. 55.

²⁹ *Ibid.*, p. 59; similarly, J. Bryk, A. Choromańska, A. Kalisz, S. Miskiewicz, D. Mocarska, D. Porwicz, A. Sadlo-Nowak, A. Świerczewska-Gąsiorowska, *Wybrane zagadnienia prawa karnego skarbowego* [Selected issues of fiscal penal law], Szczytno 2014, p. 91.

in order to avoid a tax obligation, she/he acts to obtain financial benefits. What objective, other than obtaining financial benefits at the State Treasury's expense, can their behaviour have if they want to avoid a tax amount settlement? It cannot raise any doubts that intentionally committing any crime or misdemeanour, a perpetrator does it to obtain financial benefits. Thus, there are no grounds for differentiating between those two situations. Following this train of thought, there are no grounds for placing Article 56 in the Fiscal Penal Code, because the submission of tax returns documenting an untrue state, indicating a smaller due tax amount, is always an activity performed to obtain financial benefits in the form of tax evasion or depletion by entirely or partially avoiding a tax obligation. If we approved of this opinion, the behaviour would always match the features of a crime against property and it would be necessary to adopt the legal classification of Article 268 CC. We would not be able, in fact, to prosecute a perpetrator in accordance with Article 56 FPC because the committed crime would match the features of a crime against property and not a fiscal one. Thus, the differentiation of the features of two types of prohibited acts under Article 56 FPC and Article 268 CC based on a perpetrator's intention is groundless.

Generally, it must be stated that acts specified in FPC are against a legal interest that is property, and it is a special type of property: the property of the State Treasury or local self-government units. Those prohibited acts cannot be identified with and referred to crimes against property in accordance with the Criminal Code because this would lead to negation of the significance of the fiscal penal law regulations.

J. Duży additionally states that in case of depletion of the amount of due tax based on false invoices, a tax liability does not take place at all, and so we cannot speak about the violation of tax obligations. This means that a tax obligation is not infringed by perpetrators of this kind of acts which only cause damage to property. This stand is not precise, however, because, in accordance with Article 108(1) of the Act on value added tax, in case of the issue of a false invoice, it is necessary to settle the tax indicated in it. To tell the truth, J. Duży treats this liability as a fiscal sanction,³⁰ however, the author of this article believes that in such a situation tax obligation occurs anyway because of the definition of this concept in the Tax Law. Moreover, one of the obligations imposed on taxpayers is correct completion of a tax return, which is especially important in case of prohibited acts committed as a result of intentionally incorrect completion of tax returns and, as it has been indicated above, Article 56 refers to the group of prohibited acts infringing broadly understood "tax obligations". In case of those acts, the correct completion of tax returns would be object of protection.³¹ Thus, it is difficult to rationally state that e.g.

³⁰ J. Duży, *Wina sprawców...* [Guilt of perpetrators...], p. 59; J. Duży, *Falszertwo intelektualne...* [Invoice-related...], p. 157. Other supporters of the opinion that this provision does not decide on the inception of a tax obligation indicate its erroneous construction, which is, in their opinion, an argument for purposelessness of this reference: L. Wilk, *Glosa do postanowienia Sądu Najwyższego z dnia 10 lipca 2013 r., sygn. II KK 20/13* [Gloss on the Supreme Court ruling of 10 July 2013, file No. II KK 20/13], *Orzecznictwo Sądów Polskich* No. 4, 2014, item 36, p. 474.

³¹ Similarly, J. Bryk, A. Choromańska, A. Kalisz, S. Miszkiewicz, D. Mocarska, D. Porwisz, A. Sadło-Nowak, A. Świerczewska-Gasiorowska, *Wybrane zagadnienia...* [Selected issues...], p. 62, where "compliance with obligations imposed by substantial tax law" is indicated as the object of

a crime consisting in depletion of a due tax amount is a prohibited act targeted only against property and not a taxpayer's obligations connected with correct completion of a tax return.

Thus, in fact, it is necessary to state that in spite of some similarities between the features of the prohibited act under Article 56 §1 FPC and Article 268 CC, mainly due to a different object of protection of the two provisions, it is not possible to acknowledge that the exposure of tax to depletion by submitting a tax return containing untrue data matches the features of the prohibited act under Article 268 CC, even if those tax returns are completed based on invoices documenting fictitious economic operations. In addition, it also means that the use of a term "tax fraud" in relation to the fiscal crime under Article 56 FPC is not really justified because of the differences between their features.

On the other hand, the situation connected with the prohibited act under Article 76 FPC consisting in obtaining tax refund by a perpetrator not entitled to it, especially VAT or excise duty, by misleading a tax authority is different.³² There are significant similarities between the features of acts specified in Article 76 FPC and Article 268 CC. They are bigger than between fraud and the act under Article 56 FPC. Obtaining a tax refund under false pretences as well as "ordinary" fraud specified in Article 286 CC have features that contain an element of deception³³ and disadvantageous disposal of property (in case of Article 76 FPC, a tax refund or its use for the settlement of future liabilities or tax debts is that disposal of property). Moreover, both prohibited acts refer to two actions performed.³⁴ On the one hand, a perpetrator's action is targeted at a person entitled to dispose of property (in case of the crime under Article 76 – the entitled authority), on the other hand, at property owned by that entity. Obviously, the authorities cannot in the same way as natural persons (who may be harmed by a perpetrator's action matching the features of the act under Article 286 CC) freely dispose of financial resources they manage and in this situation they must act in accordance with the provisions of financial

protection of Article 56 FPC, which means that, according to the authors, the object of protection is not only the property of the State Treasury, but also a series of legal norms that taxpayers are obliged to comply with when completing tax returns.

³² It must be noted, however, that as M. Mozgawa indicates (*Prawnokarne aspekty naruszenia podatku VAT* [Penal law aspects of VAT infringement], *Prokuratura i Prawo* No. 6, 1999, p. 17), an undue refund of tax referred to in Article 76 FPC may be treated as tax depletion referred to in Article 56 FPC, which would make differentiation between those two prohibited acts not really unambiguous. Moreover, in accordance with Article 52 §2 of the Tax Law, an undue tax refund is treated as tax arrears. Therefore, it is justifiable to ask a question about purposefulness of differentiating Article 76 FPC while, as it seems, the behaviour it penalises might be also classified under Article 56 FPC. For more on this issue, also see: T. Oczkowski, *Problematyka karnoprawnej oceny wyłudzenia podatku VAT* [Issues of penal law assessment of obtaining VAT under false pretences], *Prokuratura i Prawo* No. 7–8, 2009, pp. 100–101.

³³ On the other hand, there is no possibility of committing a prohibited act under Article 76 FPC by taking advantage of another person's error, which is specified in Article 286 CC (T. Grzegorzczak, *Kodeks...* [Fiscal...], p. 360).

³⁴ P. Kardas, G. Łabuda, *Kryminalizacja...* [Criminalisation...], p. 83.

law.³⁵ As a result, the prohibited act under Article 76 §1 FPC is sometimes called “an autonomous fiscal variation of crime under Article 286 CC”.³⁶

In spite of those similarities, however, there are also obvious differences between fraud and obtaining a tax refund under false pretences. The property that is an object of a perpetrator’s act under Article 76 FPC may only be money subject to refund within a given tax liability and not property in any other form. Taxes in Poland, as it is laid down in Articles 4–6 TL, can be only and exclusively in the form of pecuniary contributions. Any events posing threat to other types of property do not have features specified in Article 76 FPC. However, we can still analyse if they match the features of the act under Article 286 CC.³⁷

The difference between Article 76 FPC and Article 286 CC, according to P. Kardas and G. Łabuda,³⁸ also consists in the fact that the objective aspect of the features of the two prohibited acts is different. A prohibited act specified in Article 76 FPC can be committed with a direct as well as potential intention while fraud, in accordance with Article 286 CC, only with a direct intention.³⁹

Another element differentiating the prohibited act under Article 76 FPC from that under Article 286 CC is the subject (agent) who may commit them. It must be decided who can commit a prohibited act in the form of obtaining a tax refund under false pretences. Conversely to what is usually stated in the doctrine,⁴⁰ only a person who is a registered VAT payer may obtain such a refund. A person who is not a payer of a certain type of tax is not practically able to register a tax return documenting overpaid tax in the computer system and thus, their claim cannot be dealt with. Although it is not expressed in the provision directly, the subject may only be a payer of the given tax, which differentiates that act from the crime under Article 286 CC, which is a common crime. Moreover, a doubt is sometimes raised whether the term “a person” used in Article 286 CC, meaning a subject (agent) disposing of property, may refer to a state body, which makes a disadvantageous disposal of property deciding on a tax refund.⁴¹

A question arises, however, like in relation to the act under Article 56 FPC, what shall be done in a situation where a tax refund has been obtained based on false invoices documenting operations that did not actually take place. Again, there is a problem whether we can speak of the commission of a prohibited act under

³⁵ *Ibid.*

³⁶ A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks...* [Fiscal...], p. 277.

³⁷ P. Kardas, G. Łabuda, *Kryminalizacja...* [Criminalisation...], p. 83.

³⁸ *Ibid.*, p. 84; similarly, T. Grzegorzczak, *Kodeks...* [Fiscal...], p. 360.

³⁹ Some doubts concern, however, the types of lesser degree crimes under Article 76 FPC, where, according to some authors, there is only direct intention (P. Kardas, G. Łabuda, *Kryminalizacja...* [Criminalisation...], pp. 83–84). Differently in: R. Kubacki, A. Bartosiewicz, *Kodeks...* [Fiscal...], p. 466 and L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks...* [Fiscal...], pp. 362–363.

⁴⁰ For instance, W. Kotowski, B. Kurzepa, *Kodeks...* [Fiscal...], p. 347; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks...* [Fiscal...], p. 277; L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks...* [Fiscal...], p. 358.

⁴¹ P. Kardas, G. Łabuda, *Kryminalizacja...* [Criminalisation...], p. 70, although it is relatively easy to challenge this argument stating that in case of obtaining a tax refund under false pretences, a natural person, an employee of the revenue office, is misled.

Article 286 CC, which is even more justified in the context of greater similarity of the two provisions than it occurs in relation to Article 56 FPC.

The Supreme Court gave a positive answer to this question in its judgement of 1 March 2004.⁴² It states: “in case where acts committed by a perpetrator to obtain a VAT refund under false pretences, in accordance with the Act of 8 January 1993 on value added tax and excise (...), are not limited to omission of a reliable report of the object of taxation leading to avoiding expenditure from one’s own property at the expense of depletion of the State Treasury revenue, but consist in acts simulating the existence of a tax obligation only in order to obtain profits from the property of the State Treasury by pretending before a tax authority (with the use of false documents or by undertaking others steps) to have conducted real transactions, including ones concerning actually existing goods, not their substitutes, such activities constitute crimes specified in the provisions of the Criminal Code and not fiscal crimes”.⁴³

The arguments of the Supreme Court are that if we deal with obtaining a VAT refund under false pretences based on false invoices, a perpetrator acts in order to obtain financial benefits by making a tax authority refund an amount of money indicated by him/her from the property of the State Treasury with the use of fraudulent means, misleading a tax authority about the existence of tax obligation entitling to a refund. Unlike this, in connection with an act of unreliable provision of data concerning actual operations resulting in tax obligation the aim is not important, and the fact of exposing the State Treasury to depletion of tax may result from a perpetrator’s direct as well as potential intention. That is why, not every instance of obtaining a VAT refund under false pretences will always cause a fiscal penal liability. This results from the fact that the scope of protection provided by the provisions of fiscal penal law is connected with tax obligations. If they do not exist, it is not possible to deal with such a situation as a fiscal penal liability (and in case of false invoices, according to the Supreme Court, we do not deal with tax liability inception).

Analysing this opinion, it is first of all necessary to note that the Supreme Court did not pay attention to one more basic difference between the prohibited act under Article 76 FPC and fraud under Article 286 CC, which should be referred to here.

⁴² File No.: V KK 248/03, OSNKW No. 5, 2004, item 51. Similarly, Supreme Court ruling of 10 July 2013, file No. II KK 20/13, OSNKW 2013, No. 10, item 91 and glosses of approval in: A. Błachnio-Parzych, *Palestra* No. 1–2, 2015, p. 127 and L. Wilk, *Orzecznictwo Sądów Polskich* No. 4, item 36, 2014; O. Górniok, *Jeszcze o nadużyciach procedury podatku VAT* [More about misuse of VAT procedures], *Prokuratura i Prawo* No. 6, 2010, p. 20 ff; R. Kubacki, A. Bartosiewicz, *Kodeks...* [Fiscal...], p. 460. Differently in: Supreme Court judgement of 22 October 2009, file No. IV KK 433/08, OSNWSK 2009, No. 1, item 2115 with a critical gloss by J. Duży (Państwo i Prawo No. 10, 2011, p. 135). T. Grzegorzczuk’s opinion on the Supreme Court ruling of 1 March 2004 was also critical. He stated that its theses raised doubts about their validity because of Article 108(1) of the Act on value added tax (T. Grzegorzczuk, *Kodeks...* [Fiscal...], pp. 319–320); even the supporters of the Supreme Court stand notice this circumstance (e.g. R. Kubacki, A. Bartosiewicz, *Kodeks...* [Fiscal...], p. 461).

⁴³ Inter alia, M. Mozgawa expresses a similar opinion, *Prawnokarne aspekty...* [Penal aspects...], pp. 14–15, although the author refers to Article 276 CC concerning the features of the crime of theft, not Article 286 CC, as the provision of the Criminal Code applicable to the legal classification of a perpetrator’s behaviour.

Article 76 does not refer to a result, not only exposure to depletion of a tax liability amount, while the features of the act under Article 286 require a result in the form of disadvantageous disposal of property.⁴⁴

If we assume, in accordance with the logics of the Supreme Court, that we do not deal with a fiscal crime in case a taxpayer claims a refund of tax based on a false invoice, then when she/he fails to obtain a refund of tax, she/he might be prosecuted only for an attempt to commit fraud under Article 286 CC. On the other hand, in a similar situation where invoices used to complete tax returns documented real operations, we would deal with the commission of the act under Article 76 FPC. It is hard to explain rationally why in the two almost identical situations one of them should be treated as the commission of a prohibited act and the other would just be an attempt to commit a prohibited act. The Supreme Court did not explain this issue in its judgement at all.

Moreover, as P. Kardas rightly notes, the conception (represented in the above-mentioned judgement) consisting in acknowledgement that in case of false invoices we deal with a lack of infringement of a tax obligation is consequently connected with a further statement that we do not deal with a violation of any sanctioning norms that can be drawn from Article 76 FPC but we deal with the violation of sanctioning norms specified in Article 286 CC.⁴⁵ Still, the problem is that three out of four norms laid down in Article 76 FPC do not refer, in any way, to the scope of regulation in Article 286. Those are norms specifying penalisation of misleading and exposure to an undue tax liability refund committed with direct intention; misleading and exposure to an undue tax liability refund committed with potential intention; and misleading and obtaining an undue tax liability refund committed with potential intention. The behaviour listed is not subject to regulation of any norms laid down in Article 286 CC.

What is more, the features of an act under Article 76 FPC may also take place where a perpetrator depletes the value of due tax, which results in a surplus of tax calculated compared to due tax. Thus, obtaining a VAT refund under false pretences does not always take place via an artificial increase in the amount of calculated tax. Its amount may equal the amount that a taxpayer may deduct. Despite that, thanks to his/her manipulations, an undue refund of tax may take place.⁴⁶ Those acts will not be connected with the issue of false invoices. Thus, as far as they are concerned, we will also not deal with a potential classification under Article 286 CC.

⁴⁴ More on the issue, e.g. P. Kardas, G. Łabuda, *Kryminalizacja...* [Criminalisation...], pp. 73–77.

⁴⁵ P. Kardas, *O wzajemnych relacjach...* [On mutual relations...], pp. 18–19, but it must be noted that the author uses a concept of a sanctioning norm, which one can disagree with, because the norms he indicates may be recognised, based on a different point of view, as sanctioned norms. The terminology used by the author most probably is the result of A. Zoll's conception concerning the normative content of criminal provisions. More on the issue: A. Zoll, *O normie prawnej z punktu widzenia prawa karnego* [On a legal norm from the point of view of criminal law], *Krakowskie Studia Prawnicze* 1990, Year XXIII, pp. 65–95; Ł. Pohl, *Struktura normy sankcjonowanej w prawie karnym* [Structure of a sanctioning norm in criminal law], *Poznań* 2007, pp. 34–38.

⁴⁶ See, A. Bartosiewicz, *Wytudzenie...* [Obtaining...], pp. 100–101.

One norm we can decode from the content of Article 76 FPC, which can raise doubts whether it matches, to some extent, legal norms decoded from the content of Article 286 CC, is the norm penalising misleading and causing an undue refund of tax committed with direct intention. As the norm is infringed by unentitled reduction of the amount of due tax, it is not possible to adopt legal classification under Article 286 CC, because then undoubtedly the tax obligation starts but the resulting amount of tax to be settled is groundlessly reduced by a perpetrator, which should be obviously classified under Article 76 FPC if it causes a risk of an undue tax refund.

As a result, it is necessary to state that the scope of protection by the two provisions does not match one another. Not every type of behaviour penalised by Article 76 is within the scope of the norm of Article 286 CC,⁴⁷ which raises justified doubts concerning the possibility of applying Article 286 CC to punish obtaining a tax refund under false pretences with the use of a false invoice. This is because only when a perpetrator causes a refund of undue tax by acting with direct intention, will we potentially deal with the infringement of sanctioning norms derived from Article 286 CC.

Then, however, there is a problem with a loophole noticed by P. Kardas.⁴⁸ If, in every situation where a perpetrator infringes the above-mentioned norm using a false invoice, the features of the prohibited act under Article 76 do not occur (a tax obligation does not take place because the invoice does not refer to an actual legal event), there are no legal grounds for prosecuting a perpetrator of prohibited acts consisting in the infringement of three sanctioning norms mentioned above, provided a perpetrator uses a false invoice to commit those acts. On the one hand, those types of behaviour do not match the features of fraud because of an inadequate type of intention or a lack of disadvantageous disposal of property, and simultaneously, they do not match the features of the act under Article 76 FPC due to an inadequate object of protection (as according to the Supreme Court, there is a lack of tax obligation inception). This type of situation, which results from the way of thinking presented by the Supreme Court in its judgement of 1 March 2004, is hard to be considered logical or criminally and politically substantiated. Here, it is necessary to define precisely that in connection with the exposure to an undue refund of tax as a result of a perpetrator's act with direct intention committed based on false invoices, the above-mentioned P. Kardas's opinion on non-punishability of this behaviour is not precise, as this type of behaviour is not included in the normative scope of Article 286 CC, due to a lack of a required result (exposure to a refund instead of causing a refund, necessary for assigning liability under Article 286 CC). Therefore, this type of behaviour does not match the features specified in Article 286 in the form of commission but a perpetrator of this act will be probably liable for an attempt of fraud. Thus, his/her behaviour, contrary to P. Kardas's opinion, will be punishable (as she/he has exposed a legal interest to harm but has not managed to fulfil the objective).⁴⁹

⁴⁷ P. Kardas, *O wzajemnych relacjach...* [On mutual relations...], p. 19.

⁴⁸ *Ibid.*, pp. 21–22.

⁴⁹ Obviously, based on an assumption that we can consider legal classification of this behaviour in accordance with Article 286 CC.

Thus, regardless of the above, the statements in the Supreme Court judgement of 12 December 2008⁵⁰ are undoubtedly erroneous as they indicate: “The comparison of the content of Article 76 §1 FPC and Article 286 §1 CC leads to an obvious conclusion that the former is a provision *lex specialis* in relation to the latter. The features of a crime under Article 76 §1 FPC are completely contained in the general description of an action of a perpetrator of the crime under Article 286 §1 CC, specifying a special type of fraud leading to obtaining an undue refund of tax under false pretences”. This opinion is wrong because the features of the prohibited act specified in Article 76 FPC are not completely contained in the features of “ordinary” fraud due to the above-mentioned partly different scope of application of the norms laid down in the two provisions as well as a different object of protection.

It is rightly noticed that the object of protection in Article 76 FPC is, apart from tax obligations, also the property of the State Treasury and local self-government units.⁵¹ Protection of tax obligations (apart from property), however, is a factor differentiating this provision from classical fraud in the scope of a legally protected interest, which results in a conclusion that recognition of any act infringing broadly understood tax obligations as classical fraud is not possible because of a different object of protection.⁵² From this point of view, the division into false and unreliable invoices is not important in penal law because in both cases there is an occurrence of infringement of tax obligations connected with correct completion of tax returns that are based on those invoices and leading to an undue refund of tax. Thus, both situations should be classified under Article 76 FPC. Here, it is again necessary to quote P. Kardas’s opinion, with which the author of the article agrees, according to which the norm sanctioning actions consisting in infringement of private law norms can be decoded from Article 286 §1 CC. On the other hand, the norm sanctioning behaviour consisting in infringement of public law norms can be decoded from Article 76 §1 FPC.⁵³

⁵⁰ File No. V KK 76/08, LEX No. 449041.

⁵¹ P. Kardas, G. Łabuda, *Zbieg przepisów...* [Concurrence of provisions...], p. 124 ff; A. Piaseczny, [in:] A. Wielgolewska, A. Piaseczny, *Kodeks...* [Fiscal...], p. 278; L. Wilk, [in:] L. Wilk, J. Zagrodnik, *Kodeks...* [Fiscal...], p. 357. F. Prusak also specifies the object of protection of the provisions of FPC broadly as: “financial interest of the State and the European Communities as well as an established legal order in public finances” (*Kodeks...* [Fiscal...], p. 22), which seems to correspond to the opinion presented by P. Kardas and G. Łabuda. Of course, first of all, the interests legally protected by Article 76 FPC shall be, like in case of Article 56 FPC, tax obligations imposed by substantive tax law (see, e.g. R. Kubacki, A. Bartosiewicz, *Kodeks...* [Fiscal...], p. 42), which is an unquestionable fact, however, in case of infringement of those obligations, the results influence the property of the State Treasury and local self-government units. That is why, e.g. in: J. Bryk, A. Choromańska, A. Kalisz, S. Miszkiewicz, D. Mocarska, D. Porwisz, A. Sadło-Nowak, A. Świerczewska-Gąsiorowska, *Wybrane zagadnienia...* [Selected issues...], p. 88, the authors specify the object of protection of this provision as: “compliance with the provisions of substantive tax law concerning the procedure of tax liability refund”.

⁵² P. Kardas, G. Łabuda, *Kryminalizacja...* [Criminalisation...], p. 64 ff; P. Kardas, *O wzajemnych relacjach...* [On mutual relations...], p. 24–25; similarly, justification for the Supreme Court judgement of 19 March 2008, II KK 347/07, *Orzecznictwo Sądów Polskich* No. 4, item 43, 2009.

⁵³ P. Kardas, *O wzajemnych relacjach...* [On mutual relations...], pp. 27–28.

The thesis formulated by J. Duży that the State Treasury property is also a legally protected interest of Article 286 CC does not deserve approval. This author states⁵⁴ that: "One cannot agree with an opinion that the provision of Article 286 §1 CC does not protect the property of the State Treasury or other entitled entities against attempts implemented with the use of regulations of public law. This would *de facto* mean that the property of the State Treasury is protected to a lesser extent (only and exclusively by regulations of a specialised branch of law) and is subject to other (in fact, weaker) standards of protection". This opinion cannot be recognised as substantiated because, firstly, it is hard to acknowledge that the selection of a specific group of provisions sanctioning unlawful non-settlement of tax contributions, characterised by specific differences, should indicate weaker protection for the State property.⁵⁵ These are the specific features and institutions, such as vicarious liability or contributory liability that decide about a better adjustment of penal fiscal law norms to protection of tax liabilities in comparison to norms contained in the Criminal Code being more general in nature.

Apart from that, we cannot forget that the State Treasury property is also protected by the norms of financial law, which regulate such issues as, e.g. obligation to pay interest for non-settlement of tax liabilities, which are also aimed to deter taxpayers from committing acts that are detrimental to the financial interests of the State. The provisions of fiscal penal law play an ancillary role, they perform a supplementary function in relation to those provisions and this is what cannot be forgotten. It is really difficult to understand why this quoted author believes that the provisions of the Fiscal Penal Code ensure poorer standards of protection of the State Treasury property. Probably, the author based the opinion on the fact that penalties of deprivation of liberty envisaged in the Fiscal Penal Code for particular crimes are usually more lenient than those of common criminal law. On the other hand, a higher fine may be imposed in accordance with the regulations of the Fiscal Penal Code than based on the Criminal Code. Moreover, the scope of various types

⁵⁴ J. Duży, *Przedmiot ochrony oszukańczych uszczupień podatkowych* [Object of protection in fraudulent tax depletion], *Prokuratura i Prawo* No. 12, 2011, p. 139; J. Duży, *Kryminalizacja nadużycia mechanizmów podatkowych* [Criminalisation of tax mechanisms misuse], [in:] B. Sygit, T. Kuczur (ed.), *Aktualne problemy kryminalizacyjne* [Current criminalisation issues], Toruń 2013, pp. 166–167. Differently in: M. Dąbrowska-Kardas, P. Kardas, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna, t. III* [Criminal Code, Special Part, Vol. III], Kraków 2006, p. 319.

⁵⁵ By the way, it must be noted that it is not possible to approve of the thesis proposed by J. Duży that because of, inter alia, a longer period of limitation and simplification of the procedure of giving evidence for a perpetrator's guilt, we should prefer liability under the provisions of the Criminal Code in a situation of their potential concurrence with the provisions of FPC (J. Duży, *Kwalifikacja prawna uszczuplenia podatku od towarów i usług* [Legal classification of VAT depletion], *Państwo i Prawo* No. 10, 2008, p. 80). Circumstances indicated by the author cannot have any significance for assigning liability. What may be important are only the issues of appropriate interpretation of given provisions and their correct classification within the actual state, and not which legal classification facilitates a perpetrator's prosecution. The author directly indicates that the adoption of a legal classification of the act under Article 76 FPC, and not Article 286 CC, in his opinion, is an unjustified privilege for perpetrators (*ibid.*, p. 83), however, he disregards the fact that a subjective opinion that some type of behaviour is not penalised severely enough cannot lead to adopting an incorrect legal classification in order to prosecute a perpetrator and punish them more severely.

of liability is extended on a broader group of entities, which the Criminal Code lacks (e.g. because of the application of the above-mentioned vicarious liability under Article 9 §3 FPC).

Therefore, the statement that the provisions of the Criminal Code must additionally protect the State Treasury property is groundless. Moreover, such reasoning would simply undermine the sense of applying the provisions of the Fiscal Penal Code in many cases if relevant provisions of the Criminal Code, which are more universal in nature than the provisions of the Fiscal Penal Code, might substitute for them. Therefore, it is necessary to select various types of legally protected interests: the property of the State Treasury and local self-government units (protected by Article 76 FPC) and other types of property protected by Article 286 CC. Thus, it is necessary to state that the act under Article 76 FPC and the act under Article 286 CC are applicable in a different scope. Moreover, they differ considerably as to the legally protected interest. Thus, it is necessary to draw a conclusion that there is no concurrence of provisions.⁵⁶ Just to make it clear, it must be reminded that the provisions specifying crimes against property in the Criminal Code also protect the State Treasury property but only when they are dealt with within the sphere of private law regulations.⁵⁷

J. Duży's opinions about the interest legally protected by Article 286 CC result from the fact that he supports the earlier presented thesis of the Supreme Court judgement of 1 March 2004,⁵⁸ according to which obtaining a tax refund under false pretences may be in some circumstances classified as fraud under Article 286 CC, inter alia, because actions of perpetrators of prohibited acts of this kind are, first of all, detrimental to property and only then to tax obligation.⁵⁹ In the author's opinion, the State Treasury property is a primary object of protection and tax obligation is a secondary one. The author draws attention to the fact that perpetrators' aim is to become richer and not to infringe tax obligations. Thus, property is the main (type of) object of protection provided by this provision.⁶⁰ T. Oczkowski⁶¹ also believes that in some cases of obtaining a VAT refund under false pretences, perpetrators'

⁵⁶ See, P. Kardas, *O wzajemnych relacjach...* [On mutual relations...], pp. 25–28, where it is rightly noticed that the adoption of a different stand admitting such concurrence would result in a statement that "behaviour consisting in the use of unreliable or false invoices and resulting in undue refund of a tax liability in such a way that behaviour with direct intention, with identical components, would be classified as two crimes with the use of the concept of the ideal concurrence of punishable acts, and behaviour with direct intention but not in order to obtain financial benefits or with potential intention would 'only' constitute a crime of fiscal fraud". Similarly, P. Kardas, G. Łabuda, *Zbieg przepisów...* [Concurrence of provisions...], p. 162; R. Kubacki, *Wyłudzenie zwrotu VAT – odpowiedzialność karna skarbowa* [Obtaining VAT refund under false pretences – fiscal penal liability], *Przegląd Podatkowy* No. 9, 2002, p. 54, and also p. 55, where the author indicates that there is a possibility of ideal concurrence of Article 76 FPC and particular common crimes, but he does not mention fraud.

⁵⁷ P. Kardas, *O wzajemnych relacjach...* [On mutual relations...], p. 30, footnote no. 46.

⁵⁸ File No. V KK 248/03.

⁵⁹ J. Duży, *Przedmiot ochrony...* [Object of protection...], p. 134 ff.

⁶⁰ J. Duży, *Kryminalizacja nadużycia...* [Criminalisation...], pp. 167–169.

⁶¹ T. Oczkowski, *Problematyka...* [Issues...], p. 92.

activities aim to reduce tax burdens,⁶² which means they want to obtain financial benefits, so those acts should be classified in accordance with Article 286 CC. The problem should be, however, resolved in the same way as in case of Article 56 FPC: it is unquestionable that committing a fiscal crime or misdemeanour, a perpetrator acts in order to obtain financial benefits. Even a wish to reduce tax burdens leads to obtaining financial benefits by reducing a due tax amount to be settled. Therefore, there are no grounds for differentiating whether a perpetrator acted in order to obtain financial benefits or to infringe tax obligations. Thus, regardless of whether the act of issuing false invoices was the cause of a perpetrator's act or not, the aim of his/her activity was to, eventually, obtain financial benefits. That is why, the circumstances the above-mentioned authors referred to are not important for the penal assessment of an act.

Moreover, it is worth mentioning that if a perpetrator acting with direct intention obtains an undue VAT refund (only this kind of situation can be recognised as the commission of a crime under Article 286 CC) based on false invoices, even if we acknowledge that the above action of a perpetrator does not infringe a tax obligation (which is, however, doubtful if we take into consideration the previously discussed Article 108(1) of the Act on value added tax), his/her behaviour undoubtedly infringes other tax obligations which are subject to protection by Article 76 FPC (i.e. broadly understood tax obligations). J. Duży himself confirms this way of treating the object of protection under this provision indicating that the act under Article 76 FPC is targeted not only against tax obligations such as proper bookkeeping or the issue of invoices documenting economic operations in conformity with the actual state.

Thus, as a perpetrator's action based on false invoices infringes the object of protection under Article 76 FPC (broadly understood tax obligations and also the property of the State Treasury protected by this provision), it is difficult to reasonably adopt its legal classification in accordance with Article 286 CC. It seems that one can support the opinion that, as the objects of protection (what J. Duży himself agrees with) under Article 76 FPC contain numerous tax obligations, a perpetrator's act consists in the fact that she/he first of all infringes them (namely, obligations connected with proper and reliable issue of invoices and submission of tax returns). This results in a state of exposure to the detriment to the legal interest, which is the property of the State Treasury. That is why, one can state that the broadly understood tax obligations are a basic interest protected by this provision. Also because of that, the author's statements that in case of the issue of false or unreliable invoices and claiming a tax refund based on them we deal with a legal classification

⁶² The author disregards the fact that in accordance with Article 76 FPC when penalising of a tax refund obtained under false pretences, it is difficult to consider that a perpetrator's action in any situation may result from "a wish to decrease tax burdens". If a perpetrator wanted to decrease that burden, she/he should try to decrease the amount of due VAT, even to a null level, and not declare otherwise and claim a refund. Therefore, if we speak about an act under Article 76 FPC, it is not possible to find a perpetrator's motivation in the way that T. Oczkowski does. The circumstance, which the author refers to, that a perpetrator may really do business does not matter, either, if she/he uses it to obtain an undue VAT refund. There is no difference between this and a situation when a perpetrator does not do business and, nevertheless, obtains an undue tax refund.

under Article 286 CC are groundless as even if there is no tax liability inception⁶³ (which, as it must be emphasised again, is doubtful), many other tax obligations are infringed. Therefore, legal classification under Article 76 FPC needs to be adopted.

Consequently, it is not possible to approve of J Duży's statement that in the cases he describes we can distinguish direct intention targeted at the State Treasury property and potential intention targeted at tax obligations.⁶⁴ A perpetrator of the prohibited act under Article 76 FPC infringes, first of all, the tax obligation consisting in proper completion of a tax return and does it in order to obtain financial benefits. The infringement of the former interest is, therefore, a means leading to the infringement of the latter interest and the two things cannot be rationally separated. Obtaining a refund of VAT under false pretences, based on a false invoice or an invoice documenting an actual economic operation, is an act committed with the same intention that differs only in a perpetrator's method of acting.

The author's another thesis is also groundless. In case of potential concurrence of Article 286 and Article 76 FPC, it undermines purposefulness of the application of the principle of *lex specialis derogat legi generali* by adopting a primacy of solutions envisaged in the Criminal Code, due to the fact that the regulation of fiscal law (tax liability) is infringed.⁶⁵ The author states that there are no normative grounds for the application of the principle and he overlooks the fact that the essence of this principle application is that it is not usually laid down in legal regulations. He also draws a failed parallel with the concurrence of provisions of administrative law and criminal law without indicating that it is impossible to apply the principle of speciality because these are two completely different branches of law, unlike in the case of criminal law and fiscal penal law, which are closely connected with one another.

If we adopted the author's arguments, in the discussed situation, we would deal with the "ideal" concurrence⁶⁶ of the provisions of Article 76 FPC and Article 286 CC (which, as the author himself indicates, is an appropriate legal classification). This would take place in a considerable number of cases of applying Article 76 FPC (excluding those where there is a potential intention on the part of a perpetrator and there is only an exposure of tax liability to depletion).⁶⁷ Thus, the legislator would assume in advance that in some cases of Article 76 FPC application, there would be ideal concurrence with another criminal law provision, and what is more, that a sanction ruled in accordance with Article 76 would not usually be executed because Article 268 CC envisages more severe penalties, at least as far as

⁶³ In the context of a prohibited act under Article 76 FPC, a tax liability concerns the issuer of an invoice and not their contractor who, based on that invoice, claims a VAT refund (see, P. Kardas, G. Łabuda, *Zbieg przepisów...* [Concurrence of provisions...], pp. 135–136).

⁶⁴ J. Duży, *Przedmiot ochrony...* [Object of protection...], p. 140.

⁶⁵ *Ibid.*, pp. 142–143.

⁶⁶ Of course, only when we assume that the object of protection against the act under Article 286 CC is the property of the State Treasury in the area of tax liabilities; otherwise, there will be no concurrence because one of the features of the prohibited act (the feature of the object of protection) will not be matched.

⁶⁷ A similar conception is presented in I. Stolarczyk, *Odpowiedzialność za niezetelne wystawienie faktury VAT* [Liability for unreliable issue of VAT invoices], *Prokuratura i Prawo* No. 9, 2010, p. 97 ff.

deprivation of liberty is concerned. It is difficult to assume that the legislator wanted to introduce a provision concerning some cases, which match statutory features of punishable acts for which penalties would not be executed. Such a statement would totally negate the principle of the legislator's rationality and, that is why, it should be decidedly dismissed. This stand would make Article 76 FPC a useless provision, which is an additional argument for the adoption of a different legal classification of the analysed instances of obtaining a tax refund under false pretences.

Another argument for the application of Article 268 CC to some types of criminal behaviour connected with obtaining a tax refund under false pretences consists in the interpretation of the concept of "undue refund" under Article 76 FPC. According to this opinion, a refund is only a process of giving back, i.e. the amount must earlier be under control of the body that gives it back. Therefore, as a result, an undue refund is only "a refund of an amount resulting from a deduction of due tax from calculated tax claimed by a taxpayer. In this context, it is obvious that if an amount of calculated tax declared is not due tax, there is no refund of a tax amount",⁶⁸ which will take place not only in case of false invoices but also unreliable ones, because the amount of calculated tax is increased based on them. Hence, in such situations, all features of the act under Article 76 FPC are not matched.

The opinion does not seem to be convincing, however, because it would grossly limit the scope of application of Article 76 FPC, which might be applied only to cases where a tax refund results from a groundless decrease of due tax with the correctly specified amount of calculated tax or in case where a perpetrator groundlessly deducts calculated tax, regardless of an existing prohibition in the Act on taxation.⁶⁹ Apart from that, the conception neglects an important circumstance. The features specified in Article 76 FPC do not contain the term "refund" but "undue refund". Therefore, the provision covers all situations when revenue authorities refund amounts that, as they are convinced, should be refunded, but actually there are no grounds for doing it, which seems to be unquestionable. Thus, a refund may be an undue one because the amount refunded by a revenue office has never been paid to it. Here, again, there are no grounds for a refund of the amount. A revenue office erroneously pays a taxpayer an amount as a due refund. Actually and literally, something can be given back only if it has been in somebody's possession before. But when we speak about an undue refund, the term should also cover situations when there are no grounds for a refund because the amount in question has never been in the possession of the refunding party.⁷⁰

This conception is also based on one more fundamental error consisting in the interpretation of the term "refund" with complete disregard of the meaning of the term assigned to it in statutes on taxation. It must be noticed that in tax refund proceedings, a revenue office always applies, regardless of whether we deal with

⁶⁸ A. Bartosiewicz, *Wytudzenie...* [Obtaining...], pp. 100–102.

⁶⁹ The catalogue of such prohibitions is included in Article 88(1) of the Act on value added tax.

⁷⁰ See, W. Kotowski, B. Kurzepa, *Kodeks...* [Fiscal...], p. 347, where it is indicated that: "groundless refund is a refund of a tax liability without any legal or factual grounds, not based on anything, unjustified and inequitable".

real or artificially increased calculated tax, the provisions of Part IX of the Act on value added tax. Thus, since a revenue office, e.g. in case of a false invoice, makes a refund of an amount a taxpayer is trying to obtain in accordance with the provisions on tax refunds, it is hard to understand why we should believe that this situation cannot be considered a tax refund. The statutes on taxation themselves recognise such situations as tax refunds. It is also difficult to provide rational and axiological explanation why a person who groundlessly increases the amount of calculated tax in a tax return by PLN 2,000 and obtains a PLN 1,000 surplus in calculated tax should be liable under Article 286 CC, and a person who groundlessly reduces an amount of due tax by PLN 2,000 and obtains a surplus of the same amount in calculated tax should be liable under Article 76 FPC.

Summing up, it must be stated that Article 76 FPC and Article 286 CC have a different scope of protection and their ideal concurrence is not possible. In case of obtaining a tax refund under false pretences, with the use of false invoices, a tax liability occurs nevertheless. Even in case of a different interpretation of tax law, in every situation, this kind of a prohibited act infringes broadly understood tax obligations, i.e. a legal interest protected by Article 76 FPC. Thus, the features of this prohibited act are matched. However, if we assume a possibility of concurrence of both acts, there are still no grounds for stating that the principle of speciality, excluding the possibility of applying Article 286 CC, would not be applicable. The example provided by P. Kardas and G. Łabuda is still up to date: "if we recognised such a criterion of (non)-existence of an event as reliable, we would have to draw a conclusion that matching the features of the prohibited act under Article 76 FPC would take place in case of a purchase of a product for PLN 1 in the EU, while a perpetrator indicated PLN 1,000,000 in a tax return VAT-7, while it would not take place in case of no purchase in the EU at all [and the issue of an invoice – note by Ł.P.]. In such an extreme situation, the amount of PLN 1 would decide about a legal classification of the behaviour under Article 76 FPC".⁷¹ This example shows perfectly absurd consequences of an opinion that prohibited acts connected with the issue of a false invoice should lead to adopting legal classification of such behaviour under Article 286 CC and not relevant provisions of the Fiscal Penal Code.

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⁷¹ P. Kardas, G. Łabuda, *Zbieg przepisów...* [Concurrence of provisions...], p. 135.

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ON MUTUAL RELATIONS BETWEEN THE TAX FRAUD UNDER ARTICLES 56 AND 76 FPC AND A CRIME OF FRAUD UNDER ARTICLE 286 CC

Summary

The article aims to analyse mutual relations between Article 286 of the Criminal Code penalising a crime of fraud and prohibited acts under Articles 56 and 76 of the Fiscal Penal Code in order to answer a question whether the concurrence of provisions is possible and whether crimes connected with reduction of due tax liabilities by taxpayers may be classified as fraud. It is especially important in case of tax evasion connected with the use of false invoices that do not document real economic operations and where serious doubts arise as to whether there is a tax liability and, if so, whether the interests protected by fiscal penal law have been infringed. In the author's opinion, however, the analysis of the provisions and tax regulations

indicated allows stating that a crime of fraud and acts prohibited under Fiscal Penal Code differ as far as the object of protection is concerned. Thus, this is the main reason why all acts prohibited in connection with the reduction of due tax liabilities should be classified as those matching the features of fiscal crimes and misdemeanours and not the features of the crime of fraud under Article 286 CC.

Keywords: crime of fraud, tax fraud, reduction of due tax liabilities, false invoices

O WZAJEMNYCH RELACJACH POMIĘDZY
TZW. OSZUSTWEM PODATKOWYM Z ART. 56 I 76 K.K.S.
A PRZESTĘPSTWEM OSZUSTWA Z ART. 286 K.K.

Streszczenie

Celem artykułu jest prześledzenie wzajemnych relacji pomiędzy art. 286 Kodeksu karnego penalizującym przestępstwo oszustwa a czynami zabronionymi z art. 56 oraz 76 Kodeksu karnego skarbowego w celu odpowiedzi na to, czy jest możliwe wystąpienie pomiędzy nimi zbiegu przepisów i czy jako przestępstwo oszustwa mogą być kwalifikowane sytuacje związane z uszczupleniem przez podatników należności publicznoprawnych. Szczególnie duże znaczenie ma to przy przestępstwach podatkowych związanych z posługiwaniem się fakturami fikcyjnymi, niedokumentującymi prawdziwych zdarzeń gospodarczych, gdzie pojawiają się istotne wątpliwości co do tego, czy powstaje wtedy obowiązek podatkowy i czy wobec tego zostały naruszone dobra prawnie chronione przez przepisy karnoskarbowe. Zdaniem autora jednak analiza wskazanych przepisów oraz regulacji prawnopodatkowych pozwala na stwierdzenie, że przestępstwo oszustwa oraz czyny zabronione z Kodeksu karnego skarbowego mają odmienny przedmiot ochrony i przede wszystkim z tego powodu wszelkie czyny zabronione związane z uszczupleniem należności publicznoprawnych powinny być kwalifikowane jako realizacja znamion odpowiednich przestępstw i wykroczeń skarbowych, a nie znamion przestępstwa oszustwa z art. 286 k.k.

Słowa kluczowe: oszustwo, oszustwo podatkowe, uszczuplenie należności publicznoprawnej, faktury fikcyjne