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A gloss to the Supreme Court Judgment of 5 March 2019, IV KK 484/17

Abstract: This gloss discusses the issue of the prosecutor's supervision over preparatory proceedings carried out by a financial authority of preparatory proceedings and the procedural consequences of the prosecutor undertaking supervision of such proceedings.

The author is of the opinion that a procedural act performed by the prosecutor consisting in extending the period of enquiry carried out by the financial authority of preparatory proceedings for more than 6 months, does not constitute a decision which is accidental in nature and may not be deemed to be a technical act. Such an act is supervisory in nature.

Consequently, if it is assumed that the prosecutor's decision on the extension under Article 153 § 1 sentence 3 of the Penal and Fiscal Code for the period of more than 6 months of the enquiry concerning a fiscal offence, conducted by a financial authority of preparatory proceedings, means that the said prosecutor undertakes supervision over the said enquiry, then Article 155 § 1 and 2 of the Penal and Fiscal Code must be applied for the purpose of preparing and filing an indictment with the court.

In accordance with the law applicable as of 1 July 2015, the financial authority of preparatory proceedings which conducted the investigation as well as the enquiry under the prosecutor's supervision must prepare an indictment taking into consideration its formal requirements as set out in Article 119 of the Code of Criminal Procedure, Article 332 of the Code of Criminal Procedure, Article 333 of the Code of Criminal Procedure in connection with Article 113 § 1 of the Penal and Fiscal Code, and it must subsequently transfer it to the prosecutor, who approves it and files it with the court.

The act of filing an indictment with the court by the Customs Office, where the enquiry was under the prosecutor's supervision, and where such indictment was filed without the prosecutor's approval, must be deemed to have been undertaken by an unauthorized body, which constitutes a negative procedural premise which is the absence of indictment by an authorised prosecuting organ (Article 17 § 1 point 9 of the Code of Criminal Procedure).

Keywords: THE PROSECUTOR'S SUPERVISION OF PREPARATORY PROCEEDINGS, CARRIED OUT BY FINANCIAL AUTHORITIES OF PREPARATORY PROCEEDINGS; FORMAL DEFECTS OF AN INDICTMENT; ABSENCE OF COMPLAINT BY AN AUTHORIZED PROSECUTING ORGAN

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The Supreme Court Judgment of 5 March 2019, IV KK 484/17¹

The occurrence of a defect in the proceedings in the form of a submission of an indictment by the Customs Office in a situation where the investigation was under the prosecutor's supervision must result, in accordance with Article 439 § 1 point 9 of the Code of Criminal Procedure, in setting aside of the judgment of the court of the first instance and discontinuation of the proceedings in the scope based on the defective complaint. It is not possible to treat such a defect in the proceedings as a formal defect of an indictment as it does not refer to a situation where the act is performed by an authorized organ and the defect concerns only the signature of the person, but rather a situation where the act of filing an indictment with the court, and hence the act of initiating the conduct of criminal proceedings in general, is undertaken by an unauthorized organ.

The submission of an indictment by the Customs Office in the situation where the investigation was under the prosecutor's supervision, constitutes a negative procedural premise in the absence of a complaint by an authorized prosecuting organ (Article 17 § 1 point 9 of the Code of Criminal Procedure).

The gloss to the judgement

The glossed judgment was formulated against the background of the following facts:

In the course of preparatory proceedings conducted by a financial authority – the Customs Office in K., in the form of an enquiry in the matter concerning a fiscal offense, i.e. an act under Article 107 § 1 of the Penal and Fiscal Code. On 5 May 2016, the deputy District Prosecutor in T. issued a decision to extend the enquiry for a period exceeding six months.

The financial authority of the preparatory proceedings – the Customs Office in K., drew up and on 30 June 2016 filed an indictment against KK with the District Court in T., claiming that in the period from 1 October 2015 to 3 November 2015 on the premises referred to as “J.”, located in P. at the address: ul. O. [...], acting as the president of the management board of “U.” Sp. z o.o. (limited liability company) with its registered office in B. at the address: ul. P. [...], said KK organized gambling on four slot machines, for commercial purposes, contrary to the provisions of the Act of 19 November 2009 on gambling, without the required permit and without registering the slot machines with a competent head of the customs of-

¹ The judgment was published in: LEX 2019 – Internet System of Legal Information, no. 2629809.

fice, without a concession, outside the casino, i.e. an act under Article 107 § 1 of the Penal and Fiscal Code.

The District Court in T., by way of judgment of 18 October 2016, case number VI K [...], found K.K. guilty of the act he was charged with and under Article 107 § 1 of the Penal and Fiscal Code imposed a fine on him at the amount of 120 daily units of the fine, setting the unit at PLN 100, and pursuant to Article 32 § 1 and 2 of the Penal and Fiscal Code imposed a punitive measure against him in the form of enforcement of the monetary equivalent of the forfeited items, i.e. four slot machines, for the benefit of the Treasury, deciding it to be the amount of PLN 20,000, and it awarded against him the costs of the trial.

The defence counsels of the accused K.K. appealed against this judgment. The Regional Court in G. having heard the appeal on 6 June 2017 in K.K.'s case, as a result of the appeal, filed by the defence counsels of the accused, upheld the judgment of the District Court in T. issued on 18 October 2016, case number act VI Ka [...].

The abovementioned judgment of the Regional Court in G. was appealed against with a cassation appeal filed by the defence counsels of K.K. One of the defence counsels of the convicted K.K. – advocate P.H., in his cassation appeal, accused *ad quem* the court of contempt of the rules of procedure, namely violating Article 439 § 1 point 9 of the Code of Criminal Procedure in connection with Article 17 § 1 point 9 of the Code of Criminal Procedure, which involves a failure to set aside the first-instance judgment and to discontinue the proceedings, despite the absence of a complaint by an authorized organ, who in accordance with Article 155 § 2 of the Penal and Fiscal Code was the prosecutor to the exclusion of other persons, because the indictment was brought by the Customs Office in K. after 1 July 2015, i.e. on the date of entry into force of the Act of 27 September 2013 amending the Act on Code of Criminal Procedure and some other acts,² and the investigation was extended and thereby under the supervision of the prosecutor – by the decision of the prosecutor of 5 May 2016. By submitting the above charge, the defence counsel for the convicted K.K. filed for the judgment under appeal to be set aside, together with the first-instance judgment, and to discontinue the proceedings.

The prosecutor of the District Prosecutor's Office in T., in a written response to the cassation of the convict's defence counsels, applied to the court to find them manifestly unfounded and to have them dismissed. In turn, the Prosecutor of the National Prosecutor's Office, present at the cassation hearing on 5 March 2019, filed for the grant of the cassation submitted by the advocate P.H. representing the convicted K.K.

² *Journal of Laws 2013*, item 1247.

The Supreme Court, after examining at the hearing on 5 March 2019 the cassation brought by the defence counsels of the convicted K.K. against the judgment of the District Court in G. of 6 June 2017, set aside the judgment under appeal which upheld the judgment of the District Court in T. of 18 October 2016 and pursuant to Article 17 § 1 point 9 of the Code of Criminal Procedure in connection with Article 113 § 1 of the Penal and Fiscal Code discontinued the criminal proceedings against K.K., and ordered the State Treasury to pay the costs of the trial and formulated the view, whose content constitutes the thesis of the glossed ruling.

The first issue that arises against the background of the presented facts consists in determining the legal nature of the prosecutor's procedural act, which is the extension of the duration of the proceedings over the period of 6 months in the fiscal criminal enquiry to the financial authority acting under the supervision of the superior financial authority. The legal nature of the prosecutor's decision in this respect influences the prosecutor's powers to take over or not the supervision of the enquiry carried out by such financial authority, and, as a consequence, determines the competence of the authorised body to file an indictment.

The opinion of the Supreme Court expressed in the judgment of 5 March 2019, IV KK 484/17 is not novel. On 28 January 2016, the Supreme Court passed a resolution, sitting in the panel of seven judges, aiming at clarifying the discrepancies in interpretation present in the rulings of the district courts, where such discrepancies arise in respect of interpretation of Article 153 § 1 sentence 3 of the Penal and Fiscal Code, *in concreto* whether the cited provision regulates the situation in which the prosecutor plays an active role as the supervisor of an enquiry in a fiscal criminal case.³ In view of the fact that the above issue has once again been the subject of the Supreme Court's ruling, it must be noted that it still raises doubts in judicial practice. It, therefore, requires an in-depth analysis.

At this point, it should be noted that by Article 15 point 19 of the Act of 27 September 2013 amending the Act – Code of Criminal Procedure and certain other acts, Article 153 § 1 of the Penal and Fiscal Code now reads as follows: "Preparatory proceedings in the case of a tax offense should be completed within 3 months. If the proceedings are not completed within this period, the superior authority over the financial body in the preparatory proceedings, and when the proceedings are conducted or supervised by the prosecutor – then the immediate superior prosecutor, may extend the proceedings for a period of up to 6 months. In particularly justified cases, the competent superior prosecutor may extend the period of the proceedings for a further fixed period, but when it is conducted in the form

³ See: I KZP 13/15, OSNKW 2016, no. 3, item 17.

of an investigation, the extension for a period exceeding one year is made by the prosecutor superior over the prosecutor supervising or conducting the proceedings.”⁴

In matters concerning fiscal offenses, unlike under the Code of Criminal Procedure,⁵ preparatory proceedings, conducted both in the form of an investigation or enquiry, should be completed within 3 months (arg. ex Article 153 § 1 of the Penal and Fiscal Code). If it is not completed within this period, according to Article 153 § 1 sentence 2 of the Penal and Fiscal Code, in the wording applicable until 28 February 2017, it is possible to extend the preparatory proceedings for a period of up to 6 months if the proceedings are conducted independently by the financial authority of the preparatory proceedings – by its superior body, and if the proceedings are conducted or supervised by the prosecutor – by the prosecutor’s superior. The legislator, in Article 153 § 1 sentence 3 of the Penal and Fiscal Code, in the wording applicable until 28 February 2017, vested the competent organs with the right to further extend the duration of the preparatory proceedings for a period of more than 6 months, but only in “exceptionally justified cases”. “Exceptionally justified cases” which enable the extension of the preparatory proceedings for a period of over 6 months, may be justified by, for example, the scope of the case, its complexity, analysis of the collected evidence, the need for further evidentiary measures, i.e. all the situations where the reasons for not completing the proceedings occur irrespective of the body processing the case, as it was unable to remove these obstacles within the stipulated 6 months.⁶

The competence of a competent organ depends on two factors – namely, whether the preparatory proceedings are carried out in the form of an in-

⁴ The cited provision was in force from 1 July 2015 to 28 February 2017. In the wording set out by Article 48 point 12 of the Act of 16 November 2016 - Provisions introducing the Act on the National Tax Administration (*Journal of Laws of 2016*, item 1948), which entered into force on 1 March 2017, the provision of Article 153 § 1 of the Penal and Fiscal Code stipulates that: “Preparatory proceedings in a tax offense case should be completed within 3 months. If the proceedings are not completed within this period, the superior authority over the financial body of the preparatory proceedings, and when the proceedings are conducted or supervised by the prosecutor – the immediate superior prosecutor, may extend them for a period of up to 1 year. In particularly justified cases, the superior body over the financial body of preparatory proceedings, and when the proceedings are conducted or supervised by the prosecutor – the immediate superior prosecutor, may extend the period of the proceedings for a further determined period, but when the proceedings are conducted in the form of an investigation, the extension for a period exceeding one year is made by the superior prosecutor of the prosecutor supervising or conducting the proceedings.”

⁵ The Act of 6 June 1997 - Code of Criminal Procedure (*Journal of Laws of 2018*, item 1987, as amended). In common criminal procedure, an investigation should, in principle, be completed within 3 months (Article 310 § 1 of the Code of Criminal Procedure), and an investigation, in principle, should not last longer than 2 months (Article 325i § 1 of the Code of Criminal Procedure).

⁶ See: T. Razowski, in: P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy. Komentarz* [The Penal and Fiscal Code. Commentary], Warszawa 2017, p. 1322.

investigation or enquiry, and whether the extension of the proceedings is to take place for a period of up to 1 year or exceeding 1 year.⁷ If a need arises to extend the duration of the enquiry for a period of more than 6 months, as well as extend the duration of the investigation beyond this period, if it does not exceed 1 year, the right in this respect is vested in the prosecutor directly supervising the prosecutor conducting or supervising the preparatory proceedings. If it is necessary to extend the duration of the investigation for a period exceeding 1 year – the decision-maker, in the light of the aforementioned provision, is the prosecutor superior over the prosecutor conducting or supervising the enquiry.

Hence, the question arises whether the decision of the competent prosecutor regarding the existence of statutory premises for the extension of the enquiry, conducted by the financial authority of the preparatory proceedings, pursuant to Article 153 § 1 sentence 3 of the Penal and Fiscal Code, for a period exceeding 6 months in a matter concerning a fiscal offense, happens as part of the prosecutor's supervision over preparatory proceedings, or does it happen outside such supervision?

The prosecutor's supervision over preparatory proceedings is one of the manifestations of his performance of the task to prosecute crimes and uphold the rule of law (Article 2 of the Act of 28 January 2016 – Law on the Prosecutor's Office⁸).⁹ The above-mentioned duty is performed by the Prosecutor General, the National Prosecutor and other deputies of the Prosecutor General and the prosecutors reporting to them, *inter alia*, by conducting or supervising preparatory proceedings conducted by other authorities in criminal matters, including criminal and fiscal matters (*arg. ex* Article 3 § 1 point 1 of the indicated Act). As it has been rightly stated in the doctrine, "this supervision consists in influencing supervised bodies in such a way that in preparatory proceedings their statutory objectives are achieved, which entails correcting and removing irregularities in the activities of the bodies conducting preparatory proceedings, based on the information obtained in the manner prescribed by law from these authorities, allowing for an assessment of correctness and efficiency of such proceedings."¹⁰

The Fiscal Penal Code, in Article 122 § 1 vests financial authorities of preparatory proceedings and their supervisory authorities with the prosecutor's powers by way of enumeration, and by indicating the provisions of the Code of Criminal Procedure. In Article 122 § 2 of the Penal and Fiscal

⁷ See: J. Zagrodnik, in: L. Wilk, J. Zagrodnik, *Kodeks karny skarbowy. Komentarz* [The Penal and Fiscal Code. Commentary], Warszawa 2016, p. 926-927.

⁸ That is, of 23 April 2019, *Journal of Laws 2019*, item 740 as amended.

⁹ Agree: R.A. Stefański, *Metodyka pracy prokuratora w sprawach karnych* [Methodology of prosecutor's work in penal cases], Warszawa 2017, p. 292.

¹⁰ *Ibidem*, p. 293 and the cited standpoint in the doctrine.

Code, the legislator, however, stipulates that whenever a financial authority of preparatory proceedings conducts preparatory proceedings, certain procedural acts may be carried out only by the prosecutor, at his discretion or at the request of the authority conducting such preparatory proceedings (e.g. granting permission for communication between the accused, the detained person with their defence counsel; issuing an order on conducting an environmental interview at the preparatory stage; issuing a decision on requesting the release of the thing and searching the premises).¹¹

The investigation conducted by the financial authority of preparatory proceedings is supervised by the prosecutor as it directly results from Article 151c § 1 of the Penal and Fiscal Code. In principle, the personal performance of procedural acts listed in Article 122 § 2 *in principio* of the Penal and Fiscal Code, by the prosecutor, in the course of the investigation conducted by financial authorities of preparatory proceedings, under the supervision of their superior bodies, does not constitute a manifestation of supervision carried out *ex lege* by the prosecutor over the preparatory proceedings. Therefore, this supervision is still carried out by the superior authority over the authority conducting the criminal fiscal investigation, and the prosecutor interferes only whenever he perceives a need to do so, owing to, e.g. the importance or complexity of the case, the possibility of taking over the case for conducting under its supervision (Article 122 § 3 of the Penal and Fiscal Code and Article 151c § 2 sentence 1 *in fine* of the Penal and Fiscal Code).¹² Therefore, the prosecutor may at its discretion take over supervision of the enquiry, thus excluding the supervisory powers of the body superior over the financial authority of preparatory proceedings, because supervision over this type of preparatory proceedings may be exercised either by the authority superior to the financial authority of preparatory proceedings or by the prosecutor.

An exception to the above rule is the situation where the prosecutor appoints expert psychiatrists, as well as when the court has ordered a temporary detention of the suspect – then *ex lege* the prosecutor subjects the preparatory proceedings to his supervision, conducted in the form of an enquiry (*arg. ex* Article 122 § 2 sentence 2 of the Penal and Fiscal Code). Additionally, supervision by operation of law causes, in the course of an investigation conducted by financial authorities, circumstances that give rise to an obligatory defence, as set out in Article 79 § 1 of the Code of Criminal Procedure (Article 151c § 2 *in principio* of the Penal and Fiscal Code). In all other cases, the supervision of an enquiry carried out by the finan-

¹¹ Agree: T. Razowski, in: P. Kardas, G. Łabuda, T. Razowski, Kodeks karny skarbowy [The Penal and Fiscal Code], p. 1126.

¹² See: the rationale of the resolution of the Supreme Court sitting in the panel of 7 judges, of 28 January 2016 I KZP 13/15.

cial authority of preparatory proceedings is exercised by an authority superior to it (Article 151c § 3 of the Penal and Fiscal Code).

In consideration of the foregoing, and thereby referring to the previously asked question, it should be considered whether the indicated situations in which the prosecutor takes over supervision of an enquiry conducted by financial authorities of preparatory proceedings are the only ones in which this supervision materializes. The analysis should encompass the procedural act set out in Article 153 § 1 sentence 3 of the Penal and Fiscal Code, which involves the extension of the time for a period exceeding 6 months for such a procedural act by the prosecutor to the financial authorities conducting the fiscal criminal enquiry.

It should be noted here that the subject of supervision is the procedural activity carried out by a 'non-prosecutor' body conducting preparatory proceedings, as well as their outcomes in terms of, not only, their compliance with the provisions of law or their legitimacy, but also the efficiency of the entire proceedings.¹³ Pursuant to Article 326 § 2 of the Code of Criminal Procedure, which pursuant to Article 113 § 1 of the Penal and Fiscal Code applies accordingly to criminal fiscal matters, the prosecutor is obliged to supervise the proper and efficient conduct of the whole supervised by himself proceedings. This, in turn, means that the prosecutor, as part of his supervision over the proceedings, is also obliged, in addition to the control as to the merits over the preparatory stage, to exercise control over the completion of the proceedings within a reasonable time.

In the decision of the Court of Appeal in Katowice of 27 November 2013, in case II AKz 717/13,¹⁴ it was argued that "the prosecutor's decision to extend the enquiry should be deemed a fundamental act of supervision, since the refusal to extend the enquiry would end the stage of preparatory proceedings, whereas the decision to extend such proceedings has an impact on the efficiency of such proceedings, determines its length and, consequently, the right to hear the case without any undue delay. The speed of proceedings and concentration of procedural acts constitute an important factor in preparatory proceedings, and any irregularities in this respect may consequently lead to the annihilation of the objectives of the criminal proceedings set out in Article 2 of the Code of Criminal Procedure, and thus such shaping of the proceedings that the decision is issued within a reasonable time."

When taking a decision to extend the duration of an enquiry for a period exceeding 6 months, the prosecutor, at the request of the financial au-

¹³ See: R.A. Stefański, *Metodyka pracy prokuratora w sprawach karnych* [Methodology of prosecutor's work in penal cases], p. 294-295.

¹⁴ LEX no. 1488978.

thority conducting preparatory proceedings, not only obtains information about the enquiry concerning a fiscal offence matter pending before such financial authority, but is obliged before taking said decision to check the course of the proceedings so far, as well as its outcomes and the existence of any statutory premises referred to in Article 153 §1 sentence 3 of the Penal and Fiscal Code. He must, therefore, consider whether, in a given case, the “particularly justified case” allowing further extension of the duration of the enquiry has materialized so as to enable its extension.. For that reason, the prosecutor must acquaint himself with all the evidence collected so far, and must assess the investigative measures undertaken by the financial authority of preparatory proceedings and the legitimacy of the actions to be undertaken by that financial authority at the later stages of preparatory proceedings. It must be borne in mind that the prosecutor in this scope may either issue a decision to extend the duration of preparatory proceedings by more than six months for a further specified period, or refuse the financial authority’s request to extend the proceedings. The prosecutor’s decision, following an analysis of the evidence collected during the investigation, determines the continuation of the preparatory proceedings, because if the prosecutor refused to extend the proceedings at their preparatory stage, the financial authority conducting preparatory proceedings would lose its legitimacy to continue the said proceedings, which consequently would lead to their termination.¹⁵

The aforementioned observations lead to the conclusion that the prosecutor’s procedural act which consists in further extending the enquiry carried out by a financial authority of preparatory proceedings for a period exceeding 6 months fails to be accidental in nature and may not be deemed a technical act, similar to the acts indicated in Article 122 § 2 sentence 1 of the Penal and Fiscal Code. This act is supervisory in its nature. The supervision occurs by operation of law upon the issuance of a positive decision by the prosecutor allowing the extension of the period of an enquiry in the fiscal and penal matter (Article 153 § 1 sentence 3 of the Penal and Fiscal Code) and it obliges the prosecutor to exercise his rights arising under Article 298 § 1 and Article 326 of the Code of Criminal Procedure in connection with Article 113 § 1 of the Penal and Fiscal Code.¹⁶

¹⁵ See: the rationale of the resolution of the Supreme Court sitting in the panel of 7 judges, of 28 January 2016 I KZP 13/15.

¹⁶ See: the rationale of the resolution of the Supreme Court sitting in the panel of 7 judges, of 28 January 2016, I KZP 13/15. Similar: decision of the Supreme Court of 17 January 2018, V KK 144/17, LEX no. 2428822; the Appeals Court decision in Warsaw of 9 March 2018, II AKa 385/17, LEX no. 2472465. Different: J. Zagrodnik, *Glosa do uchwały składu 7 sędziów Sądu Najwyższego - Izba Karna z dnia 28 stycznia 2016 r., I KZP 13/15*, OSP 2017 [A gloss to the resolution of the Supreme Court panel of 7 judges – Criminal Law Division of 28 January 2016], notebook 7/8, p. 254-266.

Consequently, if it is assumed that the prosecutor's decision on the extension under Article 153 § 1 sentence 3 of the Penal and Fiscal Code for the period of more than 6 months of the enquiry concerning a fiscal offence, conducted by a financial authority of preparatory proceedings, means that the said prosecutor undertakes supervision over the said enquiry, then based on the facts presented above and subject to the Supreme Court's adjudication, Article 155 § 1 and 2 of the Penal and Fiscal Code must be applied for the purpose of preparing and filing an indictment with the court.

According to the cited article, in the matter where a financial authority of preparatory proceedings conducted an investigation, and in the matter concerning a fiscal offence in which the said authority conducted an enquiry under the prosecutor's supervision, the said financial authority, if it decides not to discontinue the proceedings, is obliged to prepare an indictment within 14 days from the completion of such an enquiry or investigation and to submit the indictment together with the case file to the prosecutor, with an indication which evidence was presented to the parties during the activities set out under Article 154a of the Penal and Fiscal Code, as transferred to the court together with an indictment, by simultaneously transferring to the prosecutor also possible conclusions, as set out in § 7, as well as things as evidence. The indictment confirms the contents of the indictment and is filed with the court by the prosecutor, who is the only competent organ to do so (*arg. ex* Article 155 § 2 sentence 1 of the Penal and Fiscal Code).

Therefore, in accordance with the law applicable as of 1 July 2015, the financial authority of preparatory proceedings which conducted the investigation as well as the enquiry under the prosecutor's supervision must prepare an indictment taking into consideration its formal requirements as set out in Article 119 of the Code of Criminal Procedure, Article 332 of the Code of Criminal Procedure, Article 333 of the Code of Criminal Procedure in connection with Article 113 § 1 of the Penal and Fiscal Code,¹⁷ and subsequently transfers it to the prosecutor, who approves it and files it with the court. It is evident that the prosecutor's decision to approve the indictment prepared by the financial authority of preparatory proceedings is wholly autonomous. The prosecutor may refuse to approve the indictment prepared by the financial authority of preparatory proceedings and instruct the said authority to prepare instead an application to conditionally discontinue the proceedings in the matter concerning a fiscal offence or he may instruct the authority to perform an act of investigation or enquiry, or he may even instruct the authority to discontinue the proceedings.¹⁸

¹⁷ Compare: Article 337 § 1 of the Code of Criminal Procedure.

¹⁸ See: T. Razowski, in: P. Kardas, G. Łabuda, T. Razowski, *Kodeks karny skarbowy* [The Penal and Fiscal Code], p. 1334.

However, if the prosecutor decides to approve the indictment, then it becomes its 'author' and bears all the consequences connected therewith.¹⁹ Only in matters outside the scope of the prosecutor's supervision, where the financial authority of preparatory proceedings conducted an enquiry, does the prosecutor merely draw up an indictment within 14 days from its completion and files it with a competent court and approves it before that court (Article 155 § 4 of the Penal and Fiscal Code).

Therefore, in the situation when the prosecutor in a fiscal penal matter, conducted by way of an enquiry by a financial authority of preparatory proceedings which was under the prosecutor's supervision, refuses to approve the indictment and fails to file it with the court, and the financial authority of preparatory proceedings files the indictment independently, without the prosecutor's approval, then the complaint initiating court proceedings is filed by an unauthorized body. This type of defect may not be deemed as a formal defect of an indictment, because as mentioned before, the formal requirements of an indictment are set out by the legislator in Article 119 of the Code of Criminal Procedure, Article 332 of the Code of Criminal Procedure and Article 333 of the Code of Criminal Procedure, whereas in respect of the general norm pursuant to Article 113 § 1 of the Penal and Fiscal Code they are applicable also in criminal fiscal proceedings. The prosecutor's failure to approve an indictment does not constitute a formal defect of an indictment and therefore it is not subject to the formal scrutiny under Article 337 § 1 of the Code of Criminal Procedure in connection with Article 113 § 1 of the Penal and Fiscal Code.

To sum up the above considerations, the Supreme Court correctly noted, based on the facts of the case at issue, that the act of filing an indictment by the Customs Office in K., where the enquiry was under the prosecutor's supervision, and where such an indictment was filed without the prosecutor's approval, an act that initiated in general criminal court proceedings – was undertaken by an unauthorized body, which constitutes a negative procedural premise which is the absence of an indictment by an authorised prosecuting organ (Article 17 § 1 point 9 of the Code of Criminal Procedure). Consequently, the Regional Court in G. was under an obligation to apply the norm from Article 439 § 1 point 9 of the Code of Criminal Procedure in connection with Article 17 § 9 of the Code of Criminal Procedure and set aside the appealed judgment issued in the first instance and discontinue the proceedings. As the appeals court failed to do this, the Supreme Court, granting the cassation, had to issue the relevant adjudication.

In consideration of the foregoing, the standpoint expressed by the highest judicial instance in the glossed judgment deserves approval.

¹⁹ Ibidem.

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GŁOSA DO WYROKU SĄDU NAJWYŻSZEGO Z DNIA 5 MARCA 2019 R., IV KK 484/17

Streszczenie: W glosie przedstawiono problematykę nadzoru prokuratora nad postępowaniem przygotowawczym, prowadzonym przez finansowy organ postępowania przygotowawczego, a także omówiono skutki procesowe objęcia przez prokuratora nadzoru nad takim postępowaniem.

Autor wyraża zapatrywanie, iż czynność procesowa prokuratora, wyrażająca się w dalszym przedłużeniu dochodzenia, prowadzonego przez finansowy organ postępowania przygotowawczego, na okres ponad 6 miesięcy, nie jest decyzją o charakterze wпадkowym i nie można jej uznać za czynność techniczną. Czynność ta ma charakter czynności nadzorczej. Konsekwencją przyjęcia, że przedłużenie przez prokuratora, na podstawie art. 153 § 1 zd. 3 k.k.s., na okres ponad 6 miesięcy, dochodzenia w sprawie o przestępstwo skarbowe, prowadzonego przez finansowy organ postępowania przygotowawczego, oznacza objęcie przez prokuratora nadzorem tego dochodzenia, jest zastosowanie przepisu art. 155 § 1 i 2 k.k.s. dla sporządzenia i wniesienia aktu oskarżenia do sądu. W stanie prawnym, obowiązującym od dnia 1 lipca 2015 r., finansowy organ postępowania przygotowawczego, który prowadził śledztwo, a także dochodzenie objęte nadzorem prokuratora sporządza akt oskarżenia, z uwzględnieniem przy tym jego warunków formalnych, określonych w treści art. 119 k.p.k., art. 332 k.p.k., art. 333 k.p.k. w zw. z art. 113 § 1 k.k.s., a następnie przekazuje prokuratorowi, który zatwierdza akt oskarżenia i wnosi go do sądu.

Wniesienie aktu oskarżenia do sądu przez Urząd Celný, w sytuacji gdy dochodzenie było objęte nadzorem prokuratorskim, bez jego zatwierdzenia przez prokuratora, należy uznać za dokonaną przez organ nieuprawnioną, co stanowi negatywną przesłankę procesową w postaci braku skargi uprawnionego oskarżyciela (art. 17 § 1 pkt 9 k.p.k.).

Słowa kluczowe: NADZÓR PROKURATORA NAD POSTĘPOWANIEM PRZYGOTOWAWCZYM, BRAKI FORMALNE AKTU OSKARŻENIA, BRAK SKARGI UPRAWNIONEGO OSKARŻYCIELA