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AN EXPERT OPINION VERSUS LEGAL EXPERTISE IN TAX PROCEEDINGS

Increasingly, tax law regulations concern a number of tax subjects which for various reasons reveal a very complex character and require some specific knowledge that tax authorities may lack to conduct a necessary expertise. This does not mean the knowledge of the detailed regulations of other branches of law, but the specific knowledge of certain phenomena or things (facts), which is necessary to determine tax liability in the correct amount. An example of a building as a subject of property tax can serve as a perfect example here.¹ A building object is recognized as a building and consequently given a property tax when it meets legal requirements. Having foundations by such a building is one of the legal requirements. Who and how can check whether a given building has foundations? It is simple when the foundations (or their elements) are visible and the taxpayer does not deny their existence. A case becomes complicated when a given object is situated in such a way that its foundations are invisible or the taxpayer claims they do not exist. This is important because building objects without foundations are not buildings. Consequently, if these objects are owned by people who are not engaged in any economic activity, they are not taxable. How can the tax authority conducting the proceedings explain such a matter? In fact, in the absence of the construction documents the only way to prove that the object has foundations is to ask for an expert opinion.² A further discussion will be devoted to the problems connected with the expert opinion usage.

¹ There are many similar examples regarding different taxes. It is often problematic to determine “gross vehicle weight” or “kind of suspension” of a vehicle while deciding on the motor vehicle tax. In case of farm tax, the notions “livestock building” or “an object that serves to protect the environment” are similar examples. In the forest tax it is difficult to determine what “sale of unchanged products” means.

² This view in a very similar case was confirmed by the Administrative Court in its decision dated 3 February 2006 (I SA / Gd 385/03) published www.orzeczenia.nsa.gov.pl, stating that due to the highly specialized nature of the equipment it was necessary to

Is the authority obliged to appoint an expert?

In the doctrine and jurisprudence there is a common view that in case when special knowledge is needed to establish or evaluate facts and this action is beyond the scope of knowledge and life experience of people having general education, the organizing body should appoint an expert.³ A further opinion was expressed by the Supreme Administrative Court in one of the verdicts stating that in cases of complicated factual states, which can be explained only with the help of special knowledge, the tax authority is required to use an expert's opinion.⁴ The author of this article strongly agrees with this view. Nevertheless, it is not directly reflected in the Tax Code. According to the art. 197 of the Tax Code⁵, if some special knowledge is required, the tax authority may appoint an expert who has this special knowledge in order to state an opinion. Therefore, the above-mentioned article states the possibility (not obligation) of appointing an expert when a case requires some special knowledge. Despite appearances, the provision is properly constructed because "special knowledge" should not always be the opinion subject of the expert appointed by the tax authority. It is also possible to consider the opinion presented by the tax payer or experts appointed by him. If the tax authority does not dispute the taxpayer's explanations (reviews submitted by him) regarding the complex nature of the factual state, it is not necessary to appoint an expert in accordance with art. 197 of the Tax Code. On the other hand, an expert can be appointed when there are doubts about the presented explanations or their completeness. The legislator did the right thing leaving the tax authority a possibility to decide whether there is a need to appoint an expert even when a case reveals some special knowledge. The appointment of another expert does not always make sense when a case can be explained in a different way.

appoint appropriate experts to determine whether objects carry the characteristics of buildings in the light of the definition contained in the regulations of the Construction law.

³ See M. Szalewska, M. Masternak, *Rola eksperta i jego opinii w postępowaniu administracyjnym*, (in) J. Niczyporuk (ed.), *Kodeks postępowania administracyjnego. Na 50-lecie K.P.A.*, Lublin 2010, p. 800. Such a view was expressed by the Administrative Court in its decision dated 4 March 2004 (III SA1917/2002) published in "Przegląd Podatków Lokalnych i Finansów Samorządowych" 2004, nr 10. The court stated that if the dispute with the taxpayer applies to complex processes and requires expertise, the tax authority should appoint an expert. The tax authority cannot accept any cursory knowledge of things.

⁴ See the decision of the Administrative Court dated 25 January, 2001 V SA 1085/00 – unpublished.

⁵ The Act of August 29, 1997 Tax Law (consolidated text. Laws of 2005, No. 8, pos. 60 later amended).

Findings resulting from the expert's opinion are not binding for the tax authority in a situation when not all doubts and relevant questions are explained.⁶ To deal with them, the authority may appoint another expert.⁷ It is possible to get rid of doubts by asking for an oral opinion of an expert, or some written clarification (supplementary opinion).⁸ In this context it should be noted that in case of the expert oral opinion, the tax authority is obliged to inform the party about the place and date of the expert examination not later than 7 days in advance (art. 190 of the Tax Code). This aims at allowing a party to participate in the activity (to ask questions or provide explanations.) A party can also refer to the expert opinion within a seven-day period regarding the collected evidence being informed about it by the tax authority.

Can a taxpayer appoint an expert?

The above-mentioned regulations of the Tax Code show that only the tax authority is entitled to appoint an expert to give an opinion on the complicated factual states. Thus, only the opinion given by a person appointed by the order of the tax authority under art. 197 of the Tax Code has a value of the expert opinion evidence. However, this evidence is not a proof of some special power, which involves a certain presumption, or has a priority over other items of evidence.

Appointing an expert, the tax authority may act *ex officio* or upon request. There are no obstacles for the taxpayer to apply an expert during the procedure stating that the case requires some special knowledge. This right results directly from the art. 188 of the Tax Code, under which the party's request to examine evidence should be considered if the evidence investigation could explain circumstances relevant to the case, unless these circumstances are sufficiently identified by some other proof/evidence. Therefore, the tax authority may either consider the taxpayer's request as right and appoint or refuse to appoint an expert on the ground that the issues raised by the taxpayer can be explained by using other items of

⁶ The authority is not bound by the opinion of an expert, because it constitutes the same material as any other evidence gathered in the case – see. A. Skoczylas, Gloss to sentence WSA (I SA / Ld 1875/2000) “Orzecznictwo Sądów Polskich” 2002, z. 9, Pos. 118 and the decisions cited.

⁷ See the decision of the Administrative Court dated 19 February 1997 SA/Sz 189/96; unpublished.

⁸ P. Pietrasz, *Ordynacja...*, op. cit., p. 860.

evidence (eg. the above-mentioned construction project or another official document).

The taxpayer may also present the opinions prepared by people who have the expertise needed to clarify the case facts. Such an opinion is not the opinion of an expert in the meaning of the art. 197 of the Tax Code for formal reasons for it is not an opinion written by the expert appointed by the tax authority in the form of provision. However, substantive considerations revealed by both types of the opinion concern the same problem.⁹ An opinion of the “specialist” presented by the taxpayer is one of the evidence range referred to in the art. 180 of the Tax Code according to which anything that might help to clarify the matter, and is not contrary to the law, can be accepted as evidence. Undoubtedly, an opinion prepared by the “expert” constitutes such evidence and should be analyzed by the tax authority in accordance with the principle of the evidence free assessment during the proceedings. Such an opinion has the same probative value as the opinion established by the expert nominated by the tax authority. The tax authority is obliged to consider the arguments in both opinions and determine which of these opinions is to be treated as the correct one, justifying it accordingly. In some extremely difficult cases it is possible to appoint another expert who will refer to the previous opinion.¹⁰

Who can be an expert?

According to the 197 of the Tax Ordinance any person who has special knowledge can be an expert. Such a person does not have to meet any special requirements (unless required by specific provision) meets specific formal requirements (for example, being entered on the list of certified property valuers). The tax authority decides itself whether the person has special knowledge, and thus may be an expert in the field which is the subject of the opinion, the tax authority decides itself.¹¹ At the same time, it is not explained what is meant by “special knowledge”. The literature indicates

⁹ In general understanding these two opinions are the expert opinions.

¹⁰ However, this is not an obligation for the authority – see the decision of the Administrative Court in Warsaw dated September 13, 2007 (III SA/Wa 402/07; unpublished). The Court decided that none of the procedural law regulations imposes the obligation on authorities to carry out further evidence of the expert’s opinion only because contradictory opinions have been issued. A different view would result in the need to conduct further expertise, simply because there are differences between the experts’ opinions.

¹¹ B. Brzeziński, M. Kalinowski, A. Olesińska, M. Masternak, J. Orłowski, *Ordynacja podatkowa. Komentarz. Vol. II*, Toruń 2007, p. 320.

that this includes not only scientific knowledge in the field of individual branches (eg, art, construction, agriculture, accounting), but also practical skills, based on years of experience.¹² Therefore, a person who has received no specialized education attested by a diploma, but having the relevant professional practice may have such special knowledge. Hence, there is no basis for questioning the expert's qualifications on the ground of the lack of proper training or certification.

A person who has special knowledge has to agree to be an expert in the tax proceedings. Before taking a decision on the appointment of a particular person as an expert, the tax authority has first to obtain the confirmation that the person is willing to be an expert and is ready to present his opinion. Only if the person has agreed to be an expert but refused to issue an opinion, an ordinal penalty referred to in the art. 262 of the Tax Code can be used. This penalty cannot be used (which sometimes occurs in practice) to the people who refuse to be the experts and prepare a report. This is indirectly confirmed in the art. 262 § 2 of the Ordinance, which states that punishment can be used to the person who has agreed to act as an expert but then refused to give an opinion.

Sometimes rules of the tax law foresees the obligation to appoint an expert having special powers. Art. 4 paragraph 8 of the Act on Local Taxes and Fees May serve as an example.¹³ According to it, in certain cases if the taxpayer does not specify the value on the building being the subject of taxation, the tax authority appoints an expert among certified property valuers referred to in the Act on real estate dated August 21, 1997.¹⁴ It should be noted, however, that this provision applies only when determining the value of buildings; it cannot be applied when dealing with other traits influencing the principle of taxation. It should be noted here that in the light of the above-mentioned provision it is allowed to establish the value of the building by the expert opinion, although the rules for determining this value are defined in the rules of the income taxes. This indicates that due to the complexity of the procedure the legislature orders that this value should be established by the expert, although the tax authority could do the same applying the law.

¹² H. Dzwonkowski, Z. Zgierski (in:) H. Dzwonkowski (ed.), *Ordynacja podatkowa*, Warszawa 2008, p. 883; P. Pietrasz (in:) C. Kosikowski, L. Etel, R. Dowgier, P. Pietrasz, M. Popławski, S. Presnarowicz, *Ordynacja podatkowa. Komentarz*, Warszawa 2009, p. 854.

¹³ Act of 12 January 1991 on local taxes and charges (uniform text Journal of Laws of 2010, No 95, pos. 613 later amended).

¹⁴ Journal of Laws of 2004. Nr 261, pos. 2603 later amended.

What is a subject of the expert opinion?

The subject of the expert opinion should be the explanation of the particular facts considered in the proceedings.¹⁵ It is the opinion about the state of things, phenomena, technical processes or dependencies between them. What is more, a task of the expert is not only to determine the facts of the case, but also to explain the problematic circumstances which require expertise.¹⁶ In any case, which is highlighted in the literature on the subject, a subject of the opinion cannot be the analysis of the legislation rules.¹⁷ The tax authority is obliged to apply the law and it is not in the position to replace this statutory duty on the expert. This does not mean that the body applying the law has no possibility of using the interpretation of law made by professionals (eg. legal expertise). In the context of the ongoing consideration, it is useful to return to the example regarding the building foundation mentioned at the beginning of this paper. The subject of the expert opinion should be the existence (or not) of these foundations and not the analysis of the provisions of the Tax Act for determining whether the object should be taxed as a building. As it has been highlighted in professional literature, an expert can make an expertise referring to the facts and he is not supposed to interpret the provision. Contrary to appearances, this principle is sometimes very difficult to put into practice. Art. 7 of the already mentioned Act on Local Taxes and Fees ordering the appointment of an expert to determine the value of the building can serve as an example. This value is determined on the basis of the statutory provisions governing the income taxes procedure. An expert opinion in this case must therefore be based primarily on the analysis of legislation, which regulates the rules for determining the value of the building. Is it an opinion about facts or about the law? According to the author of this article, the principal purpose is to solve the problem complex enough to require special knowledge.

In some situations, the expert opinion has to be based on the analysis of the law. Cases dealing with “creative” accounting which can only be solved with the use of the expert opinion pointing to illegal accounting operations (in opposition to the factual state) which are completely regulated by the

¹⁵ An expert opinion cannot enter into the legal norm interpretation sphere. See the decision of the Supreme Administrative Court dated April 11, 2007 (I GSK 1056/06).

¹⁶ Similarly, Ł. Matusikiewicz, *Rola i znaczenie dowodu z opinii biegłego w postępowaniu podatkowym*, “Przegląd Podatkowy” 2009, nr 9.

¹⁷ “Evidence from the expert opinion to establish the current legal status and rules for the application and interpretation of existing legislation is not admissible.” See E. Wengerek, (in:) *Kodeks postępowania cywilnego z komentarzem*, Warszawa 1989, p. 459.

law can serve as an example. A mixture of facts and law in this case is unbreakable, and the expert opinion should be conducted in connection with the interpretation of the law. The difficulty of such cases is illustrated by the judicial decisions in which the court decides whether the disputed fact in the case is a factual state or a legal regulation that requires an interpretation.¹⁸ Frequently in practice there are opinions where considerations regarding factual states are supported by the law interpretation.

An expert opinion versus legal expertise

Basically, an expert opinion should relate to the facts that are the subject of the evidentiary hearing. What if the subject of the expert opinion, apart from the factual circumstances, is also the law interpretation? The author of this paper believes that it does not mean a total loss of the probative value of that opinion. Legal reasoning revealed by such an opinion can be taken into account by the tax authority when deciding on the case, but it does not constitute evidence in the tax proceedings. The evidence is only the findings made by an expert regarding the facts. However, in many cases, legal justification of such an opinion “reinforces” the tax authority’s reasons for the decision. The expert opinion on the legal analysis should be treated like any other legal expertise. It does not constitute an expert opinion or other evidence,¹⁹ but there is nothing to prevent the tax authority or the court from considering the arguments in the expertise. The tax authority acceptance of the views revealed by the legal opinions is advisable for the sake of protecting the rights of the parties in the investigation and the authority’s seeking to issue an accurate decision.²⁰ Hence, there is no legal obstacle for the tax authority to base their decision on the effects of the law interpretation revealed by the opinion present in the case materials.²¹ There are at least two possibilities here. It is possible to consider the views

¹⁸ For example, the decision of the Supreme Administrative Court dated July 12, 2007 (II FSK 903/06), publ. www.orzeczenia.nsa.gov.pl. It states that that deciding whether a disputed building object is a building or not constitutes the issue of determining the factual state and not the interpretation of the substantive law.

¹⁹ “Investigation should only relate to the factual state and not the law” – B. Brzeziński, W. Nykiel, *Ekspertyza prawna w postępowaniu w sprawach podatkowych*, “Przegląd Podatkowy” 2002, nr 11. B. Dauter rightly notices that this is not a legal document – See B. Dauter (in:) S. Babiarz, B. Dauter, B. Gruszczyński, R. Hauser, A. Kabat, M. Niezgódka-Medek, *Ordynacja podatkowa. Komentarz*, Warszawa 2010, p. 797.

²⁰ B. Brzeziński, W. Nykiel, *Ekspertyza...*, op. cit.

²¹ In this area judicial decisions are very diverse – See B. Dauter, *op. cit.*, p. 797.

expressed in the survey and indicate their source while giving the reasons for the decision. In this case, these are the views of the tax authorities which justify their decision. In the section giving reasons for the decision it is also possible to include a reference to the attached legal expertise indicating that the law interpretation included there is accepted by the authority. In both cases, this expertise is an element of the reasons for the decision made by the tax authority with the use of the legal expertise.

The author of his paper claims that asking for legal expertise by the tax authorities is a rational way of conducting the tax proceedings in the situation where complex legal regulations are the subject of the decision making. Certainly, it would be best for the tax authorities to solve individually all legal problems that occur during the implementation phase of the tax liabilities. Theoretically, this is possible when one condition is fulfilled, that is improving the quality of the tax law. As long as this condition is not fulfilled, the tax authorities should use an expertise of specialists also when it comes to the interpretation of the law difficult points. In many cases, this prevents from making erroneous decisions and paying the costs connected with it. There are a few cases which have lasted for years and have had several conflicting judgments. In such a situation, it is reasonable and beneficial to ask for the opinion of the person specializing in a particular segment of the tax law and being an excellent expert on the matter. The author of this paper believes that this is a duty of the tax authorities deciding on the matter, who are obliged to take all necessary measures to settle the matter in the tax proceedings. Asking for a legal expertise when the case complexity requires so is such an action.

It must be concluded that the tax authority conducting the proceedings should use all means authorized by the law which can help to arrive at a correct decision. These measures (which are more frequently used by the authorities) include opinions of the experts and legal expertise. They serve to clarify problems that occur at the stage of the tax proceedings. However, they should be used skillfully with a special consideration of their specificity and evidential asset. An expert opinion as evidence does not need to exist in its pure form being only the opinion of the facts. More frequently, because of the complexity of the proceedings, such opinions reveal legal considerations. The author of this paper maintains that it does not discredit such an opinion. On the contrary, the tax authority should take advantage of it. A legal analysis of this opinion can be used in the proceedings not as evidence, but just as one of the arguments supporting a decision.

S U M M A R Y

The aim of the present publication is to bring closer the essence of two very similar and frequently confused means of evidence namely expert opinion and legal expertise. Expert opinion is done by specialists in a given domain (construction, informatics, accounting) and its aim is to clarify doubts concerning certain facts which influence the result of a proceeding in progress. The subject of legal expertise is different. In an expertise the opinions of the author are presented which relate to an interpretation of a definite legal regulation. Both an expert opinion and legal expertise might and should be used in proceedings. However, their specific character and mode of use must be emphasised. Confusing these two institutions leads to unnecessary problems in application of the law.

