

Firmancy and its tax consequences in Polish law

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Annotation

Tax fraud is one of the most dangerous violations of tax law. Their most common cause is the taxpayer's desire to conceal the source or amount of money received. The use of another person's name, surname or business name in a business activity, with that person's knowledge and consent, in order to hide or conceal the true scope of the activity in question, is known as firmancy. It is illegal and qualified as tax fraud. It is most often carried out in order to defraud a VAT refund or reduce the fiscal burden. Persons committing firmancy are subject to fiscal and tax criminal liability. In the practice of the tax authorities, it is not easy to collect evidence confirming the firmancy. Helpful in combating the practice is the implementation into Polish law of the EU Directive DAC7. The directive imposed an obligation on digital platform operators from EU countries to report to the tax authorities data on sales transactions of goods and certain services made through their Internet.

Keywords

Tax fraud, tax firmancy, tax control, fraud in internet trading

Definition of firmancy

Tax fraud is one of the most dangerous tax law infringements. Their most common cause is the taxpayer's desire to conceal the source or amount of money received. The use of another person's name, surname or business name in business activities, with that person's knowledge and consent, in order to conceal or disguise the true extent of the activity in question, is known as firmancy¹. Thus defined, it is against the law and is classified as tax fraud. It is most often carried out with the aim of obtaining a VAT refund or reducing the tax burden. Persons who engage in firmancy are liable for tax and fiscal penalties.

Scale of the phenomenon

In the EU, overall tax losses (direct and indirect) due to all fiscal fraud are estimated to have reached €200-250 billion per year in 2008, representing 2- 2.25% of EU GDP². In 2017, the VAT gap in EU Member States was equivalent to €137 billion. More than 40% of this amount was due to cross-border VAT fraud³. A lot of VAT fraud is related to the phenomenon of 'firmancy', the setting up of companies in the name of persons who are substituted, who do not correctly account for the VAT due and who do not have any enforceable assets.

The European Public Prosecutor's Office (EPPO) in 2022 focused on fraud affecting public revenue, in particular cross-border VAT fraud. The EPPO conducted 1117 investigations with a total estimated

¹ The term firmancy is used to define this problem. Polish literature describing the phenomenon of firmancy precisely in the sense as quoted. The concept of firmancy is defined in the article 113 of Tax Ordinance (Polish Statute Book of 2005, no. 8, item 60, as amended).

² European Parliament resolution of 2 September 2008 *on a coordinated strategy to improve the fight against fiscal fraud*, 2008/2033 (INI)

³ Polish Economic Institute, *Tax unfairness in the European Union*, Warsaw 2020

damage value of €14.1 billion, of which almost half (47%) resulted from VAT fraud⁴.

Legal basis of liability for firmancy

In Polish law, perpetrators of firmancy are liable under two different legal bases: the Act of 29 August 1997 - Tax Ordinance (Polish Statute Book of 2005, no. 8, item 60, as amended), hereinafter: Tax Ordinance and the Act of 10 September 1999. Fiscal Penal Code (Polish Statute Book of 2024, item 879, as amended), hereinafter: the Fiscal Penal Code.

The former law regulates the liability of a firmant (a person who pretends to be someone else's company name) for tax arrears incurred as a result of operating under someone else's "signboard," and the liability of a firmant (a person whose business is used to conceal the activities of another business entity) for lending a name, surname or business name.

The Fiscal Penal Code, meanwhile, specifies the fiscal criminal liability of an entrepreneur for using the name, surname, or name of another entity, and the liability of an entrepreneur for aiding and abetting in the commission of a crime (Article 55 of the Fiscal Penal Code).

It follows from Article 113 of the Tax Code that if a taxpayer, with the consent of another person, in order to conceal the conduct of business or its actual size, uses or has used that person's name, surname, name or business name, that person shall be jointly and severally liable with the taxpayer for tax arrears incurred in connection with such business.

Thus, a firmant is a person who, in connection with his self-employment activities, should be registered as an entrepreneur, but conceals this fact by functioning as a business entity, but using the "identity" of another person. Article 113 Tax Ordinance provides the basis for the liability of the company as a third party, but not the company. When the tax authority issues a tax decision that determines the entrepreneur's liability as a taxpayer, the basis for his liability is Article 26 of the Tax Code.

An analysis of the jurisprudence of Polish administrative courts has shown that the number of firmancy cases in which tax decisions are issued has remained more or less constant, between 30 and 15 cases per year⁵. In 2019, there were 30, in 2020 - 18, in 2021 - 15, in 2022 - 19 and in 2023 - 26.

Reasons for firmancy

The reasons for the occurrence of the phenomenon of firmancy are very different⁶:

- obtaining the right to relief,
- to benefit from a lower tax rate,
- to maintain VAT-exempt status,
- to avoid losing the right to simplified forms of taxation,
- to defraud VAT.

In addition to the aforementioned reasons, a firmant may also hide under "someone else's name" in order to:

- circumventing a court ban on doing business,
- conceal income,

⁴ EPPO Annual Activity Report, Luxembourg 2022

⁵ The analysis was conducted on the basis of a database of Polish administrative court rulings available online at <https://orzeczenia.nsa.gov.pl>, accessed 20.09.2024.

⁶ S. BABIARZ (in:) S. BABIARZ, B. DAUTER, B. GRUSZCZYŃSKI., R. HAUSER, A. KABAT, M. NIEZGÓDKA-Medek, Tax Ordinance. Commentary, Warsaw 2006, p. 450.

- preserve his pension rights,
- to conceal his identity from the tax authorities, e.g. when he has amassed a large fortune and its sources are illegal.

Control of e-commerce by the Polish tax authorities

The problem of e-commerce firmancy stems from the fact that shopping via the global network is becoming increasingly common. Online auctions are being used to hide the real size of one's business under a pseudonym and someone else's name. The leader in e-commerce in Poland is Allegro, which accounts for most of Poland's e-commerce turnover. Lagging behind are Amazon, OLX, Temu or Aliexpress.

The beginning of e-commerce control by the tax authorities was in October 2004, when, as part of the Phare 2003 project "Support for the Polish tax administration", "control activities aimed at companies offering services or goods via the Internet" were launched. The Argos programme was launched in specialised tax authorities (then tax inspection offices): a special Internet search module, part of the IT System for Fiscal Control (ISKOS). From January 2007 to the end of the first half of 2009, 488 entities conducting business using the Internet were audited. Tax decisions were issued in 275 proceedings. In subsequent years, the number of inspections increased. According to the guidelines of the Ministry of Finance, one of the priority tasks of the tax authorities is to control e-commerce using special software to analyse this phenomenon and to select entities for control⁷. Such activities are possible, inter alia, on the basis of the provisions of Articles 114-115 of the KAS Act⁸, which allows, inter alia, for the acquisition of data on entities selling through Internet portals from the owners of e-commerce platforms.

On an EU scale, the problem of e-commerce control has been comprehensively addressed by the EU DAC7 Directive (EU Council Directive 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation). It was implemented into Polish law on 1 July 2024. It imposed an obligation on digital platform operators from EU countries, including Poland, to report to tax authorities data on transactions of sales of goods and certain services (including rental of real estate, means of transport and personal services) made through them.

As a result of this implementation, Article 75b of the Act on Exchange of Tax Information with Other Countries (Polish Statute Book of 2023, item 241) was amended. Pursuant to it, the reporting platform operator provides the Head of KAS⁹ with aggregate information on vendors subject to reporting for the reporting period. It does so by the end of the month following the end of the reporting period. Only sellers are to be subject to reporting who, during the 12-month period:

- exceeded the limit of 30 sales transactions of goods on a given platform, or
- a limit on the amount of remuneration received equivalent to €2,000.

Types of firmancy

An analysis of the jurisprudence of the Polish administrative courts and the Ministry of Finance's data on fiscal control shows that several types of firmancy fraud can be distinguished¹⁰. One of the most

⁷ Ministry of Finance, Department of Treasury Control, Statement of Tasks of Treasury Control Offices for 2010, Warsaw February 2010, www.mf.gov.pl.

⁸ Act on the National Fiscal Administration, Statute Book of 2016, no. 1947, The National Fiscal Administration in Poland (KAS) has started operating on 1 March 2017.

⁹ The head of National Fiscal Administration in Poland (Polish abbreviation is KAS)

¹⁰ Activities of tax authorities in limiting the grey economy in the Polish economy, Supreme Chamber of Control, Warsaw 2017, pp. 24, D. ZALEWSKI, Liability for firmancy, Tax Monitor No. 4/2009, pp. 25-30.

common was conducting sales over the Internet by the firmant, using the data of a substituted person¹¹. For example, the person trading electronics on the Internet is merely a "shell" for the transactions of the real seller - a registered business entity. The data of the real seller was established on the basis of documents issued for the purchased goods, e.g. equipment warranties, and by identifying the owner of bank accounts. As a result, the tax authority determined a PIT liability in the amount of over PLN 364,000 PLN higher than declared. Assets amounting to 374 000 PLN were secured on account of the established tax arrears.

Another scheme of operation of Internet fraudsters is concealing the real size of one's own business by selling through virtual sellers, the so-called nicks. This method was used, for example, by an entrepreneur selling significant amounts of nutrients and medicines over the Internet. Sales were made using two accounts on an auction portal, registered in the names of different persons, which had a joint bank account for making payments for the purchased goods (see Judgment of the Voivodship Administrative Court (WSA)¹² in Kraków of 16.12.2011, I SA/Kr 765/11)¹³.

The pattern of operation of corporate entities in the case of VAT extortion is different. The fraud then takes the form of the so-called MTIC (Missing Trader Intra-Community) crime or carousel fraud. The former involves the purchase of tax-exempt (or 0%-taxed) goods from another Member State (intra-Community acquisition), followed by a domestic sale with VAT added and no VAT due being paid to the State (the taxable person does not pay VAT and disappears).

More complex tax fraud takes the form of what is known as a 'tax carousel' involving international (intra-Community) transactions in the supply chain¹⁴. It should involve at least two taxpayers from two EU countries. This offence consists of defrauding VAT by repeatedly trading the same goods between two or more EU Member States within a chain of companies. One of the participants in such transactions - the firm - disappears, failing to fulfil its obligations to pay tax¹⁵. This procedure usually concerns goods of small size, high value and difficult to identify, e.g. mobile phones, SIM cards, computer parts. In Poland, the usual role of the so-called missing taxpayer in both types of fraud is played by the firmant. In order to commit the fraud usually uses an unemployed or homeless person, who at the time of detection by the tax authorities, has no assets subject to enforcement¹⁶.

E-commerce fraud

The cases of online firmancy confirmed by tax audits have raised a legal issue that raises important questions. The question is whether, in accordance with the wording of Article 113 of the Code of Commercial Partnerships and Companies, liability for frivolous activity should be limited only to the use of one's first and last name, surname or business name, or whether, in a broader sense, frivolous activity may also be understood as the use of another person's nickname, for example in an online auction site¹⁷.

¹¹ The use of data of another person, by the firmant, sometimes referred to colloquially in Poland as "a post", especially in the case of VAT offenses.

¹² Voivodship Administrative Court - Wojewódzki Sąd Administracyjny (Polish abbreviation is WSA)

¹³ All Polish administrative court judgments cited in the article are available at <https://orzeczenia.nsa.gov.pl>.

¹⁴ PIĘTA-MINTUS, H. R., ZAWAL-KUBIAK H., European commission initiatives on VAT, Tax fraud, Tax Review No. 10/2008, p. 10.

¹⁵ ŻBIKOWSKA, A. Carousel crime or VAT extortion, Criminal Law No. 6/2009

¹⁶ Such a person is commonly referred to as a "post".

¹⁷ LESIAK, G. *Treasury inspectors on the trail of illegal business*, Rzeczpospolita No. 188 of 2009, p. 5.

It is therefore necessary to analyse the terms used in the text of Article 113 of the Code of Commercial Partnerships and Companies. - Civil Code (i.e. Journal of Laws of 2024, item 1061 as amended, hereinafter: the Civil Code), in the provisions of Article 434 (company of a natural person) and 435 § 1 and 2 of the Civil Code (company of a legal person). The firm of an individual is his or her name. This does not exclude the inclusion in the firm of an alias or terms indicating the object of the entrepreneur's activity, the place where it is carried out and other freely chosen terms (Article 434 of the Civil Code).

The firm of a legal person is its name. The firm contains a designation of the legal form of the legal person, which may be given in abbreviated form, and may also indicate the object of the activity, the seat of the person and other freely chosen terms (Article 435 § 1 and 2 of the Civil Code). The company of a legal person may also contain the name or pseudonym of a natural person, if this serves to show the relationship of that person with the establishment or activity of the entrepreneur (Article 435 § 3 of the Civil Code).

In online auction services, persons offering goods for sale appear under pseudonyms (nicknames) and are visible to other users of the website under these pseudonyms. In order to set up and register an account, which is a prerequisite for trading via the website in question, it is necessary to provide true personal data and an address. The results of tax audits of persons selling goods at online auctions show that many of them are engaged in large-scale business activities that are not registered or, when carrying out official activities, do not record sales conducted via the global network. In addition, some of the sellers conceal their own identity and trade using other people's online accounts.

Pursuant to the provisions of the Polish Civil Code on the company of natural and legal persons, a pseudonym on an Internet website must be deemed to be the company name of an entrepreneur if such a person in fact carries out business activities and is known as an entrepreneur under this pseudonym. If, in addition, there is a situation in which the account on the website to which the pseudonym is assigned is established in the name of another person (the firm), the whole procedure may be considered to be a firmancy. The condition for the issuance of a decision under Article 113 Tax Ordinance is then that the tax authority proves that the firmant knowingly made his account available to another person. Such a position in the case in question has been presented by the literature¹⁸ and approved in the jurisprudence of administrative courts (see WSA judgment of 21 May 2009, I SA/Bk 87/09, WSA judgment of 21 May 2009, I SA/Bk 87/09, or WSA judgment in Warsaw of 24 April 2018, II SA/Wa 2511/17).

Prerequisites for the liability of the company

Although Article 113 of the Tax Ordinance does not explicitly list the prerequisites for the liability of the firm and the firming party, it is accepted both in the legal doctrine and in accordance with the jurisprudence of the administrative courts that there are three such prerequisites:

- the emergence of tax arrears while carrying out concealed economic activity,
- consent of the company owner,
- use of someone else's company in order to conceal the fact of one's own economic activity or its actual size.

The tax authority conducting the proceedings in the scope referred to in Article 113 Tax Ordinance should prove that the taxpayer's action was aimed at concealing the fact of his business activity or its size, which is connected with tax evasion. Moreover, the authority has to prove that the tax arrears arose in the period in which the firm lent its name or business name (see the judgment of the WSA of

¹⁸ ZALEWSKI, D. Liability for Firmancy, Tax Monitor No. 4/2009, pp. 25-30.

14 June 2006, I SA OI 172/06, <https://orzeczenia.nsa.gov.pl>).

The basic premise excluding firmancy is the lack of consent to this procedure on the part of the firm. By agreeing to firm the taxpayer's activity, the firm exposes itself to liability for his tax arrears as a third party. It follows from Article 113 of the Tax Ordinance that both the taxpayer and the firm are jointly and severally liable with all their assets for tax arrears incurred in the course of business activity. This is a personal liability but limited in amount to the amount of arrears incurred in the course of such activity¹⁹.

By the term "tax arrears" used in Article 113 of the Tax Ordinance, it should be understood, in accordance with Article 51 Tax Ordinance, as all taxes not paid on time. According to the wording of Article 113 Tax Ordinance, tax arrears must additionally be related to the business activity of the firm. No law explicitly mentions and defines business-related taxes, however, those tax obligations that arise from events directly related to the fact of business activity should be considered as such. As a result, when interpreting Article 113 Tax Ordinance, it is necessary to take into account all taxes in which the taxpayer's (firm's) tax obligation is related to its business activity. Starting with income tax and VAT, through taxation of property used for the purpose of business activity (real estate tax, forest tax, agricultural tax), excise duty and customs duty, up to tax on means of transport and civil law transactions.

The liability of the firm is personal and joint and several with the firm. Article 113 of the Tax Ordinance, does not contain any limitations to this liability, so it is irrelevant e.g. what benefits the company owner actually obtained by making its name or business name available. It is, however, debatable whether the consent of the firm to the firm's acting on the "account of the firm" should be express or implied. It should be recognised that the liability of the person acting on behalf of the company may be established not only when he/she expressly agrees to the use of his/her company name or surname, but also when it is implied, e.g. when he/she does not enter into an agreement with the company owner, but learns about the firmancy and does not react to it and agrees to the continuation of the operation. Such an understanding of the question of the will of the firmant is consistent with the theory of criminal law, where it is admitted that the consent of the disposer of goods does not have to be explicit, it can also be implicit, as long as it is voluntary, existed at the time of the act and the person granting it could freely dispose of it²⁰.

It does not follow from the wording of Article 113 of the Tax Ordinance that the person who agrees to the use of his or her name, surname or business name must know what the other person will use it for. This issue was decided differently in the ruling of the WSA in Białystok of 11.09.2009, I SA/Bk 261/09 (<https://orzeczenia.nsa.gov.pl>). Despite the fact that in the case in question the applicant testified that she had made her Allegro controls and bank account available knowingly and knew that, probably through this account, the firm was selling second-hand clothes imported from abroad, in the Court's opinion this was not sufficient to recognise the firm's liability. The court ruled that the prerequisite for the liability of the firmant is its awareness that it was making its data available for the purpose of firming a business, and in the present case, the fact of this awareness was not proven by the tax authorities. This was not a correct ruling. The Supreme Administrative Court (NSA²¹) interpreted the provisions in a different way, recognised the liability of the person who lent his/her account on the Allegro Internet portal as a firm and reversed the judgment of the court of first instance (see judgment

¹⁹ MARIĄŃSKI, A. Liability for liabilities of a taxpayer, payer, collector in Polish law, Warsaw 1999, p. 20.

²⁰ GARDOCKI, L., Criminal Law, Warsaw 1996, pp. 118-119.

²¹ Supreme Administrative Court in Warsaw - Naczelny Sąd Administracyjny (Polish abbreviation is NSA)

of the NSA of 16.11.2010, I FSK 1991/09).

Firm's liability for tax obligations

A firm owner is not liable like a taxpayer for tax arrears, even though they formally arise from the operation of the company it runs. However, he is liable for the tax obligations of the firm as a third party. The above interpretation of Article 113 of the Tax Ordinance, according to which the taxpayer is not the one who formally carries out the activity, but the one who is firm, is well established in the jurisprudence of administrative courts.

According to it, anyone who undertakes a business activity should not engage in firmancy and therefore must bear all legal and tax consequences related to the lending of his/her name, surname or company name. Thus, the consequence of proving the taxpayer of firmancy will be the loss of the privileges he has achieved thanks to firmancy (reliefs, exemption, lower tax rate, etc.) and, as a result, the payment of a higher tax (cf. the NSA judgment of 14 June 2016 ref. II FSK 1125/14).

Assistance in running the company

Liability under businessmancy need not be feared by one who helps to run or manage someone else's business, e.g. a family business. This is a different situation from the one defined in Article 113 of the Tax Ordinance., as it is not based on the use of someone else's name while running one's own business in order to conceal it, but on a power of attorney relationship, i.e. running someone else's business on commission, in the name and on behalf of the principal.

A power of attorney relationship between two persons, according to which the contractor runs the principal's business, excludes the possibility of a charge of firmancy. For example, assisting in the running of the wife's business does not amount to concealing the husband's own income, as the granting of a power of attorney to run affairs does not amount to firmancy. When accusing a taxpayer of firming up her husband's business, the authority must show that such an action took place and that it was aimed at avoiding taxation (see the NSA judgment of 5 September 2018, II FSK 2424/16).

However, an exception is a situation where, after establishing the facts, it turns out that the power of attorney relationship was ostensible. This refers to a situation where the firmant would hold the power of attorney of the other person only formally, while de facto it would use its own assets and conduct its own business activity, but under the name of the other person (see judgment of the WSA in Wrocław of 18 February 2008, I SA Wr 1248/07).

The peculiarity of the tax procedure in cases involving firmancy is that the decision is issued in the name of a person other than the one in whose name the business activity is registered. The procedure itself is no different from those conducted in other tax cases. At its conclusion, a decision is issued determining the tax due and the income is taxed at the applicable rates. The decision is issued on the firmant's name, and its legal basis should include Article 26 of the Tax Ordinance. The rules of the liability for the taxpayer's obligations are regulated in Chapter 15 Tax Ordinance entitled "Liability of third parties" (Articles 107-119). The provisions of this chapter provide for the scope of third-party liability, the manner in which tax proceedings are conducted, the articles of the Tax Ordinance that apply in the alternative to decisions issued on the basis of the provisions of this chapter and the entities that will be liable as third parties in the situations specified in this chapter. Pursuant to Article 108 of the Tax Ordinance, the tax authority decides on the tax liability of a third party by means of a decision. Due to the accessory nature of liability, proceedings may not be initiated before:

- 1) the expiry of the deadline for payment of the established liability,
- 2) the date of delivery of the decision:

- (a) determining the amount of the tax liability,
- (b) on the tax liability of the payer or collector,
- (c) on the reimbursement of an advance input VAT tax,
- (d) determining the amount of interest due for delay;

3) the date of initiation of enforcement proceedings - in the case referred to in § 3 Article 108 of the Tax Ordinance.

The tax authority is obliged to issue a decision with respect to the firm taxpayer, determining the amount of the tax liability, and only later, on the basis of Article 108 and Article 113 of the Tax Ordinance, to issue a decision which also allows for holding the firm liable. The decision on the liability of the third party (firmant) should identify the liable party and also specify the amount of the receivable for which it is liable. The amount of this liability will be in close relation to the amount that resulted from the previous decision issued against the firmant.

Conclusions

In the practice of the tax authorities, effective combating of firmancy is hampered by the lack of evidence revealing the firmant. The person on the spot does not always care about revealing the firmant and overlooks his participation in the procedure. Particularly in cases involving large-scale VAT fraud, it appears that organised criminal groups are usually involved. Company owners do not want to disclose this fact for fear of their own safety. In e-commerce audits, on the other hand, company owners defend themselves by saying that they were not aware that their account was being used for business.

Certainly, changes in Polish law since 1 July 2024, when the EU DAC7 Directive was implemented into Polish law, are helpful in combating firmancy by tax inspection authorities. The directive imposed an obligation on digital platform operators from EU countries, including Poland, to report to tax authorities data on transactions of sales of goods and certain services (including real estate rentals, means of transport and personal services) made through them. It will thus be easier for tax authorities to obtain information on the scale of e-commerce and on dishonest taxpayers conducting unregistered business on the Internet and to discover their true identity.

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