

**Summary: Judgment of the Supreme Administrative Court of 8 February 2018, II FSK 342/17**

**Taxation – rules of taxing overpayments resulting from a conflict between national law and EU law – principle of effectiveness and equivalence**

In the subject case a Dutch investment fund (applicant) demanded a return of interest on the overpayment that resulted from being charged income tax in the years 2007-2009 under the Polish tax legislation that discriminated e.g. foreign retirement pension institutions (exemption from income tax for foreign retirement pension funds was introduced on 1 January 2011 in the wake of the recommendations of the European Commission). The applicant argued that in the light of the lack of detailed national provisions regulating that issue it must be recognised that the day as of which the interest on that overpayment must be calculated is the day it was incurred, i.e. the day the tax was charged by the remitters.

The tax authorities, including the first instance administrative court, adopted that as the change in the law did not take place as a result of the CJEU's ruling, but was a result of complying with an opinion of the European Commission, the date on which the fund gained the right to interest was the date of filing the request to establish that an overpayment exists, along with the corrected report (declaration).

The Supreme Administrative Court emphasized that from the analysis of the CJEU's rulings on the standard of interest of overpayments it follows that the duty to charge interest on the taxes charged contrary to the EU legislation, as a rule, applies to the period between the day they were charged and the return date, and normally, it may not be restricted to the period between the day falling after the day the request for returning the tax was filed, subject to the reservation that its purpose is to provide the tax payer the compensation for the losses caused by the unavailability of the amount unduly paid and subject to the adherence to the principle of equivalence and effectiveness. Therefore, the national provisions may not deprive the tax payer of that compensation and may not be less favourable than those applied in the cases based on the violations of the national law (prohibition of discriminatory treatment); however, this does not mean a duty to cover such overpayments with the most favourable system provided for in the national legislation; this also does not remove the duty imposed on the tax payer to use the legal measures available to him at the relevant time in order to retain and implement the right they hold. Taking into consideration the necessity to follow the principle of effectiveness and equivalence, the Supreme Administrative Court stated that the provisions regulating the rules of establishing, returning, and imposing interest on overpayments resulting from the CJEU's rulings must be applied to the overpayment of tax resulting from a conflict between the national law and the EU law that was not confirmed in a CJEU judgement but is obvious and confirmed in a revision of national law that was intended to remove it, as the said procedure governs the most similar case. In the light of these provisions, the starting date of the interest charged for that overpayment is the date on which the tax was charged, but the end date – either the date on which the overpayment is returned, if the request to return it was filed before the time limit, or within 30 days of the day the conflict of the national law and the EU law was removed (i.e. from the day the revision of the act of law entered into force that removed that conflict), or 30th day after the revision entered into force – if the request to return the overpayment was submitted after the lapse of 30 days of the day the revision entered into force. According to the Supreme Administrative Court, such a form of interest on the overpayments resulting from the conflict of the national law and the EU law corresponds to the standard outlined in the CJEU case law. The above ensures an equivalent to the tax payer for being unjustly deprived of the ability to dispose of the money by being granted a relevant interest on such funds, but only for the period during which the tax payer was unable to effectively demand their return.