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Liability of a Management Board Member of a Foreign Company for Tax Arrears of that Company: Considerations Regarding Article 116a(1) of the Tax Ordinance

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The subject-matter presented in this article focuses on whether Article 116a(1) of the Tax Ordinance allows for 'appropriate' application of the rules, including the exonerative and liability limiting grounds arising from Article 116 of the Tax Ordinance, to transfer liability for tax arrears of other legal persons onto members of management bodies of foreign companies. Therefore, it should be considered whether the applicable provisions of the tax law allow for the attribution of such liability or whether normative changes need to be introduced in this respect. Until recently, inconsistent and variable case law of the Supreme Administrative Court had been confirmation of the existence of the above-mentioned problem in the business practice, especially in international trade, and at the interface between tax and bankruptcy law. In conclusion, the authors emphasize *de lege lata* that it is inadmissible to apply the rules derived from Article 116 of the Tax Ordinance (TO) to transfer of liability for the tax arrears of a foreign company onto the members of its management bodies. This is an extremely important issue for the tax as well as the insolvency practice both at a national and the European level.

Keywords: tax liability of a member of the management body of a foreign company for tax arrears of that company, tax liability, foreign company, tax arrears

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Introduction

An increasing number of cases that are brought before Administrative Courts, including the Supreme Administrative Court, undoubtedly points to the importance of the institution of liability for the tax arrears of other legal persons as well as the extraordinary topicality of the issue of setting out a transparent scope *ratione personae* of Article 116a(1) in conjunction with Article 116 of the Tax Ordinance.[1] Against the background of clearly regulated and unchanging provisions of the law, an issue has emerged as to whether Article 116a(1) of the Tax Ordinance allows for 'appropriate' application of the rules arising from Article 116 of the TO to transfer liability for tax arrears of other legal persons onto members of the management boards of foreign companies. Therefore, it should be considered whether interpretation of Article 116a(1) of the TO may lead to a conclusion that these regulations allow for holding persons managing foreign companies liable for the tax arrears of these companies.

Based on the wording of the applicable provisions of the law – contrary to the position of the tax authorities and, until recently, the SAC (see judgement of 18 May 2021, case No. III FSK 3392/21) – it cannot be accepted that the term 'other legal persons' also refers to a legal person established on the grounds of foreign law and thus, that members of the management bodies are liable for the tax arrears of such persons, if the conditions laid down by the domestic regulations have been fulfilled. Hence, the altered line of case law developed by the Supreme Administrative Court in the judgements of 10 October 2023, case No. III FSK 2767/21, and of 25 October 2023, case No. III FSK 173/23, case No. III FSK 174/23, case No. III FSK 840/22, and case No. III FSK 841/22 should be followed and fully approved of; the SAC's altered line of case law has also been supplemented and further developed by the judgements of the SAC of 19 January 2024 in cases No. III FSK 3731/21 and III FSK 580/23.

It is worth emphasizing that the change in the approach presented by the Supreme Administrative Court in the above-mentioned judgements does not result from the alteration of the provisions of the tax, bankruptcy, or commercial law, but above all from a change in their interpretation (Brzeziński, 2008, p. 39). Moreover, when presenting its position, the SAC referred not only to the tax regulations, but also to the relevant provisions of private international law and the European law as far as bankruptcy law is concerned.

The present study is intended to illustrate the issue described above from the perspective of unchanging regulations and the evolution of the line of case law of the SAC. Selected court judgements will be analyzed, starting with the genesis of the regulation in question and ending with conclusions *de lega lata* and *de lege ferenda*. The authors undertook analysis of this issue also due to the lack of a comprehensive elaboration on this matter in the relevant literature; apart from selected aspects mentioned in the Commentaries to the Tax Ordinance. Such a situation is incomprehensible, given the importance of this institution for the economic practice (Suchocki, 2019, p. 46).

Genesis and construct of the institution expressed in Article 116a(1) of the Tax Ordinance

Under the provisions of the Tax Ordinance, it is the taxpayer that is, in principle, liable for their own actions or failures to act. However, the legislator provided for certain exceptions to this rule (Olesiak, 2020, p. 53),[2] which can be found in Arti-

[1] Act of 29 August 1997 on Tax Ordinance (Journal of Laws of 2025, item 111, as amended; hereinafter referred to as the TO).

[2] These exceptions clearly define the extent of third parties' liability for the taxpayer's arrears in line with the following principles: 1) there is a closed catalogue of third parties; 2) the Tax Ordinance is the exclusive basis for adjudication on the secondary liability of third parties; 3) the liability is dependent; 4) the third party's liability is subsidiary to the taxpayer's liability; 5) the third party is jointly and severally liable with the taxpayer; 6) the liability is determined by way of a constitutive decision of

cles 107–119 of the TO. These provisions of the law regulate the tax liability of third parties for someone else's tax arrears, regardless of their own activity or failure to act (Guzek, 2002, p. 1, Pajor, 2020, p. 125). The legal institution in question was awarded a clearly distinct character (Olesiak, 2020, p. 58), which is unique when it comes to the taxpayer's liability, as it binds the effects of the existence of a tax liability with an entity other than the taxpayer. The essence of this institution is subsidiarity as it is understood that the taxpayer is attributed liability first and the third party second, following prior attempt to recover the arrears from the taxpayer (Karwat, 2016, p. 178). The Polish legislator – guided by the principles of legal certainty and democratic rule of law – based the principles of third-party liability on strict, sometimes even formal, premises.

Liability of the management board members of capital companies (and capital companies being formed) for the tax arrears of these companies is regulated in Article 116 of the TO. In accordance with this Article, the board members are jointly and severally liable with all their assets for the tax arrears of a limited company, a limited company being formed, a simplified public limited company, a simplified public limited company being formed, a public limited company or a public limited company being formed, if enforcement against the company's assets has proven to be wholly or partly ineffective (Olesiak, Pajor, 2025, p. 44). However, a decision on the liability of a board member itself can be taken if they:

1) have not shown that:
   a) an application for bankruptcy has been filed in due course[3] or proceedings to prevent bankruptcy have been initiated (i.e. restructuring proceedings or an arrangement approval procedure[4]); or
   c) failure to apply for bankruptcy was no fault of their own; or
2) if they have not indicated the company's assets that could be subjected to execution enabling satisfaction of the company's tax arrears to a significant extent.

This is personal as well as joint and several liability with the legal person. However, it follows from the literal wording of Article 116 of the TO that there are a number of factors that the possibility of holding third parties liable for the tax arrears of a capital company are dependent on, including the existence of the tax arrears themselves (which have not prescribed), ineffectiveness of enforcement against the company's assets (in whole or in part), and the lack of grounds for excluding the liability of a member of the management board (such as no fault[5] or disclosure of the company's assets). If any of the circumstances indicated above occur, there will be a basis for excluding liability of a member of the management board. The relevant literature draws attention to the strict character of interpretation of the exonerative conditions referred to in Article 116(1)(1) of the TO, which cause the managers' liability to be lifted (Olesiak, 2020, p. 134). Essentially, the conditions under analysis boil down to verification of a board member's obligation to exercise professional due diligence. Diligence understood in this way should primarily manifest itself through proactive striving for submitting an application for the initiation of bankruptcy or restructuring proceedings in a timely manner; although there is no major doubt that evaluation of the actions taken should each time be based on the complete

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the tax authority in the course of separate proceedings; 7) there is a separate limitation period.

[3] Act of 28 February 2003 on Bankruptcy Law (Journal of Laws of 2022, item 1520, as amended; hereinafter referred to as the Bankruptcy Law).

[4] Act of 15 May 2015 on Restructuring Law (Journal of Laws of 2022, item 2309, as amended; hereinafter referred to as the Restructuring Law).

[5] In other words, in order to prove no fault of their own, a management board member must demonstrate that they had exercised due diligence in performing their statutory duties and that failure to submit an application in due time was not their doing (Article 116[1][a&b] of the Tax Ordinance *a contrario*; see judgements of the SAC of 4 April 2017, case No. I GSK 708/15; of 20 October 2006, case No. II FSK 1271/05; of 20 November 2003, case No. III SA 110/02).

picture of the circumstances of a specific case. A comprehensive and objective assessment as to which moment should be deemed appropriate for a board member to apply for bankruptcy or to initiate restructuring proceedings may prove to be a particularly contentious matter.

The legislator provided for similar solutions in Article 116a(1) of the TO with regard to liability of 'other legal persons' than the ones listed in Article 116 of the TO (Dowgier, 2023, p. 1127), indicating that application of the provisions on liability of management board members of capital companies is appropriate in this respect. That way, since 1 January 2003,[6] members of the management bodies of 'other legal persons' have been jointly and severally liable with all their assets for the tax arrears of such persons in accordance with the rules provided for in Article 116 of the TO applicable to members of the management boards of capital companies. Nevertheless, the very use by the legislator of the phrase 'appropriate application' of the regulations contained in Article 116 of the TO to entities that are members of the management bodies of legal persons other than capital companies means that these regulations will not be applied directly but with certain modifications (Brzeziński, 2008, p. 119).[7] This is because Article 116a(1) of the TO does not prompt referring to other regulations (Babiarz et al., 2019, p. 889). It would be a cliché to say that until Article 116a of the TO entered into fore, there had been no doubt that persons managing such entities could not be burdened with liability peculiar to the members of the management board of capital companies.

From the perspective of further deliberations and for the sake of clarity, it should be pointed out that the scope of application of Article 116a(1) of the TO regarding liability of entities that are members of the management bodies of legal persons other than capital companies has proven particularly problematic in the judicial practice (Dowgier, 2023, p. 1128). Unfortunately, the legislator has not specified what 'other legal persons' should mean, leaving this matter open to interpretation; clarification has been provided by the case law and the doctrine of tax law and, finally, through expansion of the regulation contained in Article 116a(1) of the To[8] (Babiarz et al., 2019, p. 892). And so, members of the management bodies of 'other legal persons' include, for example, members of the management boards of foundations, heads of research institutes, CEOs of state-owned enterprises, members of the management boards of cooperatives, and members of the management boards of associations (Babiarz, et al., 2019, p. 892). Moreover, there was a view put forward that Article 116a(1) of the TO is concerned with a broader catalogue of persons, including also members of the presidium of agricultural unions and heads of universities or sports clubs (Dowgier, 2023, p. 1129).[9] However, it is unacceptable to agree with the author mentioned above that it is possible for the scope of Article 116a of the TO to include members of the management boards of companies established under foreign law, even if, among others, the structure of such a company bears significant characteristics specific to a Polish limited company. According to R. Dowgier, Article 116a of the Tax Ordinance may also apply to the CEO of a company governed by foreign law, inter alia, when the structure of this company has significant features characteristic of a Polish limited company (Dowgier, 2023, p. 1127).[10]

[6] Article 116a of the Tax Ordinance was added to the legal order with the Act of 12 September 2002 Amending the Tax Ordinance Act and Certain Other Acts (Journal of Laws of 2002, No. 169, item 1387).

[7] See judgement of the SAC of 10 December 2021, case No. III FSK 206/21, LEX No. 3294776. The modifications may result from the need to 'adapt' the provisions of Article 116 of the Tax Ordinance to certain specific legislative solutions related to the operation of specific legal persons.

[8] By way of amendment of 2016, the legislator directly regulated liability for the tax arrears of persons managing associations in Article 116a of the Tax Ordinance, by adding new sections of the provision, that is sections 2–5.

[9] See judgement of the SAC of 11 November 2017, case No. II FSK 2927/15.

[10] See judgement of the SAC of 9 July 2020, case No. II FSK 1029/20.

Practice of tax authorities and the position of the Supreme Administrative Court as regards application of Article 116a(1) of the Tax Ordinance

As far as the tax authorities' practice of application of Article 116a(1) of the TO is concerned, it has become apparent that liability was mechanically imposed on a management board member of a foreign legal person. After determining the existence of tax arrears and discovering persons acting as members of the management board of a foreign company at the time the deadline for payment of the tax liability expired, the tax authorities automatically verified the premises for applying Article 116 of the TO in conjunction with Article 116a(1) of the TO by way of establishing whether the taxpayer is an insolvent debtor within the meaning of the provisions of foreign law.[11] In other words, the domestic tax authorities completely ignored the provisions of the foreign law governing analogous foreign institutions as regards the conditions for attributing and excluding liability of the members of the management boards/managers of foreign companies[12] and directly applied the principles of the domestic law, that is Article 116 of the TO, along with all the consequences of such an action. Therefore, the result was a peculiar 'mix of legal regimes' when it comes to the establishment of the status of such an entity (of a foreign legal entity); next, based on the foreign law (e.g. the Czech bankruptcy law), the rules and principles for attributing liability to members of the management boards/bodies were verified, which in turn were contained in the domestic law, that is in tax law (Article 116 of the TO), although the foreign law either had no such institution at all, or it was regulated on the basis of different principles and standards (e.g. in the Czech Republic: Articles 49 and 66 of Zákon č. 90/2012 Sb. o obchodních společnostech a družstvech (zákon o obchodních korporacích)).

As a consequence of the above-mentioned arguments and positions presented by the tax authorities and the SAC, a company governed by foreign (Czech) law rendering services/delivering goods on the territory of Poland turned into 'other legal persons' under the Polish law, although no provision of the domestic law awarded legal personality to such an entity. Moreover, the tax authorities believed that analysis of the exonerative conditions concerning members of the management boards of foreign companies was based on an assumption that a foreign company (i.e. a foreign legal person) was similar in character to the Polish capital company. Be that as it may, members of the management board of such a company should be able to satisfy the exonerative conditions indicated in Ar-

[11] In accordance with the Czech law, these include Act No. 182/2006 on Insolvency and the Relevant Procedures and Act No. 99/1963 on the Code of Civil Procedure.

[12] Zákon č. 304/2013 Sb. o veřejných rejstřících právnických a fyzických osob a o evidenci svěřenských fondů, Zákon č. 90/2012 Sb. o obchodních společnostech a družstvech (zákon o obchodních korporacích). In this respect, the Czech law – in Articles 49 and 66 – provides, inter alia, for special obligations in the event of bankruptcy of a commercial company:

(1) If a member of a statutory body has contributed to the bankruptcy of a commercial company due to failure to meet their obligations and if it has already been decided in the course of the bankruptcy proceedings how to handle bankruptcy of the commercial company, the bankruptcy court rules, at the request of the insolvency official, on:

(a) the obligation of that member to transfer the benefits, which they received on the basis of the contract on serving their function, to the insolvency estate as well as any other possible advantages obtained from the commercial company over a period of up to two years prior to the initiation of the bankruptcy proceedings, if they have been initiated at the request of a person other than the debtor; if transfer of the benefits is not possible, the member of the statutory body compensates it in money; and

(b) if a commercial company has been declared bankrupt, it may also be decided that the member is obliged to credit to the insolvency estate an amount equal to the difference between the sum of debts and the value of the assets of the commercial company; when determining the amount to be credited, the bankruptcy court takes into account, in particular, the extent to which the member's failure to meet their obligations has contributed to the insufficiency of the insolvency estate.

ticle 116 of the TO., and so applying for bankruptcy could concern a foreign company, however, the provisions of the foreign (e.g. Czech or Italian) law would apply (Suchocki, 2019, p. 45), rather than the domestic law, because it has no jurisdiction. However, the domestic law does have jurisdiction over the rules and principles governing liability of members of the management boards/bodies, which are provided for in the domestic law, that is in tax law (Article 116 of the TO in conjunction with Article 116a[1] of the TO).

It is worth emphasizing at this point that the tax authorities and the Supreme Administrative Court (SAC) had no doubts when they followed the above-mentioned reasoning and interpretation assuming that Article 116a(1) of the TO also applies to members of management bodies of foreign companies. Based on the selected judgements of the SAC,[13] it can be assumed that the SAC proved the legitimacy of such a solution, among others, by way of defining the status of a company as a legal person within the meaning of Article 116a(1) of the TO, which could be awarded pursuant to Article 17(1&2) of the Act on the Private International Law (PIL).[14] It seems appropriate to point out that considering Article 17(1&2) of the PIL to be determining the status of a legal person would be tantamount to introducing an open and unknown catalogue of legal persons into the Polish legal system (not only of the tax law). Allowing freedom in determining the scope of responsible entities (especially considering the diversity of the concepts of a legal person on an international level and difficulty in finding equivalents of 'members of the management board' of a Polish capital company within this diverse myriad) would stand in opposition to the principles, including the principle of *numerus clausus* applicable to legal persons on the grounds of the Polish law. Neither international obligations of Poland nor the constitutional values advocate departure from the principles as regards third-party liability.

Essentially, the view of the tax authorities and the SAC was based on a conviction that the concept of a 'legal person' refers not only to a legal person established under the Polish law, but has a much broader scope, which encompasses foreign entities. On this basis, the SAC drew further conclusions; the Court found that Article 116a(1) of the TO applies whenever the taxpayer is an entity that satisfies the conditions allowing for recognizing it as a legal person. Apparently, the SAC's view is that both the Polish and the foreign legal person can be considered such an entity. However, the assumptions underlying such a conviction leads to somehow equating the Polish legal person with the foreign ones. Nevertheless, such far-reaching conclusions cannot be drawn from the literal meaning of Article 116a(1) of the TO. Therefore, it was impossible to agree with the presented line of case law of the Administrative Courts. The theses formulated in such a way should be deemed to raise major doubts and controversies (Suchocki, 2019, p. 55). At the same time, it is hard to escape the impression that the extensive interpretation of the institution in question, which is presented by the SAC, follows a certain trend that is dangerous from the point of view of the security and stability of legal transactions as it lives out the maxim: *in dubio pro fisco* (Gomułowicz, 2013, p. 93),[15] which, in fact, is aimed at extending the limits of tax liability. For the sake of completeness of the elaboration, it is worth stressing that in the cases in question, the SAC has not referred to the bankruptcy laws regulated at the European level, in particular to the directly applicable Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceed-

[13] See judgements of the SAC: of 25 April 2017, case No. I FSK 1665/1; of 9 July 2020, case No. II FSK 1029/20; of 18 May 2021, case No. III FSK 3392/21; of 25 January 2023, case No. III FSK 1597/21; of 22 June 2023, case No. III FSK 2206/21; of 4 July 2023, case No. III FSK 2972/21.

[14] Act of 4 February 2011 on the Private International Law (Journal of Laws of 2015, item 1792, as amended; hereinafter referred to as the PIL).

[15] In our view, such flaws undoubtedly include vagueness of legal concepts such as 'other legal persons' within the meaning of Article 116a of the Tax Ordinance, which was a source of too much ambiguity as for a matter that should be deciphered in a literal and clear way.

ings.[16] From the point of view of the tax law and the bankruptcy law, this was completely incomprehensible despite the arguments provided in this respect and the legal basis cited by the RAC.[17]

Thus, the SAC drew the wrong conclusion that the concept of a 'legal person' mentioned in Article 116 of the TO solely refers to a legal person established on the basis of the Polish law, but Article 116a(1) of the TO applies whenever the taxpayer is an entity that satisfies the conditions allowing for recognizing it as a legal person. This could be both a Polish and a foreign legal person. It was also pointed out that there are no definitions concerning the concepts of a 'legal person' and 'liability' in the tax law, which means that reference should be made to their established meanings that have been functioning on the grounds of private law. Since in Article 116a(1) of the TO, the legislator deliberately regulated the liability of board members of legal persons other than the ones listed in Article 116 of the TO, there are no grounds to assume that the liability in question applies exclusively to companies established and registered on the territory of Poland. The purposive and systemic interpretation of Article 116a of the TO leads to a conclusion that the legislator's intention was to impose liability for tax obligations that have arisen on the territory of the Republic of Poland onto foreign legal persons as well, if, in accordance with the Polish legislation, their activity gave rise to such an obligation. Article 116a(1) of the TO applies to legal persons other than the ones listed in Article 116a of the TO, including the foreign legal persons.

It is also worth highlighting that the SAC has paid little attention in its case law to another controversial issue, namely, application of foreign law to the assessment of the exonerative conditions or ones that limit liability, which are provided for in the domestic law. Despite doubts, there has been neither any broader justification, nor analysis offered in this respect, even though the rules of interpretation have been proposed in the relevant literature (Suchocki, 2019 p. 53).

New perspective: alteration of the Supreme Administrative Court's approach to the interpretation of Article 116a(1) of the Tax Ordinance

The claim that Article 116a(1) of the TO applies to legal persons other than the ones listed in Article 116a of the TO, including to foreign legal persons, has eventually been verified negatively in the case law of the Supreme Administrative Court.

In the judgement of 10 October 2023, case No. III FSK 2767/21, the SAC stipulated that when determining that a foreign entity has the status of a legal person, one should not follow the provisions of the Civil Code, but the regulations of the Act of 4 February 2011 on the Private International Law. In this context, the SAC invoked Article 17 of the PIL, which stipulates that a legal person is governed by the law of the country where it has its registered office (Article 17[1] of the PIL). If this law provides for the jurisdiction of the law of the country whose regulations served as the basis for the establishment of a legal person, the law of that country applies (Article 17[2] of the PIL). Importantly, the law indicated in Article 17(1&2) of the PIL applies especially to: the establishment, merger, division, transformation, or termination of a legal person; the legal character of a legal person; the capacity of a legal person; representation; acquisition, and loss of the status of a partner or member as well as the rights and obligations associated with them; and liability of the partners or members for the obligations of the legal person. This means that a legal person is governed by the law of the country in which it has its registered office or by the law of the country in which it has been established and that the following should be assessed in accordance with the law of such countries: the legal character and capacity of the legal person, its representation, acquisi-

[16] OJ EU L 2015.141.19 of 5 June 2015 (hereinafter referred to as Regulation 2015/848).

[17] See judgement of the RAC in Warsaw of 18 September 2019, case No. III SA/Wa 2495/19.

tion, and loss of the membership status as well as liability of the partners or members for the obligations of the legal person. Therefore, in the SAC's opinion, application of Article 116 of the Tax Ordinance in conjunction with Article 116a of the Tax Ordinance to members of management boards of foreign companies must be deemed inadmissible. The SAC also pointed out that the provisions of Article 17(1-3) of the PIL do not absolutely exclude application of the Polish law, which follows from Article 8(1) of the PIL. According to this Article, establishing the applicable foreign law does not preclude application of the provisions of the Polish law, which undoubedly regulate the legal relationship under analysis owing to their substance or objectives, regardless of the law that applies to it, however, the rules derived from Article 116 of the TO or Article 116a(1) of the TO are not such laws.

The SAC explicitly supported the new approach in the judgements of 25 October 2023, case No. III FSK 173/22 and 174/22 as well as case No. III FSK 840/22 and 841/22, by clearly indicating that the scope of Article 116a(1) of the Tax Ordinance in conjunction with Article 116 of the Tax Ordinance does not include members of the management bodies of entities established and operating on the basis of a legal system different than the Polish one. A foreign company (established and operating under the foreign law), which does not have a registered office or branch in Poland, is not 'other legal person' within the meaning of Article 116a of the TO. It is also not an entity listed in Article 116 of the TO. Thus, the essence of the dispute was once again a matter of deciding whether a company without a registered office or a branch in Poland could be considered 'other legal person' within the meaning of Article 116a(1) of the TO. At the very beginning of its deliberations, the SAC noted that the provisions of the Tax Ordinance do not define this concept. Therefore, it is necessary to refer to the provisions of the civil law contained in Article 33 of the Civil Code, which stipulates that legal persons are the State Treasury and organizational units granted legal personality by special regulations.

Going further, the SAC reasoned that the entities listed in Articles 115 and 116 of the Tax Ordinance are organizational units established on the basis of the Polish regulations: the Act of 23 April 1964 on the Civil Code[18] and the Act of 15 September 2000 of the Commercial Code.[19] Thus, even the manner of formulating the provisions of Article 116a(1) of the TO offers no entitlement to claim that the catalogue of entities whose members of their management bodies are liable for the tax arrears of these entities includes companies established and functioning under a different legal regime than the Polish one. The closed catalogue of entities indicated in the regulations encompasses only domestic entities, which have been established and operating based on the regulations of the Civil Code and the Commercial Code. The correct interpretation of Article 116a(1) of the TO should, therefore, be based on the literal meaning of this provision, complemented by the definition of the concept of a 'legal person' described in the Civil Code. Thus, it is impossible to defend the claim that the legislator intended for Article 116a(1) of the TO to cover foreign entities, which could be attributed legal personality under foreign legal regimes.

Finally, the process of correct interpretation of the provisions under examination cannot disregard one of the fundamental principles of tax law, which is the specificity of the tax burdens to be imposed (cf. Articles 84 and 217 of the Constitution of the Republic of Poland of 2 April 1997). Therefore, such a far-reaching freedom in determining the catalogue of entities responsible for tax arrears should be considered inadmissible. Hence, following primarily the principles of legal certainty and the democratic rule of law, the SAC rightly noticed that, under the current regulations, there is no possibility for Article 116 in conjunction with Article 116a(1) of the TO to apply to members of the

[18] Act of 23 April 1964 on the Civil Code (Journal of Laws of 2022, item 1360, as amended; hereinafter referred to as the CC).

[19] Act of 15 September 2000 on the Commercial Code (Journal of Laws of 2022, item 1467, as amended; hereinafter referred to as the ComC).

management board of a foreign company.[20] Adopting a different view would stand in direct opposition to the constitutional principles mentioned above, considering, for instance, the primacy of the *numerus clausus* principle applicable to legal persons in the Polish legal order. At the same time, it is impossible to point to any merit in departing from these principles in relation to the regulations determining the scope of third-party tax liability.

Analysis of the above-mentioned judgements of the SAC allows to draw a few conclusions. Article 116a(1) of the TO should be interpreted strictly. Such an assumption leads to unambiguous conclusions: The literal meaning of the current regulations does not allow for ruling on the tax liability of members of the management board of foreign companies (Suchocki, 2019, p. 48). Therefore, it was accurately emphasized in the grounds for the judgements under analysis that under the currently applicable laws, it is difficult to argue with this view, especially considering that the members of the management board of a foreign company are not explicitly mentioned in Article 116a(1) of the TO.

As a consequence, there are no sufficient grounds for attributing liability for tax arrears of a foreign company to members of the management board of such a company. Certainly, such a solution is not provided for in Article 116a(1) of the TO in its current wording. Therefore, a member of the management board of a foreign company cannot be held liable for the tax arrears of such a company based on Article 116a(1) of the TO as its scope does not explicitly cover such an entity. Drawing opposite conclusions is allowed neither by the very literal meaning of the domestic regulation under analysis, nor the purposive or systemic considerations. It is impossible to assume that the rules governing liability of persons managing foreign legal entities fall within the scope of Article 116a(1) of the TO. The Polish legislator – guided by the principles of legal certainty and democratic rule of law – based the principles of third-party liability on strict conditions. In the light of the above, there is no reason, including no constitutional principle, which would justify interpretation of these conditions and the scope *ratione personae* in any other than strict manner. The very fact of adding Article 116a of the TO by way of amendment proves that the legislator's will has been to have the rules governing third-party liability interpreted strictly. The systemic interpretation supports the claim that whenever the Tax Ordinance refers to the concept of a limited company, it should be understood as a specific type of entity regulated by the Polish law, and when the concept of a legal person is referred to – in the absence of additional arguments – it should be understood as a legal person within the meaning of the Polish law. Interpretation cannot serve to extend the scope of applicability of the rules governing third-party liability in a way that would include entities that are not explicitly mentioned in the Polish act regulating a special type of tax liability, namely, the liability of third parties for the tax arrears of other entities (Suchocki, 2019 p. 46).

Reinforcement of the reasoning of the Supreme Administrative Court as regards Article 116a(1) of the Tax Ordinance

Another case that the SAC handled was confirmation but also a further in-depth analysis of the considerations provided above; see judgement of the SAC of 19 January 2024, case No. III FSK 3731/21, concerning a Czech company. The tax authorities consistently interpreted Article 116a(1) of the TO in a way that led to the ruling that a third party, that is a former member of the management board of a company based on the Czech commercial law, is jointly and severally labile with that company for its VAT arrears along with the default interest. It is worth pointing out that the Court of the First Instance arrived at a far-reaching interpretation and stressed – while repealing the decisions of

[20] See judgements of the SAC of 25 October 2023: Case No. III FSK 173/23, case No. III FSK 174/23, case No. III FSK 840/22, case No. III FSK 841/22.

the tax authorities of both instances and cancelling the proceedings – that it is not possible to rule on the joint and several liability for the tax arrears of a foreign company, which has no branch on the territory of Poland, based on Article 116a(1) in conjunction with Article 116 of the TO. According to the Court, the systematic and authentic interpretation of Article 116a(1) of the TO leads to a conclusion that this provision refers to the domestic legal persons other than the ones listed in Article 116 of the TO; therefore, it cannot be applied to transferring liability onto a person managing an entity with a registered office abroad. Analogous conclusions are also brought about by interpretation of Article 116a(1) of the TO in conjunction with Article 116 of the TO, which should be applied accordingly in line with the wording of Article 116a(1) of the TO.

In principle, the Supreme Administrative Court shared the view that the status of a foreign entity as a legal person should be determined based not solely on the provisions of the Civil Code, but also to the regulations contained in the Act on the Private International Law quoted above, which are applicable to public law pursuant to Article 6 of the PIL. According to the SAC, these provisions stipulate explicitly that a legal person is governed by the law of the country in which it has its registered office or by the law of the country in which it has been established and that the following should be assessed in accordance with the law of such countries: the legal character and capacity of the legal person, its representation, acquisition and loss of the membership status, and liability of the partners or members for the obligations of the legal person. Thus, in line with the provisions under analysis, it is precluded to apply Article 116 in conjunction with Article 116a of the TO to members of the management boards of foreign companies.

The view expressed by the SAC in case No. III FSK 3731/21 has been further elaborated upon in subsequent judgements of 25 October 2023, case No. III FSK 174/22, case No. III FSK 840/22, case No. III FSK 841/22. The Supreme Administrative Court has already pointed out explicitly that the scope of Article 116a(1) in conjunction with Article 116 of the TO does not encompass members of management bodies of entities established and operating based on a legal system other than the Polish one. A foreign company (established and operating under foreign law), which does not have a registered office or a branch in Poland, is not 'other legal person' within the meaning of Article 116a(1) of the TO. It is also not an entity listed in Article 116 of the TO. In order to justify this position, the SAC pointed out that the entities listed in Articles 115 and 116 of the TO are organizational units established on the basis of the Polish acts of law: the Civil Code and the Commercial Code. Moreover, the manner of formulation of the provision of Article 116a of the TO does not entitle to claim that the catalogue of entities whose members of the management bodies are liable for the tax arrears of these entities includes companies established and functioning under a different legal regime than the Polish one. The regulation is solely concerned with domestic entities which are legal persons other than the ones listed in Article 116 of the TO; this is because this rule refers to classification of an entity as a legal person that is regulated by the Polish Civil Code and refers the interpreter to specific provisions regarding the establishment of a legal person and obtaining legal personality. It is impossible, therefore, to defend the claim that the legislator intended for Article 116a of the TO to cover foreign entities, which could be attributed legal personality under foreign legal regimes, because the definition of a legal person contained in Article 33 of the Civil Code –which Article 116a of the TO refers to – covers the State Treasury as well as entities established on the basis of the domestic regulations. In order for Article 116a(1) of the TO to have the meaning that the tax authority attributes to it, Article 33 of the CC would have to be adapted as well. Such an interpretation of Article 116a(1) of the TO also allows to uphold the principle derived from Article 107(1) of the TO, which is highlighted in the doctrine and the case law and which stipulates a closed catalogue of third parties who are liable for another person's tax debt, because it is limited to entities that are expressly granted legal

personality based on the act of law (Olesiak, 2020, p. 53, Pajor, 2020, p. 159). If it were assumed that Article 116a(1) of the TO also referred to an unspecified group of foreign entities, it would make this catalogue open, especially considering the fact that it would be impossible to indicate which provisions should serve as a basis for assessing the attribute of a legal personality of a foreign entity. In the opinion of the SAC, it is, thus, impossible to claim that the rules for attributing liability to persons managing foreign legal entities are covered by Article 116a(1) of the TO and the legislator has resigned from regulating the principles and scope of this liability in any way, while paying more attention to, for example, ordinary associations or a simple public limited company being formed (Suchocki, 2019 p. 49).

Need for verification of the taxpayer status and grounds for liability of managing persons: what the SAC emphasized additionally

Alteration of the line of case law, which was presented by the SAC and has been universally approved both in the practice and the doctrine of tax law, does not discharge from the obligation of carrying out comprehensive analysis of evidence in consideration of the taxpayer's status. It cannot be assumed that the mere emergence of an 'element of foreign law' (i.e. a foreign company) makes it impossible to apply Article 116a(1) of the TO. It is actually a fundamental principle that the tax authorities and Administrative Courts should follow: the status of the taxpayer should be determined. This issue has also been noticed in practice, however, the Supreme Administrative Court stressed that in the case of foreign entities whose principal place of business is outside Poland but which have a branch in Poland, determination that there are indications of insolvency, which justify applying for bankruptcy, may be based on the domestic law. Therefore, it is necessary for the Polish authorities to refer to Articles 10, 11, and 21 of the Bankruptcy Law as they are the right ones when it comes to establishing the exonerative conditions and ones that limit liability. Thus, the Polish regulations may be applied to a branch of a company that is governed by the foreign law as the Polish jurisdiction covers such a branch in terms of opening and conducting bankruptcy proceedings. It is worth pointing out that the Polish regulations contain a closed catalogue of both positive and negative conditions that allow to impose liability on third parties for claims originally attributable to another entity. There is also another issue linked to the considerations above; namely, a question arises whether it is possible to accept that assessment of the appropriate time for applying for bankruptcy of an entity operating under a legal regime other than the Polish one may be done on the basis of the Polish bankruptcy laws. The issue should be resolved taking into consideration the principles governing mutual recognition of judgements and powers of individual Member States as to deciding on bankruptcy of companies, which have been regulated in Regulation 2015/848.

In the light of that regulation, a Member State's courts have jurisdiction over opening bankruptcy proceedings for a debtor whose principal place of business is located on the territory that State. In the case of companies and legal persons, the principal place of business is assumed to be in their registered office defined in the Statute, unless it is proven otherwise. If the debtor's principal place of business is on the territory of a Member State, the courts of another Member State are entitled to open bankruptcy proceedings, only if the debtor has a branch on the territory of that State. The effects of such proceedings are limited to the value of the debtor's assets located on the territory of the latter Member State (Article 3 of Regulation 2015/848). The domestic law of the State that initiates the main proceedings is the one that determines the conditions for opening the bankruptcy proceedings and the manner they are conducted and terminated. Above all, it is the EU regulations that stipulate that in the case of foreign entities whose principal place of business is outside Poland but which has a branch in Poland, de-

termination that there are indications of insolvency, which justify applying for bankruptcy, may be based on the domestic law which holds jurisdiction. In other words, the Polish bankruptcy regulations may only be applied to a branch of a company that falls under the Polish jurisdiction as regards opening and conducting the main bankruptcy proceedings. However, such a solution cannot be applied to foreign legal persons that do not have branches in Poland because they are subject to neither the Polish regulations nor the jurisdiction of the domestic tax authorities and Administrative Courts.

To recapitulate, it should be pointed out that the judgement of the SAC of 19 January 2024, case No. III FSK 580/23, is a summary of the new altered line of case law, which indicates the necessity to refer not only to tax regulations, but, above all, to non-tax regulations establishing the status of legal entities (and foreign companies), when interpreting the rules and principles governing liability described in Article 116a(1) of the TO. In analysis of the issue in question, European Union regulations have been referred to so extensively for the first time; they have been given appropriate priority and it was stressed that when evaluating the rules and principles of the bankruptcy law in relation to the purposes of the institutions based on tax law, it is necessary to apply rules contained not only in the domestic law but also in the European Union law.

Conclusions concerning *de Lege Lata* and *de Lege Ferenda*

Ultimately, the issues presented in this article have been resolved and, in consequence, members of the boards of foreign companies cannot be held liable under Article 116a of the TO. However, the origin and purpose of these regulations were completely different. Nevertheless, the tax authorities and, until recently, the Supreme Administrative Court as well have still seemed not to grasp this idea fully, whereas the Regional Administrative Courts and the broadly understood practice, especially in the international aspect, have perceived the matter in a completely different fashion. It is a truism to state that the line of case law was altered while the currently applicable Article 116a of the TO remained unchanged. There is no doubt, *de lege lata*, that the members of the management board of a foreign company are not subject to lability – covered by the scope of Article 116a of the TO – for the obligations of these companies under the Polish regulations.

De lege ferenda, if the applicability of the institution provided for in Article 116a of the TO were to be extended, which was probably the genesis of its introduction to the Polish tax system, it may only take place in the normative mode through intervention of the legislator who must carry out a legislative procedure, if they wish for this Article to cover the above-mentioned persons. Especially that the institution provided for in Article 116a of the TO and, above all, in Article 116 of the TO requires amendment;[21] such a need partially arises from the judgements of the Court of Justice of the European Union of 27 February 2025 in case C-277/24 (Adjak) and of 30 April 2025 in case C-278/24 (Genzyński) (Olesiak, Pajor, 2025, p. 42). The considerations presented above are important due to the fact that regulations concerning liability of management board members for the tax arrears of 'other legal persons,' including, above all, the foreign ones, have still not been comprehensively discussed in the doctrine of tax law (Dowgier, 2023, p. 1129). Moreover, the methods indirectly applied by the legislator seem to be a temporary solution that does not solve actual, practical problems in the long run, and certainly cannot be seen as an element of legal stability and certainty both of the tax law and the insolvency solutions

[21] General Interpretation of the Minister of Finance and Economy of 29 August 2025 No. DTS2.8012.5.2025 on the Application of Article 116 of the Act on Tax Ordinance in conjunction with the judgements of the Court of Justice of the European Union of 27 February 2025 in case C-277/24 (Adjak) and of 30 April 2025 in case C-278/24 (Genzyński), Official Journal of the Minister of Finance of 29 August 2025, item 10/2025.

affecting application of the tax law. If the legislator possibly decided to strive for amending Article 116a of the Tax Ordinance, we would suggest that they, first and foremost, took into account the values underlying an orderly and stable tax system as well as the constitutionally protected merits and rely on the latest line of the SAC's case law in a way that violates no standards of legal protection of the taxpayer, instead of being guided primarily by the pursuit of securing public finances. It is obvious that the scope *ratione personae* of third-party liability for the tax arrears of legal persons (and the so called 'other legal persons'), and consequently, the limits of such liability, will ultimately be determined by the trends followed in the tax policy as well as by the economic rationale and – to a greater or lesser extent – by social influences (Gomułowicz, 2013, p. 12).

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