

ACTIVE REGRET IN THE LIGHT OF THE LATEST AMENDMENTS TO FISCAL PENAL CODE

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ABSTRACT

The study presents both planned and introduced amendments concerning the traditional measure of fiscal penal law: active regret. The publication consists of four thematic parts. The first part presents general characteristics of active regret and provides an overview of the functions this measure performs. The second and third parts contain a presentation of the proposed and eventually withdrawn amendments in terms of the positive and negative premises of active regret, respectively. The fourth part of the article discusses the amendments introduced to the Fiscal Penal Code, allowing for the submission of the notification to the financial preparatory proceeding body also via an account at the e-Tax Office. The publication ends with conclusions, in which the author assesses the current legal regulations in the analysed field.

Keywords: active regret; e-active regret, fiscal offences, fiscal misdemeanours

INTRODUCTION

Active regret is a traditional measure of fiscal penal law that is subject to the regulations of not only Chapter 2 'Non-institution of punishment for perpetrators' of the Fiscal Penal Code of 1999 currently in force¹ but also former fiscal penal codes. All the successive legal acts regulating fiscal penal law, i.e., the Fiscal Penal Code of 2 August 1926,²

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¹ Act of 10 September 1999: Fiscal Penal Code, consolidated text, Journal of Laws of 2023, items 654 and 818, hereinafter 'FPC'.

² Journal of Laws of 1926, No. 105, item 609, as amended.



the Fiscal Penal Code of 18 March 1932,³ the Decree of the President of the Republic of Poland: the Fiscal Penal Law of 3 November 1936,⁴ the Decree of 11 April 1947: Fiscal Penal Law,⁵ the Fiscal Penal Act of 13 April 1960,⁶ and the Fiscal Penal Act of 26 October 1971,⁷ provided for it.

It is emphasised in the doctrine that active regret is a universal measure as it is applicable to all fiscal offences and misdemeanours. It consists in the fact that a perpetrator of a fiscal offence or a fiscal misdemeanour discloses the commission of a prohibited act and its circumstances and settles the financial loss. Therefore, the legislator ensures complete impunity, although it is neither a circumstance excluding the unlawfulness of an act (countertype) nor a circumstance excluding guilt.⁸

Active regret is also a measure of criminal policy that performs the functions established by the legislator in combating fiscal crime. To a large extent, the functions are an expression of the general role of fiscal penal law. It is indicated in the literature that the current regulation of fiscal penal law provides the basis for distinguishing the following functions of active regret: it discloses fiscal offences and misdemeanours, it provides justice, it acts in a preventive way, it plays an enforcement-related role, it provides guarantees, it ensures procedural economics, and it is fiscal in nature.⁹

The function of disclosing fiscal offences and misdemeanours consists in self-denunciation, i.e., revealing one's own act and its significant circumstances, as well as the denunciation of persons cooperating in its commission. In other words, the function comes down to the fact that if a financial preparatory proceeding body, having completed its inspection activities, reveals the commission of a prohibited act or receives clearly documented information about the commission of a fiscal offence or misdemeanour, the perpetrator cannot take advantage of the benefit of active regret, which means that he cannot avoid fiscal criminal liability.

The justice-related function is connected with the idea of restorative justice. Its most important element does not consist in redressing the damage but in resolving the conflict between the perpetrator and the aggrieved. Compensating for the damage is only a way of resolving this conflict. The Fiscal Penal Code uses the concept of depletion of public law liabilities instead of the concept of damage and provides its legal definition in Article 53 § 27 FPC.¹⁰ As a result, the non-institution of punishment by using various means of punishment reduction,

³ Journal of Laws of 1932, No. 34, item 355, as amended.

⁴ Journal of Laws of 1936, No. 84, item 581, as amended.

⁵ Journal of Laws of 1947, No. 32, item 140, as amended.

⁶ Journal of Laws of 1960, No. 21, item 123, as amended.

⁷ Journal of Laws of 1971, No. 28, item 260, as amended.

⁸ Sawicki, J., Skowronek, G., *Prawo karne skarbowe. Zagadnienia materialnoprawne, procesowe i wykonawcze*, Warszawa, 2021, p. 91; Sawicki, J., 'Znaczenie czynnego żalu w prawie karnym skarbowym', *Prokuratura i Prawo*, 2013, No. 6, pp. 34–35; Legutko-Kasica, A., *Czynny żal jako instrument polityki kryminalnej wobec sprawców przestępstw i wykroczeń skarbowych*, Brzeźnia Łąka, 2021, p. 185; Legutko-Kasica, A., 'Czynny żal w kodeksie karnym skarbowym', *Prokuratura i Prawo*, 2012, No. 4, pp. 130–131.

⁹ For more see: Legutko-Kasica, A., *Czynny żal jako instrument...*, op. cit., p. 187 et seq.

¹⁰ *Ibidem*, pp. 187–189. Article 53 § 27 FPC stipulates: 'Public law liability depleted by the commission of a prohibited act shall be expressed as the amount of money that a person obliged

inter alia through the measure of active regret, in exchange for the perpetrator's voluntary compensation for the damage, fits into the concept of restorative justice in fiscal criminal law.¹¹

The above function, which is also referred to as repressive justice, is sometimes associated with retaliation. The use of penal repression is aimed at satisfying the sense of justice both individually (of the aggrieved) and socially. This function of criminal law plays a much more important role in traditional common crimes such as murder or theft, where the aggrieved party is a particular individual, than in fiscal offences, which inflict harm on the general interest. In fiscal criminal law, the justice-related function results from the statutory directive to adapt the severity of fiscal penal repression to the degree of social harmfulness of the act and the degree of the perpetrator's guilt.¹²

However, the basic task of the individual preventive function of active regret is to shape the legal awareness of society, which means that in the event of a fiscal offence or fiscal misdemeanour commission, the perpetrator will be held criminally liable for it. That is why it consists mainly in deterring potential perpetrators by prohibiting certain acts and by imposing penalties for committing them. It should be noted that if the perpetrator reveals the commission of a prohibited act within the prescribed period, he may express active regret and will avoid punishment.¹³

The execution-related function is a characteristic feature of fiscal penal law because its role is to ensure obedience to financial obligations and prohibitions by means of punitive measures. Failure to perform or, on the contrary, fulfilment of financial obligations by the perpetrator of a prohibited act has an impact on the repression, mitigation, or even exclusion of criminal liability.¹⁴ The fundamental function of fiscal penal law is not to enforce repression but public law liabilities and to compensate for the financial loss to the State Treasury or another entitled entity. The assumption of the priority of the enforcement purpose over repression is the *signum temporis* of contemporary penal policy in fiscal criminal law, which involves treating criminal sanctions as *ultima ratio*, in accordance with the intended purpose that the main aim of criminal law norms is not to punish a perpetrator, but to protect a legal interest and to resolve a social conflict resulting from the commission of a prohibited act.¹⁵ It is manifested in a number of fiscal penal regulations, which entirely express a thesis that the sooner the financial loss is compensated and public law liabilities are fulfilled, the greater is the relief and mitigation of fiscal penal liability the perpetrator of a fiscal offence or misdemeanour may

to pay or to declare to pay as a whole or in part evaded, and this financial depletion actually occurred.'

¹¹ Sawicki, J., *Zaniechanie ukarania jako element polityki karnej w prawie karnym skarbowym*, Wrocław, 2011, pp. 61–62.

¹² Wilk, L., Zagrodnik, J., *Prawo i proces karny skarbowy*, Warszawa, 2015, p. 14.

¹³ Legutko-Kasica, A., *Czynny żal jako instrument...* op. cit., pp. 193–194.

¹⁴ Zoll, A., 'Założenia polityki karnej w projekcie kodeksu karnego', *Państwo i Prawo*, 1995, No. 5; Siwik, Z., *Systematyczny komentarz do ustawy karnej skarbowej. Część ogólna*, Wrocław, 1993, pp. 9–10.

¹⁵ Siwik, Z., 'Kodeks karny skarbowy. Ogólne zasady odpowiedzialności i karania', *Przegląd Podatkowy*, 1999, No. 12, p. 31.

count on.¹⁶ Therefore, it is more about enforcing public law liabilities and compensating financial loss to an entitled entity than about repression. Thus, it is necessary to make a clear distinction between an execution-related purpose and a compensatory one of the fiscal response,¹⁷ because the former consists in inducing the perpetrator to fulfil a public law obligation towards the State Treasury, and the latter constitutes the infliction of pain upon the perpetrator, which may also constitute compensation for the damage caused.¹⁸

The main role of the guarantee-related function of active regret is to ensure that the perpetrator avoids criminal liability, of course after he meets certain requirements, which include notifying a prosecuting body of the commission of a certain act, and disclosing significant circumstances of the act, in particular, persons cooperating in its commission. The provision of Article 16 § 1 FPC is applicable only when the due public law liability depleted by the commission of a prohibited act is settled in full within the deadline set by the authorised preparatory proceeding body. However, if even one requirement is not met, active regret does not occur and, therefore, the authority is not bound by it.¹⁹

Active regret in fiscal penal law also performs the function of procedural economics. According to Z. Siwik, this is manifested in the fact that active regret is a legal measure serving to protect the financial interests of public law entities. These entities are not so much interested in punishing the perpetrator, but in recouping due financial amounts by virtue of public levies as quickly and inexpensively as possible. The state refrains from punishing the perpetrator when it is certain that the depleted financial obligation will be compensated. If the State Treasury does not suffer any financial loss, there is no actual need to enforce penal repression. The complete impunity promised in advance by the legislator is aimed at encouraging the perpetrator to abandon the criminal path and facilitate the prosecution of his acts. The abolition of penalisation is determined by the fact that the perpetrator withdraws from the criminal path after having committed a prohibited act. This general impunity clause is a kind of 'reward' for the perpetrator's active regret.²⁰

The fiscal function of active regret is related to the collection and retention of funds by the state to perform its mandated tasks. A derivative of the fiscal function, its partial element, consists in the necessity of protecting and developing the sources of budget revenues. This is expressed in the principle of tax source protection, which means that tax collection cannot lead to the abandonment of taxable activities and thus a reduction in the volume of tax revenues. Strict taxes and their strict enforcement may only bring temporary benefits and lead to the destruction of the source of income. The principle of tax source protection involves shaping the tax system, the structure of taxes, and the enforcement methods in a way that encourages

¹⁶ Wilk, L., Zagrodnik, J., *Pravo i proces...*, op. cit., p. 110.

¹⁷ Radzikowska, Z., *Założenia systemu wymiaru kary w polskim prawie karnym skarbowym*, Kraków, 1986, p. 38.

¹⁸ Legutko-Kasica, A., *Czynny żal jako instrument...*, op. cit., pp. 195–196.

¹⁹ *Ibidem*, p. 213.

²⁰ Siwik, Z., *Systematyczny komentarz...*, op. cit., p. 125.

taxpayers to develop their business activities. This, in turn, will increase budget revenues from taxes in the long run, rather than causing taxpayers to abandon their taxable business activities.²¹

POSITIVE PREMISES OF THE AMENDMENTS

The requirement of denunciation is the first positive premise of active regret. It concerns both self-denunciation, i.e., notifying a prosecution body of the commission of a fiscal offence or misdemeanour on one's own, and the denunciation of persons cooperating in the commission of those offences (Article 16 § 1 FPC). Therefore, it involves providing prosecution bodies with significant information concerning prohibited acts previously unknown to them. The information must be significant, and this is decided by the relevant body. The information must also be complete, thus applying to all persons cooperating in the commission of the reported act. The omission of even one cooperating person excludes the application of Article 16 FPC.²²

The requirement to settle the due amount of the public law liability depleted by the commission of a prohibited act within the deadline set by the preparatory proceeding body constitutes the second positive premise of active regret (Article 16 § 2 sentence 1 FPC). This requirement materialises only when, as a result of a fiscal offence or misdemeanour, there is actual depletion of public law liabilities. At the same time, it unambiguously indicates the legislator's priorities. From the perspective of the necessity of settling the due amount, it does not matter whether the depletion directly matches the elements of a given prohibited act.²³

However, if the prohibited act does not involve depletion of the due amount and the forfeiture of items is obligatory, the perpetrator should submit those items, and if this is not possible, pay their monetary equivalent. There is no obligation to pay their monetary equivalent if the forfeiture concerns items specified in Article 29 § 4, i.e., objects whose production, possession, trade, storage, transportation, transfer, or transmission is prohibited (Article 16 § 2 second sentence FPC). However, if the submitted items subject to forfeiture might be quickly damaged or spoiled, if their storage involves disproportionate costs or excessive difficulties, or causes a considerable reduction in their value, the preparatory proceeding body should impose on the perpetrator an obligation to pay their monetary equivalent, unless the forfeiture concerns items specified in Article 29 § 4 FPC (Article 16 § 3 FPC).²⁴

²¹ Legutko-Kasica, A., *Czynny żal jako instrument...*, op. cit., pp. 219–220.

²² Skowronek, G., *Kodeks karny skarbowy. Komentarz*, Legalis, 2020, thesis 2 to Article 16; Legutko-Kasica, A., 'Czynny żal w kodeksie...', op. cit., p. 132.; Tużnik, M.R., 'Wpływ pandemii Covid-19 na instytucję czynnego żalu w prawie karnym skarbowym', in: Stefański, R.A. (ed.), *Srebrna księga jubileuszowa upamiętniająca XXV-lecie Wydziału Prawa i Administracji*, Warszawa, 2022, p. 337.

²³ Zgoliński, I. (ed.), *Kodeks karny skarbowy. Komentarz*, Lex, 2021, thesis 2 to Article 16.

²⁴ Skowronek, G., *Kodeks karny skarbowy...*, op. cit., thesis 3 to Article 16; Kardas, P., Łabuda, G., Razowski, T., *Kodeks karny skarbowy. Komentarz*, Lex, 2017, thesis 4 to Article 16; Legutko-Kasica, A., *Czynny żal jako instrument...*, op. cit., p. 257; Tużnik, M.R., 'Wpływ pandemii...', op. cit., p. 338.

Submitting the Bill amending the Act: Fiscal Penal Code and some other acts of 3 March 2022,²⁵ the Ministry of Justice proposed a new wording of Article 16 § 2 first sentence FPC: 'The provisions of § 1 shall apply only if the due public law liability depleted by the commission of a prohibited act is settled in full within the deadline set by the competent preparatory proceeding body.'

Therefore, the change consisted in waiving the requirement that the public law liability depleted by the commission of a prohibited act should be 'due'. In the drafter's opinion, the requirement that the liability should be due, introduced by the amendment of 28 July 2005 to the Fiscal Penal Code and some other acts,²⁶ resulted not only in the blurring of the borderline between criminal and tax liability, but also in the significant limitation of the possibility of applying measures based on the compensation for financial losses in the revenues of the State Treasury and other entitled bodies. Above all, however, it led to a successive slowdown in the proceedings over time. Moreover, the Ministry of Justice argued that the change would enable the perpetrator to reach an agreement with the prosecutor on the amount he should return to the State Treasury (or other creditors) so that he could count on more lenient treatment.²⁷

Thus, the settlement of a public law liability depleted by the commission of a prohibited act would be a premise of effective active regret regardless of whether the liability is due. To take advantage of the benefit of active regret, it would be necessary to pay even such a tax that is not yet due. According to tax law experts, it is a controversial solution because it is not possible to demand payment of tax that is not due, i.e., when the tax obligation has not yet transformed into a tax liability.²⁸

The Ombudsman was also critical of the above-mentioned solution and stated that, in practice, waiving the requirement that the liability should be due in the case of measures allowing for evading fiscal penal sanctions might lead to a situation in which an obligation to pay a tax remitted or barred by the statute of limitations would arise. Such consequences, according to the Ombudsman, would be unacceptable from the point of view of the standard of taxpayers' rights protection.²⁹

As a result of the negative assessment reported by many groups, including experts, the project was withdrawn. The Ministry of Justice explained that the reason for abandoning work on the project was the purposelessness of continuing work on the project currently due to the fact that the scope of fiscal criminal liability is closely related to the regulations concerning both natural persons' and legal persons' tax obligations, which have been subject to frequent and significant

²⁵ No. UD 357 in the list of the legislative and programme works of the Council of Ministers, the Sejm of the 9th term.

²⁶ Journal of Laws of 200, No. 178, item 1479.

²⁷ Justification for the Bill amending Fiscal Penal Code and some other acts of 3 March 2022, UD 357, the Sejm of the 9th term, pp. 30–31.

²⁸ Keler, R., 'Czynny żal po ostatnich zmianach (i przed kolejnymi)', *SPGC Blog*, 8 September 2022, <https://spcgblog.pl/tax-law/czynny-zal-po-ostatnich-zmianach-i-przed-kolejnymi/> [accessed on 23 October 2022].

²⁹ Stance of the Ombudsman reported within the opinion on the Bill amending Fiscal Penal Code and some other acts of 3 March 2022, UD 357, the Sejm of the 9th term, <https://legislacja.rcl.gov.pl/projekt/12357450/katalog/12860114>, [accessed on 23 October 2022].

amendments recently; on the other hand, fiscal criminal liability should be shaped based on the main principle of the *ultima ratio* of criminal law, i.e., only after the areas requiring an adequate criminal law response have been ultimately identified.³⁰

NEGATIVE PREMISES OF THE AMENDMENTS

Negative premises of active regret may be divided into three groups:

- (1) pursuant to Article 16 § 5 FPC;
- (2) pursuant to Article 16 § 6 (1), (2) and (4) FPC;
- (3) pursuant to Article 16 § 6 (3) FPC.

When negative premises have occurred pursuant to Article 16 § 5 FPC, the perpetrator's notification is ineffective if it was submitted:

- (1) at the time when the law enforcement body had already obtained clearly documented information about the commission of a fiscal offence or misdemeanour (Article 16 § 5 (1) FPC);
- (2) after the law enforcement body commenced official activities, in particular a search, verification, or inspection aimed at revealing a fiscal offence or misdemeanour, except in situations where the activity did not provide grounds for initiating proceedings concerning this prohibited act (Article 16 § 5 (2) FPC).

As indicated above, active regret under Article 16 FPC is not limited in any way in terms of its object-related matter, i.e., it applies to all fiscal offences and misdemeanours.³¹ However, there are subject-related limitations excluding the possibility of applying the measure of active regret in relation to:

- (1) the managerial perpetrator, i.e., the person in charge of the commission of the prohibited act revealed;
- (2) the recommending perpetrator who, taking advantage of another person's dependence, ordered him to commit a prohibited act revealed;
- (3) the agent provocateur, i.e., a person inducing another person to commit a fiscal offence or misdemeanour to instigate proceedings concerning the commission of this prohibited act against him (Article 16 § 6 (1), (2), and (4) FPC).

The last group of negative premises consists of the circumstances resulting in the fact that the perpetrator who organised a group or association with the aim of committing a fiscal offence or managed such a group or association cannot benefit from active regret unless he submitted a notification together with all members of the group or association (Article 16 § 6 (3) FPC).³²

The above-discussed, eventually withdrawn project of the Ministry of Justice also introduced changes in the scope of negative premises of active regret; namely, it concerned the condition under Article 16 § 5 (2) FPC, modifying the provision in

³⁰ Kancelaria Prezesa Rady Ministrów, *Projekt ustawy o zmianie ustawy – Kodeks karny skarbowy oraz niektórych innych ustaw*, <https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-karny-skarbowy-oraz-niektorych-innych-ustaw> [accessed on 23 October 2022].

³¹ Legutko-Kasica, A., *Czynny żal jako instrument...*, op. cit., p. 271.

³² See Wilk, L., Zagrodnik, J., *Kodeks karny skarbowy. Komentarz*, Legalis, 2021, thesis 10 to Article 16.

such a way that the perpetrator's notification would become ineffective if it were submitted 'after the law enforcement body started an official activity, in particular a search or inspection aimed at revealing a fiscal offence or misdemeanour, except in situations where the activity did not provide grounds for initiating proceedings concerning this prohibited act.'

Purely hypothetically, it can be assumed that if the above-mentioned change were introduced to the Fiscal Penal Code, its consequence would be that the effectiveness of active regret would depend on the commencement of official activities by any unspecified body (and not a law enforcement body as up to now).³³ Moreover, according to experts and the Ombudsman, the object-related change in the provisions would be particularly severe and unfavourable for taxpayers because it would limit the possibility of making use of active regret. For example, it would prevent them from declaring active regret in situations where the course of inspection activities revealed irregularities of which a taxpayer is not always aware.³⁴

Also, according to the Lewiatan Confederation,³⁵ such a change would be very unfavourable for taxpayers. In the opinion submitted during the consultations, experts indicated that due to the complexity of tax regulations, their extensiveness, and frequent changes, it is unfair to taxpayers to deprive them of the only opportunity to protect themselves against fiscal criminal liability for an unintentional mistake. As a result, as one can read in Lewiatan's opinion, active regret may become a measure that taxpayers may be able to use relatively rarely. Meanwhile, the measure is extremely valuable for securing the citizens' situation, and in trivial cases, waiving fiscal criminal liability brings positive effects more often than imposing even the smallest penalties. Moreover, its experts feared that the introduction of the proposed provision would lead to the infringement of the currently accepted principle of priority of the enforcement function over the repressive function in fiscal penal law.³⁶

On the other hand, the Ministry of Justice emphasised in its justification of the proposed amendment to Article 16 § 5 (2) FPC that it is currently not possible to prosecute perpetrators of fiscal offences and misdemeanours revealed during an

³³ Banaszak, E., 'Już niedługo mogą czekać nas poważne zmiany w Kodeksie karnym skarbowym', *Blog TPA*, 22 June 2022, <https://blog-tpa.pl/2022/06/28/juz-niedlugo-moga-czekac-nas-powazne-zmiany-w-kodeksie-karnym-skarbowym/> [accessed on 24 October 2022].

³⁴ Stance of the Ombudsman reported within the opinion on the Bill amending Fiscal Penal Code and some other acts of 3 March 2022, UD 357, the Sejm of the 9th term, <https://legislacja.rcl.gov.pl/projekt/12357450/katalog/12860114> [accessed on 5 November 2022]; Banaszak, E., 'Już niedługo...', op. cit.

³⁵ Lewiatan Confederation is a Polish business organisation thanks to which companies influence the shape of law, seek a dialogue with administration and obtain tools to develop business. It represents its members in Poland and the European Union. It has a standing representative office in Brussels and is the only Polish organisation that is a member of BusinessEurope, the biggest European business organisation, cf. Konfederacja Lewiatan, *Lewiatan – kim jesteśmy*, <https://lewiatan.org/lewiatan-kim-jestesmy/> [accessed on 22 September 2023].

³⁶ Rada Podatkowa Lewiatan, *Uwagi Konfederacji Lewiatan do projektu ustawy o zmianie ustawy – Kodeks karny skarbowy oraz niektórych innych ustaw*, <https://lewiatan.org/wp-content/uploads/2022/04/KL-118-53-PP-2022.pdf> [accessed on 5 November 2022]; Rochowicz, P., 'Skrucha już nie pomoże. Resort Ziobry odsyła czynny żal do lamusa', *Rzeczpospolita*, 10 May 2022, <https://www.rp.pl/podatki/art36265131-skrucha-juz-nie-pomoze-resort-ziobry-odsyła-czynny-zal-do-lamusa> [accessed on 5 November 2022].

inspection carried out by a competent body that is not a law enforcement one. Perpetrators may effectively avoid liability by declaring the so-called active regret even during an inspection, which is not possible when a law enforcement body starts an official proceeding. According to the Ministry of Justice, the purpose of the measure of active regret regulated in Article 16 FPC was to grant exemption from liability (punishment) only to those perpetrators of prohibited acts who, on their own initiative and of their own will, disclose irregularities before a competent body does so, regardless of whether this body is a law enforcement one or another competent one authorised to do so. For these reasons, in the Ministry's opinion, the above-mentioned restriction should have been removed. Moreover, according to the drafter, it is also difficult to ignore that, from a pragmatic point of view, explanatory activities still do not constitute a stage of the proceeding principally aimed at revealing a fiscal offence or misdemeanour, which should exclude the possibility of self-denunciation. Therefore, the drafter decided to clearly emphasise that only activities such as inspections result in the 'expiry' of the right to effective active regret within the meaning of Article 16 FPC.³⁷

CHANGES IN THE FORM OF NOTIFICATION

In the light of the currently applicable wording of Article 16 § 4 CCP, the rule is that the notification shall be submitted in writing or orally for the record. In practice, the first form is more convenient and more often used. After the outbreak of the Covid-19 pandemic, the possibility for submitting active regret in writing recorded on paper or in an electronic form, or orally for the record, was introduced. E-pleadings were signed with a qualified electronic signature, a trusted signature, or a personal handwritten signature and sent via electronic communication means, including the e-tax platform referred to in the Act of 29 August 1997: Tax Law.³⁸

The above change was introduced to the Fiscal Penal Code by virtue of Article 26 of the so-called Covid Act, i.e., the Act of 31 March 2020 amending the Act on Special Solutions Preventing, Counteracting, and Combating Covid-19, Other Contagious Diseases, and Crisis Situations Caused by Them, and Some Other Acts,³⁹ constituting the legislator's quick response to the breakout of the Covid-19 pandemic.

The above-mentioned amendment was very well assessed in the legal community. There were opinions that it was long-awaited and that the Ministry of Justice transferred the responsibility for the archaic regulations that were then in force onto the Ministry of Digitisation. Taking into account the constantly growing number of activities performed only electronically (Standard Audit File-Tax, financial

³⁷ Justification for the Bill..., op. cit., pp. 29–30.

³⁸ Consolidated text, Journal of Laws of 2021, item 1540, as amended; Keler, R., *Czynny żal po ostatnich zmianach (i przed kolejnymi)*, <https://spcgblog.pl/tax-law/czynny-zal-po-ostatnich-zmianach-i-przed-kolejnymi/> [accessed on 6 November 2022].

³⁹ Journal of Laws of 2020, item 568.

statements, MDR, WHT, Transfer Pricing Reports), it would seem irrational that the so-called active regret could only be submitted in the traditional ways.⁴⁰

However, on 5 October 2021, by virtue of Article 89(1) of the Act of 18 November 2020 on Electronic Delivery,⁴¹ the wording of Article 16 § 4 FPC regulating the issue was amended, and the only forms of notification left were the written and oral ones. What was pointed out was the successful synchronisation of the above provision of the Fiscal Penal Code with the amended Article 116 § 1 of the Code of Criminal Procedure,⁴² applicable to fiscal penal cases pursuant to Article 113 § 1 FPC and stipulating that: 'Unless the statute provides otherwise, the parties and other entities entitled to take part in the procedural activity may submit declarations, including motions, in writing or orally for the record. A declaration submitted electronically shall also be considered one submitted in writing' and that active regret submitted electronically should be interpreted as active regret submitted 'in writing'. However, the problem consisted in the fact that the amended Article 116 § 1 CCP was scheduled to enter into force no sooner than on 1 October 2029.

In the meantime, there was a situation where, pursuant to the literal wording of the provisions of Article 16 § 4 FPC (the version applicable from 5 October 2021) and Article 116 CCP (the version applicable until 30 September 2029, i.e., 'Unless the statute provides otherwise, parties and other entities entitled to take part in a procedural activity may submit motions and other declarations in writing or orally for the record'), it was not possible to submit active regret in electronic form.⁴³

This state of affairs caused numerous doubts about submitting active regret electronically. In response, the Ministry of Finance expressed its stance that changes to Article 16 § 4 FPC introduced by the Act on Electronic Delivery do not modify the substantive content of the regulations provided therein, as they are only of an adjusting nature. Thus, the submission of active regret electronically (e.g., via e-PUAP or the e-Tax Office) remains effective from 5 October 2021. According to the Ministry, the legislator's intention was that the term 'in writing' should mean both on paper and in electronic form. Moreover, it was emphasised that the justification for the Bill on electronic delivery clearly indicates that the change in terminology used in legal provisions, consisting of changing the words *pisemnie* into *na piśmie*, was aimed at balancing the paper form with the electronic form, with the proviso that paper documents should be signed with a handwritten signature, while electronic documents should be signed with a qualified electronic signature, trusted signature, or personal handwritten signature.⁴⁴

⁴⁰ Cf. Pogroszewska, M., 'E-czynny żal budzi wątpliwości', *Rzeczpospolita*, 12 October 2021, Legalis 2021; Koślicki, K., *Elektroniczny czynny żal zablokowany na osiem lat*, <https://www.prawo.pl/podatki/elektroniczny-czynny-zal-po-nowelizacji-kks-i-kpk-zablokowany-na,509700.html> [accessed on 15 March 2022]; Tużnik, M.R., 'Wpływ pandemii...', op. cit., p. 341.

⁴¹ Journal of Laws of 2020, item 2320, as amended.

⁴² Act of 6 June 1997: Code of Criminal Procedure, consolidated text, Journal of Laws of 2022, item 1375, as amended, hereinafter 'CCP'.

⁴³ See Pogroszewska, M., 'E-czynny żal...', op. cit.

⁴⁴ Ministerstwo Finansów, *e-Czynny żal w sprawach karno-skarbowych wciąż możliwy i skuteczny*, Lex, 2021; Tużnik, M.R., 'Wpływ pandemii...', op. cit., pp. 342–343.

On 7 July 2022, a number of changes were introduced to the Fiscal Penal Code. They were connected with the new IT solution implemented by the Ministry of Finance, i.e., the e-Tax Office, which is ultimately intended to replace the tax portal. The changes included, *inter alia*, enabling entities to notify a financial preparatory proceeding body of active regret via an account in the e-Tax Office. This was done by virtue of Article 9(1) of the Act of 8 June 2022 amending Some Acts to Automate the Handling of Some Matters by the National Fiscal Administration,⁴⁵ by means of adding § 4a to Article 16 FPC, stipulating that: 'Notification of the financial preparatory proceeding body may also be made via the account in the e-Tax Office.'⁴⁶

In the justification for the governmental bill, it was noted that the addition of Article 16 § 4a FPC indicates an additional, in relation to the provision of § 4, possibility for sending a notification of the so-called active regret via the e-Tax Office. The provision will constitute a supplement to Article 114c FPC, regulating the possibility of delivering pleadings in the course of a preparatory proceeding also via the e-Tax Office, as Article 16 § 4a FPC concerns the stage before the preparatory proceeding is instigated.

The drafter also emphasised that the addition of § 4a was aimed at clarifying Article 16 § 4 FPC, stating that such a notification shall be submitted 'in writing,' i.e., also electronically, to a financial preparatory proceeding body via the e-Tax Office. The phrase 'in writing' shall apply to both a paper form and an electronic one. The pleading recorded on paper must have a handwritten signature. Pleadings in electronic form must have a qualified electronic signature, a trusted signature, or a personal handwritten signature. However, the possibility of submitting active regret in the previous traditional form remains unchanged.

The justification also indicated that the provision of Article 16 § 4 FPC applies to all law enforcement agencies to which active regret may be submitted, as Article 16 FPC does not limit the submission of active regret to financial preparatory proceeding bodies. The phrase '(...) who notified a body authorised to prosecute of the fact (...)Y' is used. The provision of Article 16 § 4a FPC will constitute a special provision supplementing Article 16 § 4 FPC, applying only to financial preparatory proceeding bodies that will act within the e-Tax Office. The introduction of Article 16 § 4a is aimed at avoiding potential interpretational doubts concerning the possibility of submitting active regret via the e-Tax Office.⁴⁷

CONCLUSIONS

When assessing the measure of active regret in fiscal penal law in its current form, it is necessary to point out that the introduction of the above-presented changes within the scope of positive premises would lead to a situation where a taxpayer would

⁴⁵ Journal of Laws of 2022, item 1301.

⁴⁶ Krywan, T., *Zmiany w Kodeksie karnym skarbowym w 2022 r.*, Lex, 2022.

⁴⁷ Justification for the Bill of 8 June 2022 amending Some Acts to Automate Some Proceedings of the National Fiscal Administration, the Sejm print No. 2138, the Sejm of the 9th term, p. 23.

be obliged to pay the remitted or expired tax, which would constitute a serious limitation of his rights.

On the other hand, if the proposed changes regarding negative premises were introduced, they would significantly narrow the possibilities for taxpayers to use active regret and infringe upon the currently accepted principle that prioritises the execution function over the repressive one in fiscal penal law.

The change that resulted in the restoration of the possibility of submitting active regret in electronic form, albeit a bit limited, deserves approval. The change was undoubtedly long awaited due to the doubts raised about the possibility of submitting active regret in electronic form and constituted the legislator's response to this state of affairs. Therefore, the amendment corrected the legislative error and provided an appropriate guarantee of the rights of taxpayers, who could not rely on the non-binding stance of the Ministry of Finance, because it could result in the imposition of penalties on them in accordance with the provisions of the Fiscal Penal Code.⁴⁸

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⁴⁸ See Pogroszewska, M., 'E-czynny żal...', op. cit.; Tużnik, M.R., 'Wpływ pandemii...', op. cit., p. 344.

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