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Personal liability of a de facto director for the tax debts of a limited liability company under German, Austrian and Polish law

Odpowiedzialność faktycznego członka zarządu za zobowiązania podatkowe spółki z ograniczoną odpowiedzialnością na gruncie prawa niemieckiego, austriackiego i polskiego

Abstract

Issues of directors' personal liability for limited liability companies tax debts are related to the need to maintain an appropriate relationship between enforcement of obligations under the law and respect for the rights of subjects of these obligations. On the one hand, in the case of limited liability companies, we are faced with the problem of guaranteeing effective protection to the company's creditors, including public law creditors, and, on the other hand, with the need to maintain acceptable standards for imposing liability for the company's obligations as a separate legal entity. The conflict of these values becomes apparent with particular intensity in the situation of actual influence on the functioning of the company by persons who are not appointed as directors or act as a director without due authority. Analysis of Polish, German and Austrian law allows the conclusion that the scope of liability of de facto directors is sometimes shaped differently and the sources of such liability are different. The purpose of this article is to indicate the need for a statutory regulation of the legal position of a de facto director.

Keywords: directors' personal liability, de facto director, comparative analysis, Germany, Austria and Poland

JEL: K15, K22, K34

Streszczenie

Zagadnienia odpowiedzialności członków zarządu spółek z ograniczoną odpowiedzialnością za ich zaległości podatkowe wiążą się z potrzebą utrzymania odpowiedniej relacji między egzekwowaniem obowiązków wynikających w przepisów prawa a poszanowaniem praw podmiotów tych obowiązków. Z jednej strony bowiem w przypadku spółek z ograniczoną odpowiedzialnością mamy do czynienia z problemem zagwarantowania efektywnej ochrony wierzycielom spółki, w tym także wierzycielom publicznoprawnym, a z drugiej – z koniecznością zachowania akceptowalnych standardów nakładania odpowiedzialności za zobowiązania spółki jako odrębnego podmiotu prawa. Konflikt tych wartości uwidacznia się ze szczególną intensywnością w sytuacji faktycznego oddziaływania na funkcjonowanie spółki przez osoby, które znajdują się poza jej organami albo działają w charakterze organu bez należytego umocowania. Analiza prawa polskiego, niemieckiego i austriackiego pozwala na sformułowanie wniosku, że zakres odpowiedzialności faktycznych zarządców bywa kształtowany odmiennie i odmienne są źródła tejże odpowiedzialności. Celem artykułu jest wskazanie potrzeby ustawowego uregulowania sytuacji prawnej faktycznego zarządcy.

Słowa kluczowe: osobista odpowiedzialność członka zarządu, faktyczny członek zarządu, analiza komparatystyczna, Niemcy, Austria i Polska

Introduction

The most popular legal form of doing business in Poland is the limited liability company. A number of circumstances contribute to this state of affairs, including in particular the very low initial capital requirements of the company, the amount of which was reduced from PLN 50,000.00 to PLN 5,000.00, with the simultaneous exclusion of the liability of a shareholder for the company's obligations[1]. On the one hand, such a significant reduction of capital requirements – of course, in addition to other circumstances, including in particular the recent changes in the taxation of business income – has undoubtedly contributed to an even greater increase in the popularity of this legal form. On the other hand, however, the legislator chose not to introduce additional mechanisms aimed at protection of the interests of creditors of these companies. The reduction of capital requirements has essentially nullified the guarantee function of share capital. However, this has not been followed by a critical reflection on the legal basis for the liability of persons other than the company itself for its obligations in the event of its insolvency. The burden of risk associated with insolvency has thus been shifted to the creditors – both private and public – of these companies.

The basic instrument for securing the interests of tax creditors against the insolvency of a limited liability company is the possibility to attribute to the company's directors responsibility for tax arrears incurred during their tenure. The basis for such action is Article 116 o.p.[2] It should also be noted that this provision was transferred in an unchanged form by the Codification Committee of the General Tax Law to the draft of the new Tax Ordinance (Etel, 2017, p. 354). Thus, in the current state of the law, as well as in this projected one, the point of reference for the attribution of tax liability to the company's director is his formal appointment. This circumstance should be assessed from the perspective of the provisions of the Commercial Companies Code, although it should be indicated already at this point that the assessments made by administrative courts in this respect are not consistent.

The standpoint of the national legislator on this subject may be regarded as overly conservative. It does not seem to notice the problem of a de facto director, which occurs in practice. This state of affairs is all the more surprising, as the problem of the de facto director is not only discussed in the literature, although mainly in foreign literature, but is also reflected in the draft directive on the single-member private limited liability company (*Societas Unius Personae*). The solutions adopted in the sphere of liability should take into account several standards. On the one hand, they must not nullify the need for a statutory definition of the liable directors and the grounds for their liability, while on the other hand, they should protect the interests of tax creditors in a sufficiently effective manner.

The analysis of the current legal situation in Poland will be made in the context of the legal solutions in force in Germany and Austria. The aim of this analysis is to assess the standpoint of the Polish legislator in the context of the possible scope of liability for tax debts of capital companies[3].

Liability of a de facto director under German tax law

The German Tax Ordinance (Abgabenordnung)[4] does not contain a provision that exclusively regulates the liability of a director of a limited liability company (*Gesellschaft mit beschränkter Haftung*). The legal basis for the attribution of liability to a company's director is § 69 AO. This provision establishes a general basis for the attribution of tax liability to, inter alia, the legal representative of a natural or legal person. However, while this provision defines the prerequisites for the attribution of liability for – as it is put in German tax law scholarship – "tax losses" (*Steuerausfälle*), or in other words "tax damages" (*Steuerschäden*)[5], the scope of its application is determined by reference to §§ 34–35 AO. Only a person who is expressly mentioned in them can be held liable for the others' tax debts (*Steuerhaftung*).

According to § 34(1) sentence 1 AO, the legal representatives of natural and legal persons (...) shall fulfil the tax obligations of these entities. In particular, they shall ensure that taxes are paid from the funds they manage. The direct subject of this regulation is the problem of the fulfilment of tax obligations by entities that are wholly or partly incapable of acting independently in legal transactions. Persons acting on their behalf have, by virtue of § 34 AO, certain obligations, and these are treated as their own. These exist independently of the obligations of the represented entities. Therefore, the legal representative does not step into the place of the represented entity, in particular does not become a taxpayer.

On the basis of § 69 in conjunction with § 34(1) AO, a director of a limited liability company can be held liable (Kratzsch, 2021, p. 594). This is because he or she is – in accordance with § 35(1) GmbHG[6] – its legal representative. This provision places emphasis on a circumstance of a formal nature, namely the appointment as a director. Circumstances such as the actual undertaking of the function or the capacity to perform the function are thus irrelevant. For these reasons, this provision is the basis for the attribution of liability to a so-called front or straw man director (*Strohmann-Geschäftsführer*) (Althuber et al., 2013, p. 580; Nacke, 2017, p. 12; Kratzsch, 2021, p. 594).

The above regulation is supplemented by § 35 AO, which covers persons with powers of disposal (*die Verfügungsberechtigten*). According to this provision, persons with powers of disposal acting on their own behalf or on behalf of a third party shall have the obligations of a legal representative (§ 34(1)) to the extent that they are able to fulfil them de jure and de facto.

A person entitled to disposition is anyone who legally and factually disposes of means attributable to another entity within the meaning of § 39 AO (Blesinger, 2005, p. 25; Krause & Meier, 2014, p. 907), and in such a capacity also acts outside (Nacke, 2017, p. 15). The concept of disposition, on the other hand, is based on a civil law view and implies a direct effect on the state of the right through the possibility to dispose of, abolish, encumber or internally

change it (Koenig, 2021, p. 336). The fulfillment of the prerequisites referred to in § 35 AO results in the imposition of the obligations of a legal representative on the person entitled to the disposition referred to in § 34 AO.

The literature distinguishes two groups of cases on the basis of § 35 AO. The first group comprises persons who, on the basis of a law, official or court order or legal action, have the power of disposition (Krause & Meier, 2014, p. 906); this can be, for example, a proxy[7]. The second group, on the other hand, includes persons who do not have the power of disposition (Guth & Ling, 1982, p. 11; Nacke, 2017, pp. 15 and 19), but behave externally as if they were entitled (Koenig, 2021, p. 337; Kratzsch, 2021, p. 594.). This equates the legal position of a person who actually has the power of disposition with a person who merely pretends to do so (Althuber et al., 2013, p. 580). A necessary and sufficient condition for this is that such a person appears externally as if he or she is entitled, thereby creating a misleading perception (Rüsken, 2020, p. 216; Koenig, 2021, p. 337). The circle of people who must be under a misconception as to the scope of the authorisation is not subject to any limitation, nor does it have to be substantial (Nacke, 2017, p. 16). For obvious reasons, the assessment is made from the perspective of other trading participants, including in particular the company's counterparties. However, such a person is not required to act in this capacity in relation to the tax authorities (Althuber et al., 2013, p. 580; Krause & Meier, 2014, p. 907; Koenig, 2021, p. 338). What is more, external appearance within the meaning of this provision occurs not only when the circle of people is external to the company, but also when certain actions are taken exclusively in relation to the company bodies or shareholders of the company itself (Rüsken, 2020, pp. 216–217). A special case of acting externally is the use of another person who is bound by the instructions given to him (Krause & Meier, 2014, p. 907). In this case, someone else is acting externally in relation to the general public, but at least a limited circle of people will recognise the person giving the binding instructions as an authorised person.

The final determination that we are dealing with a person who only pretends to have the power of disposal is based on all circumstances of the case. This can be evidenced by a number of factual circumstances, such as, for example, having access to the bank accounts of the "represented" entity (Althuber et al., 2013, p. 580).

In the approach presented here, § 35 AO places the emphasis on the actual existence of the power of disposition rather than on the power itself (Althuber et al., 2013, p. 580; Koenig, 2021, p. 337). It should be noted, however, that the alternative approach recognises the necessity of the existence of the power in each case. However, the use of an apparent power of attorney (*Anscheinsvollmacht*) or an implied power of attorney (*Duldungsvollmacht*) is then accepted as sufficient (Blesinger, 2005, p. 25). Both apparent and implied power of attorney fall into the common category of a power of attorney based on appearance (*Rechtsscheinsvollmacht*) (Smyk, 2010, p. 181). The source of the relation of a power of attorney based on sham is not the declaration of the principal, but the legal appearance created by the principal (consciously or negligently) of granting a power of attorney, which is linked to the need to protect the other party acting in confidence in the existence of the power (Drapała, 2013, p. 17).

Depending on which of the above concepts we consider to be correct, the consequences in terms of determining the circle of liable persons are the same.

The construction of § 35 AO opens the way for a de facto director of a limited liability company (*faktischer Geschäftsführer*) to be held liable under § 69 AO. This concept, which appears in both literature and case law, is neither statutorily defined nor generally has an established conceptual scope (Krause & Meier, 2014, p. 905). Most studies on the subject distinguish between its narrower and broader meaning.

More narrowly, a de facto director (*der faktische Geschäftsführer im engeren Sinne*) is a person who has never been appointed as a director in any form, including defectively, but who nevertheless actually exercises the powers belonging to a director (Krause & Meier, 2014, p. 908). The reasons for this are varied. Most often it is related, as mentioned above, to the appointment of a front or a straw man director (*Strohmann-Fall*) (Schirrmacher, 2019, p. 9.). However, reasons of an organisational or family nature are also included (Krause & Meier, 2014, p. 908). From the perspective of the attribution of liability to a de facto director, the circumstances already presented above, in particular the external appearance of the state of affairs, are relevant.

In the narrower sense, the category of de facto director also includes a person who, although he does not behave like a director, exerts considerable influence on the management of the company's affairs. This includes, among others, a shareholder of a limited liability company who, when exercising his right under § 37(1) GmbHG to issue binding instructions, does so to such an extent that the impression is created that it is he who is managing the company's affairs (Schirrmacher, 2019, pp. 9–10; Koenig, 2021, p. 337). The scope of liability thus extends to a person who, even indirectly, influences the legal and factual fulfillment of duties by the legal representative (Nacke, 2017, pp. 16–17). This results in the fact that a shareholder of a limited liability company can be held liable on the basis of § 69 in conjunction with § 35 AO. The legal situation of the sole or dominant shareholder of a limited liability company is special (Nacke, 2017, p. 17). This is because in this case, the shareholder can not only by means of binding instructions, but also by means of a resolution to dismiss a present director and to appoint a new one, influence the fulfillment of the company's tax obligations (Krause & Meier, 2014, p. 906; Koenig, 2021, p. 339).

The notion of de facto director in the broader sense (*der faktische Geschäftsführer im weiteren Sinne*) includes three cases (Krause & Meier, 2014, p. 905).

Firstly, it is a case of a director defectively appointed to the function, who nevertheless undertook to perform his duties. Appointment as a director requires compliance with a number of formal conditions under company law. The liability of a defectively appointed director may first be considered on the basis of § 69 in conjunction with § 34 AO. This is because, despite the existence of a specific defect, the shareholders actually manifest their will to appoint a person as a director. However, as noted in the literature, only a duly appointed director can be held liable on this basis. From the perspective of § 34 AO, what matters is the formal and not the actual status of the person concerned as a director (Krause & Meier, 2014, p. 908). This in turn is to be assessed on the basis of company law.

However, a defectively appointed director is liable under § 69 in conjunction with § 35 AO. Indeed, the assumption of director's duties actualises the prerequisites expressed in this provision, which, as indicated above, places the emphasis on the actual performance of the function and not on the formal correctness of the act of appointment (Krause & Meier, 2014, p. 908). Also the other prerequisites under this provision are usually fulfilled in connection with the activity of the defectively appointed director.

Secondly, it concerns a director who has effectively resigned or been removed from the office, but who nevertheless continues to perform his or her duties. As a general rule, a director who has effectively resigned or been removed from office is not liable for tax debts incurred thereafter. However, this does not apply if he/she continues to perform the duties of a director (Krause & Meier, 2014, p. 908). Again, the liability of the de facto director is derived from § 69 in conjunction with § 35 AO (Nacke, 2017, p. 18). Indeed, the effective resignation or removal from office results in the inadmissibility of liability on the basis of § 69 in conjunction with § 34 AO. Again – in principle – all the prerequisites of § 34 AO are fulfilled (Krause & Meier, 2014, p. 909).

Thirdly, we are concerned with a person who actually performs the functions of a director prior to his or her appointment. Here, too, we are dealing with a de facto director who can be held liable on the basis of § 69 in conjunction with § 35 AO. It must be emphasised that the de facto director, as soon as he or she is appointed, is still liable for debts incurred prior to his or her appointment. Nor does the legal basis of his liability for tax debts incurred up to that time change (Krause & Meier, 2014, p. 909).

Liability of a de facto director under Austrian tax law

The substantive legal basis for the attribution of liability to a director of an Austrian limited liability company (*Gesellschaft mit beschränkter Haftung*) is § 9(1) BAO[8]. This provision sets out the prerequisites for the attribution of liability to different categories of representatives of legal and natural persons. The scope of its application is determined by reference to §§ 80–83 BAO.

According to § 80(1) BAO, the persons appointed to represent legal persons and the legal representatives of natural persons shall fulfill all duties incumbent on the persons they represent and shall be authorized to exercise the rights to which they are entitled. In particular, they shall ensure that the levies are paid from the funds they administer. The object of this provision is to impose – inter alia, on persons appointed to represent legal persons (*die zur Vertretung juristischer Personen berufenenen Presonen*) – obligations analogous to those incumbent on the represented person, and this due to their lack of capacity to act independently in legal transactions (Althuber & Tanzer, 2019, p. 73). Thus, the representative of a legal person has the same rights and obligations under this provision as those of the represented entity (Bieber & Brandl, 2015, p. 22; Althuber & Tanzer, 2019, p. 73; Ritz & Koran, 2021, p. 300).

On the basis of § 9(1) in conjunction with § 80(1) BAO, a director of a limited liability company can be held liable (Althuber & Tanzer, 2019, p. 73). This is because he or she is – according to § 18(1) – its legal representative[9]. This provision emphasises the formal aspect, i.e. the appointment as a director (Althuber et al., 2013, p. 581.). The assessment in this respect is made from the perspective of company law (Bieber & Brandl, 2015, p. 24; Althuber, 2020, p. 186; Ritz & Koran, 2021, p. 38). The actual undertaking of the director's duties is irrelevant. Therefore, a so-called front or straw man director (*Pro-forma-Geschäftsführer* or *Strohmann-Geschäftsführer*) may be held liable on this basis (Rauscher, 2016, 25; Ritz & Koran, 2021, p. 28).

Both the literature and the case law emphasise that a de facto director (*De-facto-Geschäftsführer*) is not a person entitled to represent the company – within the meaning of § 80(1) BAO (Bieber & Brandl, 2015, p. 26; Rauscher, 2016, p. 39; Althuber, 2020, p. 187; Ritz & Koran, 2021, pp. 28 and 38). This means that the lack of a formal appointment as a director excludes – in any case and regardless of the intensity of the activities undertaken – the admissibility of holding such a person liable for the tax debts of a limited liability company (Althuber et al., 2013, p. 581; Althuber, 2020, p. 190).

In view of the wording of § 9(1) in conjunction with § 80(1) BAO, the question arises as to the effect of a defective appointment as a director on any liability for the company's tax debts. As indicated above, the assessment of the effectiveness of an appointment as a director is made on the basis of the provisions of company law. The literature as well as the case law takes a strict approach to the interpretation of these provisions. It is emphasised that only a person who has been correctly appointed is a director (Althuber et al., 2013, 581; Althuber, 2020, pp. 186–187; Ritz & Koran, 2021, p. 38). If there is a defect in the appointment, we are thus not dealing with a director, but only with a de facto director (*faktischer Geschäftsführer*)[10]. He cannot be liable on the basis of § 9(1) in conjunction with § 80(1) BAO.

The presented approach to the interpretation of § 9(1) in conjunction with § 80(1) BAO, present both in literature and case law (Althuber et al., 2013, p. 581), ultimately led to a change in the legal situation. With the Abgabenänderungsgesetz 2012[11], a legal basis was created for holding a de facto director liable. According to the following, in force since 1 January 2013 § 9a(1) BAO, insofar as persons actually exert an influence on the fulfillment of the duties of the taxable person and the representatives referred to in §§ 80 et seq., they shall exert this influence to the effect that these duties are fulfilled (Althuber, 2020, p. 191).

The notion of de facto director under Austrian company law includes persons who actually manage the affairs of the company, but who have not been effectively appointed to the function (Althuber, 2020, p. 191). The concept of a de facto director under the tax law – in light of the wording of § 9a BAO – is therefore much broader. This provision places the emphasis exclusively on the causal connection between the tax loss (*Abgabenausfall*) and the actual influence exercised on the company or the persons entitled to represent it (Althuber et al., 2013, p. 581). The external impression created by the de facto director is therefore of no relevance – as is the case under § 35 AO (Althuber, 2015, p. 87). This means that a de facto director under the Austrian tax law is not only a person who has been ineffectively (due to a defective resolution) appointed to the function, but also a person who exerts actual influence on the company or its bodies, including exclusively within the framework of the company's internal relations (Althuber, 2020, p. 191). The presence or absence of an organisational link between the person concerned and the company is irrelevant in this case. Thus, it may also be a person "external" to the company (Althuber, 2015, p. 90). What is not clear in the literature, however, is when we are dealing with actual influence – especially in the context of the admissibility of issuing binding instructions by a shareholder – with which the prerequisites of § 9a BAO are connected. Analogous doubts arise in the context of the required degree of intensity of influence and possible liability arising from omission (Althuber, 2015, pp. 90–91).

Liability of a de facto director under Polish tax law

The Polish Tax Ordinance includes directors of capital companies, including a limited liability company (*spółka z ograniczoną odpowiedzialnością*), in the category of third parties. This category encompasses within its scope various persons that are liable for other taxpayers' arrears. It must be emphasised that liability as a third party may only be incurred by a person who is directly included in this category of persons by the relevant provisions of the Tax Ordinance. This is due, inter alia, to the fact that the provisions on third-party liability – at least in their assumptions – change the distribution of the tax burden determined by the provisions of substantive tax law (Mastalski, 2017, p. 604.). Therefore, the mere existence of certain links with the original tax debtor, which may constitute a substantive reason for making a given person liable for taxpayers' arrears, does not automatically result in its liability if it is not explicitly included in this category (Olesiak & Pajor, 2011, p. 160). Consequently, the catalogue of third parties is closed and cannot be expanded other than by amending the law (Olesiak, 2020, pp. 86–89).

The basis for attributing liability to a director of a limited liability company is Article 116 § 1 o.p. It follows explicitly from this provision that a director is liable for the company's tax arrears. A director, on the other hand, is a person appointed to the function in accordance with the relevant provisions of company law (Karwat, 2016, p. 294). The actual undertaking of the duties of a director is irrelevant in this context (Karwat, 2016, p. 295). Therefore, this provision also provides a basis for holding a front or straw man director liable. In this context, the administrative courts refer to a formal circumstance, i.e. the appointment as a director.

Under no circumstances does this provision provide a basis for holding liable a person who has never been appointed – at least defectively – as a director[12]. This means that a de facto director in the narrower sense, understood as a person who has never been appointed as a director, but who nevertheless actually exercises the powers belonging to a director, cannot, in light of the current state of the law, be held liable for the company's tax arrears (Babiarz, 2013, p. 632). Nor do the provisions of Polish tax law contain any other legal basis allowing such a person to be held liable for the company's tax arrears.

The above considerations might lead to the conclusion that the current legal situation in Poland is analogous to that in Austria before § 9a BAO came into force or in Germany under § 69 in conjunction with § 34(1) AO. However, this is not the case. The understanding of the notion of "director" and "performance of duties by a director", as referred to in Article 116 § 2 of the Tax Ordinance13 , is relatively liberal in the jurisprudence of administrative courts. Indeed, the analysis of the jurisprudence of the administrative courts indicates two groups of cases of de facto directors who bear liability on the basis of Article 116 § 1. These cases may be referred to as de facto directors in a broader sense.

The first group of cases relates to persons who have been defectively appointed as a director and have taken up their duties. The degree to which the act appointing the director is defective is irrelevant in this case. Thus, it may be a resolution contrary to the articles of association, invalid due to being contrary to the law, or even a resolution that does not exist under company law. The awareness of the persons concerned of the existence of such a defect is also irrelevant. What distinguishes this case, however, from the situation of a de facto director in the narrower sense, is the manifestation by the authority or authorised person of the will to appoint the person concerned as a director and the subsequent assumption by the person concerned of the

duties belonging to a director (Olesiak, 2020, p. 106–107). The second group of cases comprises persons who, although duly appointed, continue to act as a director despite the fact that their mandate has expired or they have effectively resigned. The relevant element for this group of cases is that the person has been validly appointed and, after the expiry of his or her mandate, the body or person entitled to appoint the director at least tacitly accepts his or her continuation as a director.

In none of the above-mentioned cases we are dealing with a director within the meaning of company law, however, these persons are directors within the broad meaning of this concept adopted by administrative courts on the basis of Article 116 § 1 o.p. Due to the above-mentioned general principles governing third-party liability, including a closed catalogue of liable persons and the resulting prohibition on holding a de facto director liable by analogy, the case law has expanded the notion of "director" and "performance of duties by a director" to include strictly defined cases of de facto directors in the broader sense.

Conclusions

The research carried out indicates that the solutions adopted under the Polish tax law – in terms of determining the scope of liable persons – are relatively conservative. The scope of liability is broadened through the practice of law application by administrative courts. As can be seen from the above, the range of persons that can be qualified as a de facto director in Germany as well as in Austria is relatively wide. The legal situation of a de facto director is itself – from the perspective of tax liability – equated with that of a duly appointed director (Althuber et al., 2013, p. 580). The possibility of regulating the liability of de facto directors in the broader sense does not in itself invalidate the constitutional standards for the imposition of public burdens under the Polish constitutional law. The narrow scope of Polish regulation in the researched area should be extended to include solutions allowing the attribution of liability also to de facto directors. This would ensure effective protection of creditors and at the same time increase the level of legal certainty of persons acting on behalf of the company.

Indeed, the current state of the law cannot be considered satisfactory for two reasons. Firstly, the public burden that we are dealing with in the case of third-party liability requires normativisation of all its elements – with particular emphasis on determining the circle of persons on whom it rests. Secondly, adequacy as an element of the proportionality test dictates that the public burden should be shaped in such a way that it genuinely achieves the intended and constitutionally legitimate objectives of the legislator. Narrow limits of responsibility may be at odds with such an assumption, in particular if they would make it relatively easy to avoid the attribution of responsibility on the basis of sham actions (acting on the board after the expiry of the mandate; entering into the performance of tasks in the knowledge of a defect in the act of appointment and later invoking this defect). On the other hand, however, the definiteness of the public burden argues against accepting the exercise of influence over the company's action as a premise for liability. This could lead to a subjectivisation of assessments and significant discrepancies in case law.

Notes/Przypisy

[1] Article 151 § 4 of the Commercial Companies Code (Journal of Laws 2022, item 1467 with further amendments).

[2] Tax Ordinance (Journal of Laws of 2022, item 2651 with further amendments), hereinafter: o.p.

[3] It should be noted that when a limited liability company is referred to in the context of German and Austrian law, it should be understood as the equivalent of the Polish limited liability company standardised in the Polish Commercial Companies Code. In no way are these companies the same (Pajor, 2022, p. 54).

[4] Abgabenordnung (BGBl. I S. 3866, ber. 2003 S. 61), hereinafter: AO.

[5] The doctrine of tax law uniformly points to the compensatory nature of the liability of statutory representatives (*Schadenersatzcharakter*) (Nacke, 2017, p. 9; Blesinger, 2005, p. 21; Kratzsch, 2021, p. 593).

[6] Gesetz betreffend die Gesellschaften mit beschränkter Haftung (RGBl. I S. 477 with further amendments), hereafter: GmbHG.

[7] It should be pointed out that the liability of a proxy is not automatic. Certain additional conditions must be met in this case.

[8] Bundesgesetz über allgemeine Bestimmungen und das Verfahren für die von den Abgabenbehörden des Bundes, der Länder und Gemeinden verwalteten Abgaben (Bundesabgabenordnung – BAO) (BGBl. Nr. 194/1961 with further amendments), hereafter: BAO.

[9] Gesetz über Gesellschaften mit beschränkter Haftung (RGBl. Nr. 58/1906 with further amendments), hereafter: GmbHG.

[10] Individual cases of defective resolutions are analysed in: Althuber, 2020, pp. 188–190.

[11] *Bundesgesetz, mit dem das EU-Amtshilfegesetz erlassen wird* (...) (Abgabenänderungsgesetz 2012 – AbgÄG 2012, BGBl. I Nr. 112/2012).

[12] An analogous view is presented in the company law literature regarding the liability of the de facto director of a limited liability company under Article 299 of Commercial Companies Code (Kappes, 2009, p. 147).

[13] Pursuant to Article 116 § 2 of the Tax Ordinance, the liability of members of the management board covers tax arrears in respect of obligations whose due date expired while they were acting as a member of the management board, as well as arrears listed in Article 52 and Article 52a arising while they were acting as a member of the management board.

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