



VORONEZH STATE UNIVERSITY  
LAW FACULTY  
FINANCIAL LAW DEPARTMENT



INFORMATION AND RESEARCH CENTER OF THE PUBLIC FINANCE  
AND TAX LAW OF CENTRAL AND EASTERN EUROPEAN COUNTRIES  
(POLAND) (RUSSIAN BRANCH IN VORONEZH)



TAX SOVEREIGNTY AND THE CONCEPT OF FISCAL RULE-MAKING  
IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE

# TAX SOVEREIGNTY AND THE CONCEPT OF FISCAL RULE-MAKING IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE

Conference Proceedings

Marina Sentsova (Karaseva), Eugeniusz Ruskowski,  
Aleksi Paul, Michal Radvan (eds.)

---

**TAX SOVEREIGNTY  
AND THE CONCEPT OF FISCAL RULE-MAKING  
IN THE COUNTRIES OF CENTRAL  
AND EASTERN EUROPE**

Conference Proceedings

Voronezh  
VSU Publishing House  
2018

---

Tax Sovereignty and the Concept of Fiscal Rule-Making in the Countries of Central and Eastern Europe : Conference Proceedings / Marina Sentsova (Karaseva), Eugeniusz Ruskowski, Aleksei Paul, Michal Radvan (eds.). Voronezh : Voronezh State University, Faculty of Law, 2018. – 370 p.

ISBN 978-5-9273-2665-5

347.73(082)\*336.1/.2\*339.7\*336.71\*(062.534)\*

- financial law
- public finance
- taxes, fees
- international finance
- banking industry, banks
- conference proceedings

Editors: Marina Sentsova (Karaseva), Eugeniusz Ruskowski, Aleksei Paul, Michal Radvan

© 2018 Voronezh State University

ISBN 978-5-9273-2665-5

---

# Table of Contents

Program Committee of the Conference.....	7
Local Organizational Committee of the Conference.....	8
List of Reviewers.....	9
Preface.....	11

## PART 1

### LEGAL ISSUES OF TAX SOVEREIGNTY

<b>The Tax Policy of The Republic of Bulgaria As A Destructive Factor for State System Development.....</b>	<b>15</b>
<i>Dina Alontseva, Olga Lavrishcheva</i>	
<b>Tax Sovereignty of The Welfare State (Experience of The Central and Eastern European Countries) .....</b>	<b>27</b>
<i>Eugeniy Belikov</i>	
<b>Issues Around the Preservation of Monetary Sovereignty by The European Union Member States in The Context of European Integration .....</b>	<b>42</b>
<i>Yulia Gorosh, Aleksander Ponomarev</i>	
<b>On the Role of Representative Organs of Power in The Realization of The Tax Sovereignty .....</b>	<b>51</b>
<i>Valentina Ivanova</i>	
<b>Specific Features of Tax Sovereignty in The Sphere of The Taxation of Credit Consumers Cooperatives Under the Legislation of The Russian Federation.....</b>	<b>59</b>
<i>Nikolay Mikhaylovich Konin, Konstantin Alekseevich Tikhonov, Kirill Sergeevich Krotov</i>	
<b>Establishment of Tax Legal Guarantees of The Taxpayer's Rights as A Manifestation of Tax Sovereignty.....</b>	<b>67</b>
<i>Maria Mardasova</i>	
<b>Realization of Tax Sovereignty in Value-Added Taxation of Cross-Border Transactions.....</b>	<b>76</b>
<i>Aleksei Paul</i>	

---

<b>The Sovereignty of The Countries of The European Union in The Area of The Customs Union and Common Commercial Policy .....</b>	<b>84</b>
<i>Anna Reiver-Kaliszewska</i>	
<b>Conceptual Causes of The Tax Interests Conflict Arising from Inaccurate Interpretation of The Essence of State Tax Sovereignty.....</b>	<b>96</b>
<i>Anatoliy Sebyukov, Levon Nariniyan</i>	
<b>Polish Minimal Tax on Commercial Real Estate as A Manifestation of Sovereign Tax Imposing Power.....</b>	<b>107</b>
<i>Małgorzata Wróblewska</i>	
<b>Tax Sovereignty in Russia: Preferential Taxation Regimes Provided by Sub-Central Governments.....</b>	<b>119</b>
<i>Aleksey Zhbataev, Michael Sadchikov</i>	

**PART 2**  
**CONTEMPORARY ISSUES OF FISCAL RULE-MAKING  
IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE**

<b>Tax Annulment in The Concept of Fiscal Rule Making – Comparative Analysis.....</b>	<b>129</b>
<i>Piotr Bulawa</i>	
<b>Written Explanations of The Tax Law: Fiscal Law-Making, Interpretation or Law Enforcement?.....</b>	<b>138</b>
<i>Igor Dementyev</i>	
<b>The Preventive Measures of Coercion in Russian Tax Legislation and Lawmaking .....</b>	<b>151</b>
<i>Ekaterina Efremova</i>	
<b>Lawmaking in The Field of Tax Consolidation: Is It the Manifestation of Tax Sovereignty or A Threat to National Fiscal Security?.....</b>	<b>158</b>
<i>Irina Glazunova, Kirill Maslov</i>	
<b>Fiscal Rule-Making in Russian Institutes' of Higher Education Property Taxation: Economic Analysis of The Effects of Amendments.....</b>	<b>172</b>
<i>Artem Krivosheev, Natal'ya Spiridonova</i>	

---

<b>Fiscal Lawmaking Municipalities: The Experience of Russia And European States</b> .....	180
<i>Svetlana Mironova</i>	
<b>Questions of The Central Bank of The Russian Federation Lawmaking in Regard to Banks' Liabilities in The Framework of The Russian Tax Legislation</b> .....	199
<i>Elena Pastushenko, Larisa Zemtsova</i>	
<b>Tax Integration in The Area of Direct Taxation in The European Union</b> .....	208
<i>Karina Ponomareva</i>	
<b>On Correlation Between National Tax Legislation and Tax Agreements of The Russian Federation and Selected Countries of Central and Eastern Europe</b> .....	227
<i>Vasily Popov, Elena Trishina</i>	

**PART 3  
TAX ADMINISTRATION AND TAX LAW**

<b>Soft Law as A Device of Transforming the International Tax Law Order (By the Example of The Beps Project)</b> .....	239
<i>Maxim Belyaev, Vladislav Denisenko</i>	
<b>Bank Tax in Poland: Efficiency and Impact on Financial Stability</b> .....	253
<i>Anna Jurkowska-Zeidler</i>	
<b>The Principle of Trust in The Light of The Provisions of The Code of Administrative Procedure and The Tax Ordinance Act</b> .....	266
<i>Ewa Koniuszewska</i>	
<b>Tax Report Analysis in The System of Citizens' Obligations to The State</b> .....	276
<i>Larisa Korobeinikova</i>	
<b>Use of The Concept of The Actual Right to Income at The Settlement of Tax Disputes in The Russian Federation</b> .....	284
<i>Iuliia Ledneva</i>	
<b>Mechanism of Reverse Charge Value Added Tax in Transactions Concerning the Provision of Building Services – Selected Issues</b> .....	296
<i>Katarzyna Martko-Mazur, Marta Sagan</i>	

---

<b>Scope of Discretion of a Municipal Council in Implementing and Determining the Amount of Resort Tax in Polish Resorts.....</b>	<b>307</b>
<i>Małgorzata Ofiarska</i>	
<b>Scope of Discretion of Tax Authorities in Applying Punitive Rate in The Tax on Civil Law Transactions .....</b>	<b>321</b>
<i>Zbigniew Ofiarski</i>	
<b>Electronic Revenue Registry as A Tool for Fair Tax Payments .....</b>	<b>333</b>
<i>Michał Radwan</i>	
<b>Efficiency and Effectiveness of Tax Administration and The Rights of Taxpayers in The Light of The First Experience of The Functioning of The Reform of The National Revenue Administration in Poland.....</b>	<b>340</b>
<i>Eugeniusz Ruśkowski, Piotr Woltanowski</i>	
<b>The Principle of Tax Fairness and Its Role in Shaping the Tax System .....</b>	<b>356</b>
<i>Katarzyna Świąch – Kujawska</i>	

---

## Program Committee of the Conference

Vladimir BABCAK, Pavol Josef Safarik University in Kosice, Slovakia

Leonard ETEL, University of Bialystok, Poland

Jan GLUCHOWSKI, Nicolaus Copernicus University in Torun and Torun School of Banking, Poland

Edward JUCHNIEWICZ, Gdansk University, Poland

Aleksander KOSTYUKOV, Omsk State University, Russia

Natalia LUNINA, Voronezh State University, Russia

Petr MRKYVKA, Masaryk University, Czech Republic

Michal RADVAN, Masaryk University, Czech Republic

Olga ROGACHEVA, Voronezh State University, Russia

Eugeniusz RUSKOWSKI, University of Bialystok, Poland

Marina SENTSOVA (KARASEVA), Voronezh State University, Russia

Yury STARILOV, Voronezh State University, Russia



---

## Local Organizational Committee of the Conference

Marina SENTSOVA (KARASEVA)

Nikolay ANDREEV

Lilia BOBKOVA

Andrey KRASYUKOV

Maria MARDASOVA

Marina OBUKHOVA

Aleksei PAUL

Irina SAPRYKINA

Anton YAKUSHEV

---

## List of Reviewers

Nikolay Andreev, Voronezh State University, Russia  
Radim Boháč, Charles University in Prague, Czech Republic  
Karel Brychta, Brno University of Technology, Czech Republic  
Mária Bujňáková, Pavol Jozef Šafárik University in Košice, Slovakia  
Piotr Bulawa, Silesia University in Katowice, Poland  
Karin Cakoci, Pavol Jozef Šafárik University in Košice, Slovakia  
Karolína Červená, Pavol Jozef Šafárik University in Košice, Slovakia  
Lubomír Čunderlík, Comenius University in Bratislava, Slovakia  
Damian Cyman, University of Gdansk, Poland  
Damian Czudek, Masaryk University, Czech Republic  
Rafał Dowgier, University of Białystok, Poland  
Ana Dujmovic, University of Mostar, BiH  
Riel Franzsen, University of Pretoria And African Tax Institute, RSA  
Yulia Gorosh, Masaryk University, Czech Republic  
Gábor Hulkó, Széchenyi István University, Hungary  
Petra Jánošíková, University of West Bohemia, Czech Republic  
Michal Janovec, Masaryk University, Czech Republic  
Edward Juchniewicz, University of Gdansk, Poland  
Anna Jurkowska-Zeidler, University of Gdansk, Poland  
Marie Karfíková, Charles University in Prague, Czech Republic  
Michael Kohajda, Charles University in Prague, Czech Republic  
Ewa Koniuszewska, University of Szczecin, Poland  
Michal Koziel, Technical University of Ostrava, Czech Republic  
Andrey Krasnyukov, Voronezh State University, Russia  
Juha Lindgren, University of Vaasa, Finland  
Hana Marková, Charles University in Prague, Czech Republic  
Kirill Maslov, Omsk State University, Russia

---

Dorota Masniak, University of Gdansk, Poland  
Magda Mosionek – Schweda, University of Gdansk, Poland  
Petr Mrkývka, Masaryk University, Czech Republic  
Rafał Mroczkowski, University of Gdansk, Poland  
Jan Neckář, Masaryk University, Czech Republic  
Krystyna Nizioł, Szczecin University, Poland  
Małgorzata Ofiarska, University of Szczecin, Poland  
Przemysław Panfil, University of Gdansk, Poland  
Aleksii Paul, Voronezh State University, Russia  
Karina Ponomareva, Omsk State University, Russia  
Mariusz Popławski, University of Białystok, Poland  
Marta Postuła, University of Warsaw, Poland  
Sławomir Presnarowicz, University of Białystok, Poland  
Michał Radvan, Masaryk University, Czech Republic  
Anna Reiwer-Kaliszewska, University of Business and Administration in Gdynia, Poland  
Anna Románová, Pavol Jozef Šafárik University in Košice, Slovakia  
Marta Sagan, University of Rzeszów, Poland  
Nicola Sartori, University of Milano-Bicocca, Italy  
Johan Schweigl, Masaryk University, Czech Republic  
Marina Sentsova (Karaseva), Voronezh State University, Russia  
Jana Šimonová, Academy of The Police Force in Bratislava, Slovakia  
Miroslav Štrkolec, Pavol Jozef Šafárik University in Košice, Slovakia  
Miroslav Štrkolec, Pavol Jozef Šafárik University in Košice, Slovakia  
Eva Tomášková, Masaryk University, Czech Republic  
Zbigniew Ofiarski, University of Szczecin, Poland  
Roman Vybíral, Charles University in Prague, Czech Republic  
Małgorzata Wroblewska, University in Gdansk, Poland  
Anton Yakushev, Voronezh State University, Russia

---

## Preface

Information and Research Center of the Public Finance and Tax Law of Central and Eastern European Countries (Poland) (Russian Branch in Voronezh) is a unit of the Law Faculty of Voronezh State University, founded in 2008. This is a subdivision of the Information and Research Center of The Public Finance and Tax Law of Central and Eastern European Countries established at the Law Faculty of the University in Bialystok (Poland).

The main objectives of the Russian Branch of the Center are to gather information about scientific activities of its members, share experience, undertake common researches and conference initiatives, as well as support the achievement of these goals. The Center develops exchange of information among research and university centers in Russia, Kazakhstan, Poland and other Eastern and Central European Countries, initiates cooperation with institutions in Eastern and Central European countries and cooperates with the governmental and non-governmental organizations. One of the crucial goals of its activity is to investigate European standards in the fields of public finance and tax law and to share experiences with other countries.

The Russian Branch of the Center also focuses on publishing activity and the organization of seminars and conferences. The main aspect of the activity is the support of research exchange between scientific centers in Eastern, Central and Western Europe. The Russian Branch of the Center assembles academics specializing in public finance and tax law as well as in related fields from Russia and abroad.

One of the important forms of the Russian Branch's activity is a publication of the Yearbook of the Center that was stated in 2010. It helps to discuss contemporary issues of financial, tax and budget law with the involvement of scientists from all over the Eastern and Central European countries.

From 2018 The Russian Branch of the Center takes part in preparing the academic quarterly focused on financial law – Financial Law Review which is published in cooperation with the Centre for Local Government Law and Local Finance Law of the University of Gdansk, the Department of Financial Law and National Economy of the Faculty of Law of Masaryk University in Brno and the Department of Financial Law, Tax Law and Economics of the Faculty of Law at the Pavel Jozef Šafárik University in Kosice.

The Russian Branch of the Center participates in the organization of scientific and research meetings and conferences including in cooperation with the Russian Branch of International Fiscal Association.

So far, together with the Financial Law Department of the Law Faculty at Voronezh State University and in particular cases also with some or all of the mentioned partners, the

Russian Branch of the Center has already arranged and run 4 international conferences and international seminars which supplemented or extended chosen issues of the conferences:

- VI International Conference of the Center on Financial Law: “Contemporary Issues of Tax Law”, Voronezh, September 4–6, 2007;
- XII International Conference on Financial Law “Problems of Tax Administration in the Countries of Central and Eastern Europe”, Omsk, September 23-24, 2013;
- International Conference on Financial Law: “Tax Sovereignty and Taxpayer rights Protection: Experience of Eurasian Economic Union and European Union”, Voronezh, November 11–12, 2016;
- International Conference on Financial Law: “Tax Sovereignty and the Concept of Fiscal Rule-Making in the Countries of Central and Eastern Europe”, Voronezh, April 20, 2018.

Altogether the Faculty of Law of Voronezh State University and the Russian Branch of the Center has published a number of volumes of publications whose authors are researchers from several dozen research centers all over Belarus, Czech Republic, Kazakhstan, Lithuania, Poland, Russia, Ukraine:

- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova), M. (eds)): Современные проблемы теории налогового права (Contemporary Issues of Tax Law Theory), Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2007.
- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova), M. (eds)): Современные проблемы финансового и налогового права стран Центральной и Восточной Европы (Modern Problems of Financial and Tax Law in the Countries of Central and Eastern Europe): Публичные финансы и налоговое право (Public Finance and Tax Law), ежегодник (yearbook), File no. 1, Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2010.
- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova), M. (eds)): Бюджетные и налоговые реформы в странах Центральной и Восточной Европы (Budget and Tax Reforms in the Countries of Central and Eastern Europe): Публичные финансы и налоговое право (Public Finance and Tax Law), ежегодник (yearbook), File no. 2, Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2011.
- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova), M. (eds)): Вып. 3: Преференции в финансовом праве и экономике стран Центральной и Восточной Европы (Preferences in Financial Law and Economics of the Countries of Central and Eastern Europe): Публичные финансы и налоговое

право (Public Finance and Tax Law), ежегодник (yearbook), File no. 3, Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2012.

- Костюков, А. (ред.) (Kostyukov, A. (eds.)): Проблемы налогового правоприменения в странах Центральной и Восточной Европы (Problems of Tax Administration in the Countries of Central and Eastern Europe), Омск (Omsk): Омский государственный университет им. Ф.М. Достоевского (Omsk State University Publishing), 2013;
- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova), M. (eds.)): Доходы бюджетов в странах Центральной и Восточной Европы (Budget Revenues of the Countries of Central and Eastern Europe): Публичные финансы и налоговое право (Public Finance and Tax Law), ежегодник (yearbook), File No 4, Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2014.
- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova), M. (eds.)): Целевые публичные фонды и неналоговые платежи в странах Центральной и Восточной Европы (The Targeted Public Funds and non-Tax Payments of Central and Eastern Europe): Публичные финансы и налоговое право (Public Finance and Tax Law), ежегодник (yearbook), File no. 5, Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2015.
- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova), M. (eds.)): Противодействие уклонению от уплаты налогов в странах Центральной и Восточной Европы (Anti-Tax Avoidance Rules in the Countries of Central and Eastern Europe): Публичные финансы и налоговое право (Public Finance and Tax Law), ежегодник (yearbook), File no. 6. , Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2016.
- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova), M. (eds.)): Налоговый суверенитет и защита прав налогоплательщиков: опыт Евразийского Экономического Союза и Европейского Союза (Tax Sovereignty and Taxpayers' Rights Protection: Experience of Eurasian Economic Union and European Union), Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2016.
- Карасева (Сенцова), М. (ред.) (Karaseva (Sentsova)), М. (eds.)): Природоресурсные и экологические платежи в странах Центральной и Восточной Европы (Nature-Resource and Ecological Payments in the Countries of Central and Eastern Europe): Публичные финансы и налоговое право (Public Finance and Tax Law), ежегодник (yearbook), File no. 7, Воронеж (Voronezh): Издательский дом ВГУ (Voronezh State University Publishing House), 2017.

International scientific conference “Tax Sovereignty and the Concept of Fiscal Rule-Making in the Countries of Central and Eastern Europe” took place in April 20, 2018 in Voronezh (Russia). The conference was organized by the Russian Branch of the Center and the Financial Law Department of Faculty of Law at Voronezh State University with the help of the Russian Branch of International Fiscal Association.

The aim of the Conference was to enable the presentation and discussion of the tax sovereignty and the concept of fiscal rule-making in the countries of Central and Eastern Europe and to publish the results in the conference proceedings “Tax Sovereignty and the Concept of Fiscal Rule-Making in the Countries of Central and Eastern Europe”.

- Research papers that encompass the following areas were invited:
- Axiological and philosophical aspects of tax sovereignty;
- Realization of tax sovereignty and tax integration;
- Tax sovereignty and tax discretion in European countries;
- Common (theoretical) issues of tax law;
- Tax law rule-making;
- Some types of taxes and its regulation;
- Contemporary issues of tax administration.

As there were many participants with many contributions dealing with many different issues from the broad area of financial law, organizers decided to divide the publication into three parts:

1. Legal Issues of Tax Sovereignty.
2. Contemporary Issues of Fiscal Rule-Making in the Countries of Central and Eastern Europe.
3. Tax Administration and Tax law.

All contributions were double (or sometimes triple) blind reviewed by experts in the area of financial law not only from Central and Eastern European countries.

*Marina Sentsova (Karaseva), Aleksei Paul*

---

## PART 1. LEGAL ISSUES OF TAX SOVEREIGNTY

---

# THE TAX POLICY OF THE REPUBLIC OF BULGARIA AS A DESTRUCTIVE FACTOR FOR STATE SYSTEM DEVELOPMENT

*Dina Alontseva<sup>1</sup>, Olga Lavrishcheva<sup>2</sup>*

### **Abstract**

The present study is devoted to the analysis of the essence of the Bulgarian tax system, since the accession of this state to the EU leaves its mark on its development and further economic integration as well as globalization at international level.

The purpose of the study is to identify and analyze the characteristics of taxation in Bulgaria and to develop ways of reforming the mechanism of tax policy, which will contribute to the improvement of the tax system in the country. The purpose of the study is due to the fact that the tax policy of the Republic of Bulgaria is currently considered as a factor in the destructive state development, since the system of taxation in this state is characterized by inefficiency in tax collection, lack of information protection and data transmission companies, still non-effective structure of direct and indirect taxes.

The hypothesis of the study is the development of prospective aspects for overcoming the problem of destructive aspects in Bulgarian state system by means of formulating effective mechanisms of tax policy and improving the taxation system under current conditions.

The methodological basis of the study is presented by general scientific, private and special cognitive methods. A special place among them is occupied by formal research methods (analysis and synthesis, comparison, modeling, etc.), which allowed to formulate hypothesis and productive conclusions.

### **Key words**

Tax policy, taxation, indirect taxes, excise duties, value-added tax, the Republic of Bulgaria.

**JEL classification:** K 340

---

<sup>1</sup> Candidate of Juridical Sciences (PhD in Law), Associate Professor, Head of the Department of Theory and History of State and Law at Bunin Yelets State University; 12.00.01 – Theory and history of law and state; the history of doctrines on law and state; the number of books and papers in peer-reviewed journals – 54; dina.alontseva@mail.ru.

<sup>2</sup> Candidate of Juridical Sciences (PhD in Law), Associate Professor of the Department of Civil and Arbitration Procedure at Bunin Yelets State University; 12.00.06 – Land law; natural resources law; environmental law; agrarian law; the number of books and papers in peer-reviewed journals – 40; lavrisheva-olga@mail.ru.



## 1 Introduction

The choice of such an ambiguous research issue is not random. Since January 1, 2007 Bulgaria has been the member of the European Union (the EU). Over the years of the transition period it has pursued a policy of convergence and integration into this unique multinational community that could not but have an effect on its tax system. Economic integration into the EU is a distinctive demonstration of globalization that takes place in the world economy and allows to optimize the global economic process. The European Union is open to all the countries that meet the criteria of membership in all the areas of economy, legal regulation, social protection, preservation of the environment, etc.

The membership in the EU requires a candidate country to achieve stability of institutions: firstly, guaranteeing democracy, supremacy of law, human rights, respect for and protection of minorities; secondly, ensuring the existence of a functioning market economy and ability to handle the competitive pressure and market forces in the EU; thirdly, guaranteeing an ability to enter into commitments of the membership, including adherence to the aims of political, economic and monetary union.

The accession of Bulgaria to the EU has had both positive and negative effects. The accomplished multi-phased transition of Bulgaria contributed to business initiative optimization that, for its part, created favorable conditions for further development of market economy in Bulgaria. As of 2008, “Bulgaria is among the leaders of the EU (takes the 6th place) on GDP growth rates. According to the data of the European Association of the Chambers of Commerce and Industry, Bulgaria takes the 2nd place after Denmark on the assessment of the condition of business climate in the EU countries. Bulgaria has taken the 9th place in the world and the 1st place among the countries of Central and Eastern Europe for investment attractiveness” (Bozhinova, Zhekova, Peykovska, 2008: 6).

After joining the EU the priority of tax policy included a set of activities aimed at stimulating effective and sustainable growth of the national economy. Special emphasis is placed on preventing unlawful actions on the part of industrial and commercial structures in the sphere of taxation as well as return of monetary funds, derived from illegal trade, back to Bulgaria. As part of the main priority of Bulgarian foreign policy, directed at the accession to the EU in 2007, the government of the republic has been trying to bring the national legislation in the tax area into line with the norms of the European Union.

The first steps in this direction were made from 2006 to 2007.

By 2008 Bulgaria moved up to the first place among 178 countries on successful undertaking tax reform. It can be explained by the accommodative tax policy of the government that “introduced 10% corporate tax rate, a flat tax rate of 10%, a zero per cent tax rate on capital gains, a zero tax rate on profits of municipalities, in which the level of unemployment of 35% exceeds the average level in the country” (Bozhinova, Zhekova, Peykovska, 2008: 6). At present Bulgaria remains the country with the lowest income tax in the European Union – 10%, that is four times lower than the average level (38% for the EU and 43% for the Eurozone) (Vasileva, 2012: 46).

Despite positive aspects of reforming the taxation system in 2008, Bulgaria could not cope with the global economic and financial crisis. The credit market, real sector and, not the least, labour market sustained great losses. Currently Bulgaria is a country of an endless crisis. In the present circumstances Bulgaria cannot keep high GDP growth, which leads to reducing foreign investment flows and, consequently, to a rising budget deficit.

The significance of the research issue is determined by the fact that at present Bulgaria requires development of a clear tax policy that can drastically change the economic situation in the country.

The aim of the study is to analyze the tax policy of the Republic of Bulgaria as a factor of destructive state development, as the modern system of taxation in the country is characterized by inefficiency in tax collection, lack of information protection and data transfer of companies, and non – effective structure of direct and indirect taxes (more than 3% of indirect taxes in Bulgaria).

The hypothesis of the study is the development of prospective ways for overcoming the problem of destructive elements in Bulgarian state system by means of formulating effective mechanisms of tax policy and improving the taxation system under current conditions.

The methodological basis of the study is presented by general scientific, private and special cognitive methods. A general scientific dialectical method will give an opportunity to examine the problems of reforming the tax legislation of the Republic of Bulgaria at the present stage, to reveal positive and negative aspects of the tax reform, to analyze different opinions on the topic, and to illustrate key changes of the tax legislation.

The methods of formal logic will permit to characterize transformations in the fiscal sphere at the present time. Besides, by means of these methods of scientific cognition we will carry out the research of the current legislation for consistency with the problem in question. The defects of regulatory control will also be revealed. For the purpose of correlating different legal norms we will use comparative legal and formal legal methods in the paper. Using a combination of different methods has allowed to achieve the aim of the study.

The analysis and generalization of the Bulgarian experience in the field of improving the national tax legislation will lay the foundation for harmonizing existing legal acts with the aim of increasing the level of coordination in the activities of governmental and local authorities.

The method of content analysis will provide completeness, validity and consistency of the data obtained.

Predictive methods will help define the development trends of the investigated object and observe possible positive or negative consequences of realization of the tax legislation acts of the Republic of Bulgaria.

Some sociological (modelling, extrapolation) and statistical (classification, correlation) cognitive methods will be applied for the purpose of revealing certain regularities and development trends of the tax legislation of the Republic of Bulgaria.

The study of the socio-economic situation in Bulgaria used formal methods of cognition. The use of such methods as analysis and generalization, comparison, modeling, etc. is explained by the necessity of formulating the hypotheses and productive ideas and also the need of understanding and explaining existing statistical data.

In writing this research paper we have used all the above-listed methods.

Quite a large number of works at international level are devoted to the investigation of the evolution of the Bulgarian fiscal system, its current condition and future prospects; the substantiation of the necessity of changes in the directions of the tax policy; strengthening of the role of taxes in state economic regulation and enhancing the effectiveness of their influence on the social and economic development of the country: A. Obadić, T. Globan, O. Nadoveza (Obadić, Globan, Nadoveza, 2014: 653-667), D. Dimova (Dimova, 2017: 463-470), M. Simionescu, L.-L. Albu (Simionescu, Albu, 2016: 850-866), A. Zabinski, M. Sosnowski (Zabinski, Sosnowski, 2013: 468-479), D. Ninov (Ninov, 2008: 33-82), M. Karaseva (Sentsova) (Karaseva (Sentsova), 2015: 84-88), Z. Ofiarski (Ofiarski, 2015: 16-37), M. Strkole (Strkole, 2015: 38-50), R. Mrocgkowski (Mrocgkowski, 2015: 86-97).

Nenkova P. in her paper “Fiscal decentralization and local finance reforms in Bulgaria: A review of ten years’ experience” overviewed the development of fiscal decentralization in Bulgaria over a period of 2003-2012 on the basis of examining its key aspects: responsibility for the expenses, the distribution of income and intergovernmental transfers; and assessed the variants of policies for solving current problems of the local financial system (Nenkova, 2014: 342-352).

Vasilev A. undertakes a quantified assessment of the social effect from the introduction of proportional taxation in Bulgaria in 2008 (Vasilev, 2015: 205-220). Using a general equilibrium model, supplemented with the informal sector, he carries out a computing experiment to evaluate the benefits of proportional taxation. He proves that a lower effective tax burden in the new taxation scheme results in moving people to the official sector, stimulates investments and increases production and consumption.

We would like to mention in particular the study of Tanchev S. that considers the opportunities for combination of a proportional and progressive income tax in Bulgaria as factors for economic growth (Tanchev, 2016: 66-77).

## 2.1 General Information

It is worth mentioning that fiscal legislation in Bulgaria is not systemized. Each type of tax has its own normative act regulating its legal basis. As a result, fiscal legislation is

rather extensive and nonsystematic, which causes certain difficulties in law enforcement. The structure of the taxation system in the Republic of Bulgaria is presented below.

Types of taxes:

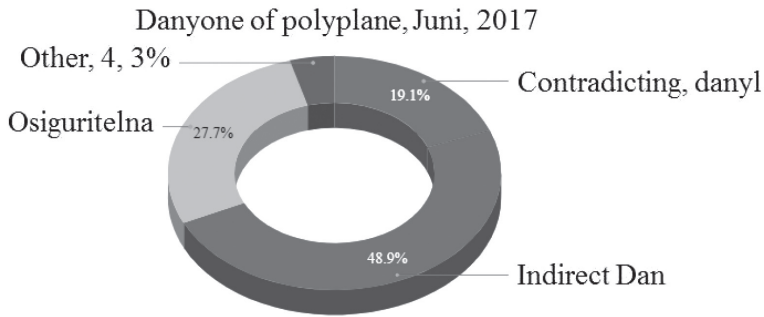
1. Personal income taxes.
2. Value-added tax.
3. Income tax.
4. Corporate tax.
5. Patent tax.
6. Falsified acquisition of property tax.
7. Property acquisition by donation tax.
8. Tourist tax.
9. Inheritance tax.
10. Vehicle tax.
11. Real estate tax.
12. Gambling tax.
13. Income tax of budget units.
14. Insurance contributions tax.
15. Shipping tax.
16. Expenditure tax.

It is noteworthy that the taxation scheme in the Republic of Bulgaria includes:

- direct taxes (corporate tax, personal income tax, withholding taxes, expenditure tax, alternative taxes on certain activities, etc.);
- indirect taxes (value-added tax and excise duties).

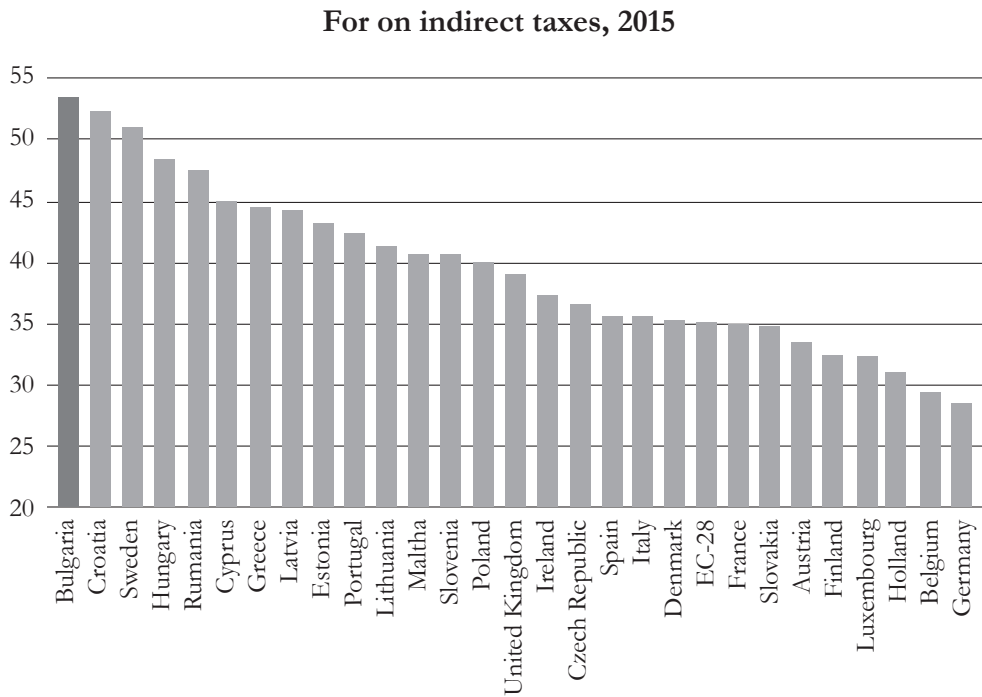
In this study we will examine the significance of indirect taxes in the taxation system of Bulgaria. Their high proportion suppresses consumption in the country and impedes economic development. The situation is aggravated by the flat income tax without unpaid minimum in combination with practically regressive contributions for social insurance. For the first half of 2017 tax revenues accounted for 14.5 billion leva that is 7.8% more compared with the previous year. Of these, 7.1 billion leva fall at indirect taxes – VAT, excise duties and fees. Direct taxes, i.e. income and personal income taxes, are 2.8 billion BGN, and other tax revenues in the treasury are estimated from social and medical insurance contributions (4 billion leva) and other taxes (0.6 billion leva), including property taxes. It means that indirect taxes account for 48.9% revenues of the treasury, and direct taxes – only 19.1% that is 2.6 times less.

Table 1: Indirect tax revenues in 2017 (Atanasov, 2017)



An indirect tax is a tax on consumption which is paid by the buyer, even if it is paid by the seller. A high share of this tax means lowering consumption of the population. Therefore, it is not surprising that Bulgaria has the highest share of its tax revenues from indirect taxes in the EU and, at the same time, it has the lowest consumption – only 53% for an average European by 2016. Table 3 presents the situation of consumption of indirect taxes in the EU countries.

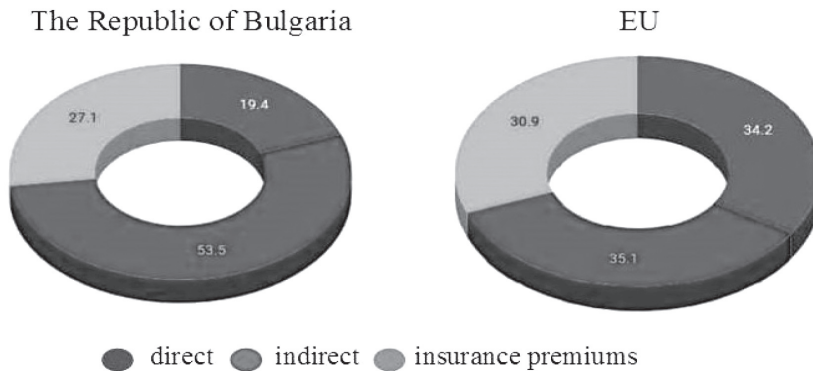
Table 2: The situation of consumption of indirect taxes in the EU countries (Atanasov, 2017)



In 2015 Bulgaria had 53.5% tax revenues from indirect taxes, and the average figure in the EU is 35.1%. On VAT revenues Bulgaria is second only to Croatia with 30.9%, with the average of 18.1% for the EU. Bulgaria is still the leader on revenues from excise duties, and for the EU it is 9.7%.

But on direct taxes Bulgaria is at the other extreme. With 19.4% of its revenues the country occupies the 25<sup>th</sup> place before Lithuania, Hungary and Croatia. The share of these taxes in the EU countries amounts on average 34.2%. Bulgaria also has one of the lowest levels of property taxation – 2% tax revenues, the EU average share being 6.8%. The difference between the Republic of Bulgaria and the international community can be demonstrated as follows.

Table 3: The correlation of the tax system in the Republic of Bulgaria and the EU (Atanasov, 2017)



Now let us look closely at the analysis of direct and indirect taxes in the Republic of Bulgaria.

## 2.2 Value added tax (VAT)

According to the requirements of the Bulgarian tax legislation, the registration of a company as a VAT payer is necessary in the following cases:

- for each person obliged to pay a tax with a chargeable turnover of 50,000 leva or more over a period not exceeding the last 12 consecutive months before the current month;

- each legal person not obliged to pay a tax and a person obliged to pay a tax that is not registered on other grounds, but acquires goods in the community with a total value of more than 20,000 leva;
- a foreign person, having a permanent facility in the territory of the state, in which he/she pursues an economic activity and meets the demands for the necessary registration;
- a foreign person that is not established in the territory of the state, but conducts chargeable deliveries from the place of performance within its territory and meets the demands for the necessary registration.

Besides, it should be taken into account that if the VAT registration in the above-mentioned cases is not carried out before the occurrence of the events specified, the tax authorities of Bulgaria will forcibly register the company as a VAT payer, calculate VAT for payment as well as impose a fine.

The VAT rate is 20%; however the law determines the grounds for lowering the tax rate. For instance, the rate for staying at a hotel during organized trips is 7%; for travel companies the VAT rate is lowered to 9%.

Some spheres of business in Bulgaria are free of VAT. The normative acts of Bulgaria stipulate the grounds for exempting from VAT: firstly, buying and selling dilapidated buildings or their parts (including adjacent land parcels) as well as offices; secondly, buying and selling farm lands and forests (unless a change of usage is made, e.g. for construction); thirdly, deals of non-economic character, etc.

### **2.3 Excise duty**

An indirect tax is calculated in the Republic of Bulgaria for the following goods: alcoholic beverages (including wine and beer), tobacco products, energy products and electrical energy, motor vehicles, coffee and coffee extracts, gambling machines, a roulette in a casino.

The goods specified may be put into the mode of excise-duty delayed payment under the following conditions:

- production in the territory of the state;
- import into the territory of the state from the territory of another Member State;
- import into the territory of the state.

Importation is considered to have been effected after excise goods get free from the customs regime and are permitted for free circulation. From now on, it is necessary to pay an excise duty.

After analyzing indirect taxes in the Republic of Bulgaria, it can be stated that the tax policy of the Bulgarian government focuses on maintaining the stability of the economy in times of crisis, stimulating business and investment activity through alleviating the tax burden of business and achieving a minimum level of taxation within the European Union; simplifying the tax system and specifying tax legislation in order to improve its transparency, eliminating internal contradictions and imperfections in the practice of taxation and control; preserving tax rates on direct taxes in combination with lower social insurance contributions of employers in support of economic growth and employment; preserving the higher share of taxation of indirect taxes compared to direct taxes.

To sum up, taxes have an impact on consumption and savings, as tax changes have a direct impact on the level, dynamics and structure of disposable income. The increase in public spending causes an increase in GDP, while the increase in taxes has the opposite effect. And in a market economy, economic growth is measured by GDP growth, so taxes, the state and the market economy are inextricably linked.

Having analyzed the tax system of the Republic of Bulgaria, we note that the system itself is based on the clearly developed tax policy of the state. Currently, the tax policy is determined by the government programme over a period of 2014-2018. Its priorities are upholding the rule of law and support of institutions that work effectively and transparently for the benefit of citizens and guarantee conditions for a worthy life and personal development, preservation of the tax system and low share of GDP redistributed by the government as well as maintenance of a favorable fiscal environment. Tax policy is a basis for economic and fiscal policy of the country and an important tool for regulation on a macroeconomic level. Apart from being the key element of fiscal policy, tax policy should also be considered as an important factor for stimulation of direct foreign investments, economic growth and employment.

Effective tax policy for providing financial and macroeconomic stability and supporting economic growth, investments and employment will be carried out by means of:

- 1) thorough analysis of the tax policy of the Republic of Bulgaria;
- 2) developing the concept of a new model of effective tax policy and tax system reforms with tax preferences according to the Law on state aid of the EU 2014-2018;
- 3) assessing the effect of the new model of budget policy on budget revenues, economic development, investments and employment;
- 4) organizing public debates on general tax policy of the country;
- 5) preparation of a roadmap for realization of a new model of tax policy and reforms in the tax system;
- 6) analysis of the tax system on types of taxes and structural elements of taxes;



- 7) reduction of administrative burden and expenses for the business and citizens;
- 8) effective tax incentives for stimulation of investments, innovations and employment.

The tax policy of the government is also aimed at reducing gray economy, fighting against tax fraud and tax evasion.

However, despite the structured tax policy in the Republic of Bulgaria, there are drawbacks in the functioning tax system. We will consider them thoroughly. The description of the presented types of taxes demonstrates that in its essence the tax policy in the Republic of Bulgaria is a destructive factor of state system development. Among the drawbacks of the functioning system of indirect taxes are:

- firstly, collection of indirect taxes is carried out on the principle of self-taxation and the payer has to regulate individual taxable capacity independently; such taxes are distributed among individuals disproportionately to their income or capital;
- secondly, for a low-bracket category of the population indirect taxes become burdensome as they are mainly fiscal in character;
- thirdly, they limit the level of profit, since it is not always possible to push up a price proportionately to the indirect tax rate, especially in the case when tax rates increase.

Having analyzed the destructive aspects of the Bulgarian state system, we will offer the following steps for transformation of the mechanism of the tax policy that will contribute to improvement of the taxation system.

Firstly, it is necessary to devise a new drastically changed concept of the tax policy in the Republic of Bulgaria.

Secondly, due to the prevailing indirect system of taxation, it is important to reduce a tax burden in respect of payers of this type of taxes by means of granting various benefits and preferences.

Thirdly, it is essential to stimulate the development of a production sector of economy, since it is the main income source of budget for any modern democratic state in the era of developing market turnover and relationships.

### **3 Conclusion**

Having analyzed certain types of taxes and having clarified the peculiarities of taxation in Bulgaria, we should note the following points. At the present time in order to overcome the social and economic crisis, it is necessary to be very careful at making decisions about the tax policy pursued as it causes some problems that should be taken into account.

Firstly, the tax legislation of the Republic of Bulgaria requires development and systematization.

Secondly, for the purpose of improving the competitiveness of the republic among other EU members the tax system should be clearly differentiated in respect of tax types. It concerns both residents and nonresidents of the state that should be granted a certain status to stimulate the development of the tax system. A certain status means a system of benefits and preferences for the development of economic relationships that are favourable not only for foreign organizations, but also for the tax system of the Republic of Bulgaria itself.

Thirdly, it is essential to develop the system of direct taxes, since their role in the domestic taxation system is not big, which has a negative impact on the whole tax system of the republic.

Fourthly, in order to eliminate the destructive factor for the state system in the Republic of Bulgaria, it is necessary to move from theoretical concepts to practical actions, which can increase competitiveness and economic stability both within the state itself and in the international arena.

## References

- Atanasov, I.: Polovinata dan'chni prikhodi v khaznata idvat ot taksuvane na potreblenieto (A half of revenues get into the treasury from the tax on consumption). Barikada. <https://baricada.org/2017/08/02/kosveni-danatsi/>
- Vozhinova, M., Zheкова, K., Peukovska, P.: Экономический потенциал Болгарии. Путеводитель инвестора (The economic potential of Bulgaria. A guide-book for the investor), М.: Импрес ООД – Пловдив (Moscow: Impres OOD – Plovdiv), 2008.
- Dimova, D.: Modeling data on taxes and average annual salary in Bulgaria. International Multidisciplinary Scientific GeoConference Surveying Geology and Mining Ecology Management, SGEM 17(21), (2017).
- Karaseva (Sentsova), M.: Some Methodological Approaches to the System of Financial Law, in: Petr Mrkyvka (ed.): System of Financial Law: General Part : Conference Proceedings, 1st ed. Brno: Masaryk University, Faculty of Law, 2015.
- Mrocgowski, R.: Bail-in Principle as the Basic of the Bank Recovery and Resolution Mechanism in European Union, in: LAZEK, Jiff (ed.): System of Financial Law: Financial Markets : Conference Proceedings, 1st ed. Brno: Masaryk University, Faculty of Law, 2015.
- Nenkova, P.: Fiscal decentralization and local finance reforms in Bulgaria: A review of ten years' experience. Mediterranean Journal of Social Sciences no. 10 5(23) (2014).

- Ninov, D.: Social goals and consequences of the flat (proportional) taxation in Bulgaria. *Ikonomicheski Izsledvania* no. 17(4) (2008).
- Obadić, A., Globan, T., Nadoveza, O.: Contradicting the twin deficits hypothesis: The role of tax revenues composition. *Panoeconomicus* no. 61(6) (2014).
- Ofiarski, Z.: The Constitutional Position of the Monetary Policy Council and the Regulations of the Act on the National Bank of Poland, in: LAZEK, Jiff (ed.): *System of Financial Law: Financial Markets : Conference Proceedings*. 1st ed. Brno : Masaryk University, Faculty of Law, 2015.
- Simionescu, M., Albu, L.-L.: The impact of standard value added tax on economic growth in CEE-5 countries: econometric analysis and simulations. *Technological and Economic Development of Economy* no. 22(6) (2016).
- Strkole, M.: Private Legal and Public Legal Interaction of the Financial Market Legislation, in: LAZEK, Jiff (ed.): *System of Financial Law: Financial Markets : Conference Proceedings*. 1st ed. Brno : Masaryk University, Faculty of Law, 2015.
- Structure of Bulgarian Tax System. Ministry of Finance of the Republic of Bulgaria. <http://www.minfin.bg/bg/774>
- Tanchev, S.: The role of the proportional income tax on economic growth of Bulgaria. *Ikonomicheski Izsledvania (Economical news)* no. 25(4) (2016).
- Vasilev, A.: Welfare effect of flat income tax reform: The case of Bulgaria. *Eastern European Economics* no. 53(3) (2015).
- Vasileva, V.: Анализ налоговой политики в Республике Болгарии за период 2007-2011 годы (The analysis of the tax policy in the Republic of Bulgaria over a period of 2007-2011), *Финансы: Теория и практика (Finances: Theory and Practice)* no. 6 (2012).
- Zabinski, A., Sosnowski, M.: Fiscal aspects of tax system restructuring in Central and Eastern Europe. *Transformations in Business and Economics* no. 12(2 B) (2013).

---

# TAX SOVEREIGNTY OF THE WELFARE STATE (EXPERIENCE OF THE CENTRAL AND EASTERN EUROPEAN COUNTRIES)

*Eugeniy Belikov*<sup>1</sup>

## **Abstract**

The article is devoted to the analysis of socially oriented tax and legal policy of the Central and Eastern European countries which are mostly members of the European Union at the present stage of development, including in times of economic crises. Given that the independent tax and legal policy of a state is a manifestation of its tax sovereignty, a study investigating the influence of restriction of national tax powers within the framework of this integration unit in order to achieve goals and principles of a welfare state appears to be relevant. In the course of the research, the general theoretical model of using legal means in the tax and legal regulation, statistical and comparative and legal methods are applied. It is proved that legal stimulation of subjects of tax legal relationship to socially responsible behavior is a most important legal means to carry out the socially oriented tax and legal policy in the countries of Central and Eastern Europe, with respect to the realization of welfare state principles by them.

## **Key words**

Tax and legal policy, tax sovereignty, tax and legal incentives, welfare (social) state, principles of a welfare state.

**JEL Classification:** K34

## **1 Introduction**

Most of the developed and developing countries are currently welfare states or declare themselves as such. Nearly all constitutions adopted after World War II in varying degrees contain provisions of social character, state and law social bases irrespective of their political regime, form of government and state religion. For the first time the term “welfare (social) state” as a constitutional principle was recorded in the Basic law of Germany 1949, in which Art. 20 states that “The Federal Republic of Germany is a democratic and social federal state”. Then the considered term was enshrined in the Constitutions of the countries of Europe and Latin America, in particular Central and

---

<sup>1</sup> doctor of jurisprudence, associate professor, Saratov State Law Academy, professor of the department of financial, banking and customs law; areas of specialization – financial legal support of social statehood, financial law, tax law, budgetary law; the author of more than 70 works, including 3 monographs, a manual, 26 articles in the reviewed journals; belikovy79@mail.ru.

Eastern Europe: Croatia 1990, Macedonia 1991, Romania 1991, Slovenia 1991, Russian Federation 1993.

In the Basic laws of some European countries the term “social (welfare) state” is not used, but they contain either characteristics of the state which are rather close in meaning to the name and contents of this term, or the norms affirming the social and economic rights of the population and obligations of the state in the social sphere are recorded. Thus, Art. 2 of the Constitution of Poland states that “The *Republic of Poland* is a *democratic* state ruled by law, implementing the rules of social justice”. Art. 1 of the Constitution of the Republic of Serbia says that this state is based on the rule of law and social justice.

The phenomenon of the welfare state is a subject of studying of many social sciences, including the legal one. At the same time, the concept “welfare state” is examined in the scientific literature from various points of view. For the purposes of this study the welfare state is understood as a constitutional state whose main goal is the achievement and maintenance of the high standard of living of each person and society in general by vigorous, conscious and responsible activity of public authorities, local government bodies and other subjects of public law, first of all in the sphere of public finance, for ensuring social security and public stability, conditions for realization of personal potential, minimization of social risks and unjustified social differences.

In the welfare state the creation of conditions providing worthy life and free development of the person in many respects depends on financial activity of public entities and their bodies. It appears that the essence of financial activity of a welfare state should consist in socially oriented formation, distribution and use of public financial resources for the purpose of realization of public interests. A special role in this process belongs to the legal regulation of taxation and tax and legal policy which should develop according to the principles of welfare state (social justice, creation of socially oriented economy, social and economic equality of individuals and social, national and other communities, social responsibility, social solidarity, social safety). In the context of ongoing powerful integration processes in the 21st century (for example, the development of the European Union, formation of the Eurasian Economic Union) and also periodic world and regional economic crises, the issues of formation and realization of tax and legal policy of welfare states are becoming even more relevant.

The purpose of the article is to analyze the socially oriented tax and legal policy of the Central and Eastern European countries, which are mostly members of the European Union at the present stage of development, including in times of economic crises. Given that the independent tax and legal policy of a state is a manifestation of its tax sovereignty, a study investigating the influence of restriction of national tax powers within the framework of this integration unit in order to achieve goals and principles of the welfare state appears to be relevant. In the course of the research, the general theoretical model of using legal means in the tax and legal regulation (Malko, 2003; Miroshnik, 2003; Laychenkova, 2007; Belikov, 2014: 12-13; Bogovac, 2015; Belikov, 2016), statistical and

comparative and legal methods are applied. The justification of the leading role of tax and legal incentives in the course of carrying out socially oriented tax and legal policy in the countries of Central and Eastern Europe is also based on scientific developments of the financial and legal policy concept (Karasyova, 2003; Smirnikova, 2011; Himicheva, Pokachalova, 2006; Belikov, 2016). Over recent years, questions relating to realization of tax sovereignty have become a subject of various legal researches (Havanova, 2013; Raritska, 2015; Andreyev, 2017; Ponomareva, 2016; etc.). However, in the context of achieving the goals and principles of a welfare state in the countries in question, these issues have barely been touched in the scientific studies.

## **2.1 Socially oriented tax and legal policy and tax sovereignty in the countries of Central and Eastern Europe**

For the purposes of this research, the tax and legal policy is understood as the state activity carried out in interaction with civil society organizations on the formation and realization of conceptual ideas and programs aimed at providing effective legal regulation in the field of the taxation by legal means. The development of tax and legal policy concepts should be based on accurately formulated priorities arising from the constitutional principles, and in particular from the principle of the welfare state. The social orientation of tax and legal policy, as it seems, should consist in equitable distribution of a tax burden by the state to the population and business, their stimulation to responsible and socially important behavior, increase in their interest in a vigorous creative activity resulting in the social stability and growth of welfare of all society, and taking into account social factors in the tax law (Belikov, 2015: 6 – 8).

An independent tax and legal policy maintained by the welfare state, which contributes to securing their citizens' basic social needs, is based on tax sovereignty acting as a manifestation of the state sovereignty in the economic sphere, or, to be exact, in the field of taxation. In turn, the essence of tax sovereignty, according to K.A. Ponomareva, is reflected in unique and special powers of the state to establish and pursue tax policy (Ponomareva, 2016: 251). It is also necessary to agree with M.N. Sadchikov's point of view about tax sovereignty in that "the exclusive right of the state is to carry out independently and on its own the function of taxation and collection of taxes within the territory of its jurisdiction" (Sadchikov, 2016: 18). In recent years, issues related to the tax sovereignty have become a subject of various legal researches and are constantly updated within the integration state units.

Thus, the rapprochement of tax systems and tax and legal policy in EU countries, mainly in the field of indirect taxation, was a consequence of realization of main objectives of this integration unit, namely: the creation on the territory of Europe of a single commodity and service market, and as a result, elimination of customs and tax barriers. In particular, the EU Council in its directives establishes the norms regulating process of

harmonization of the legislation in Member States on sales taxes, duties and other forms of the indirect taxation to the extent this harmonization is required for creation and functioning of domestic market (Contract on the EU, Art. 93 and 94).

For example, the Directive of Council 2006/112/EU of November 28, 2006 “On the common system of value added tax” determines all VAT taxation basic elements, except concrete tax rates established by each EU Member State independently within the limits provided by this Directive. In particular, no EU country can establish the main rate of the VAT at less than 15%, at the same time it can provide a zero rate and no more than two lowered rates, the minimum of which has to be not less than 5%. Thus, EU countries, acting according to the Treaty on the EU and directives adopted according to the Treaty in the indirect taxation, limit a part of their powers in the tax sphere, including in the field of establishment of the VAT, keeping a possibility of establishment of concrete tax rates within a certain framework.

The analysis of the legislation of 11 countries of Central and Eastern Europe, members of the EU, demonstrates that these states fulfill the requirements of the integration legislation for establishment of rates of the VAT completely, but at the same time they use differently the law-making opportunities which are available for them in the aspect of social orientation of the taxation, a ratio of the fiscal and regulating taxation functions. A common feature for all countries in question is the establishment of main (standard) rate of the VAT (for example, 19% in Romania and 27% in Hungary), a zero rate, as a rule concerning inner-union and international passenger traffic and also the lowered rates, as a rule having social character. At the same time 7 countries (The Czech Republic, Croatia, Latvia, Lithuania, Hungary, Poland and Romania) use two lowered VAT rates, and 4 (Bulgaria, Estonia, Slovenia and Slovakia) – one for each country.

Thus, in Bulgaria and Estonia the main rate is 20%, and the lowered rate (9%) extends only to separate services or goods (generally, hotel accommodation). At the same time in Estonia the lowered rate is also applied to selling pharmaceutical production, medical equipment for disabled people, books (except electronic ones), newspapers and periodicals. The main VAT rate in Slovakia is also 20%, and the lowered rate is 10% concerning some food, pharmaceutical production, medical equipment for disabled people and books (except electronic ones). In Slovenia, together with the main rate of 22% one lowered rate (9.5%), including the operations with food, medicines, newspapers, books, periodicals, social housing is established.

In Romania the main VAT rate has decreased since January 1, 2017 from 20 to 19% and it is the lowest one among the countries of Central and Eastern Europe. At the same time the lowered rates are established at 5% (concerning social housing, books (except electronic ones), newspapers and periodicals, attendance of cultural and sporting events) and 9% (for example, concerning food, pharmaceutical production, medical equipment for disabled people, hotel accommodation). In Lithuania the main VAT rate is 21%, and the lowered rates concern separate goods or services: medicines and medical equipment

for disabled people (5%) and also some internal passenger traffic, books (except electronic ones), newspapers and periodicals, hotel accommodation, the centralized heating (9%). In Poland with the main VAT rate of 23% two lowered rates are present. The rate of 5% is established concerning selling some food, fruit juice, some books and periodicals (except electronic ones), and certain agricultural goods. The rate of 8% is applied to a rather wide list of socially important goods and services, in particular, to certain food, pharmaceutical production, medical equipment for disabled people, children's car seats, some newspapers and magazines, attendance of cultural and sporting events, amusement parks, hotel accommodation, use of sports equipment, and some household services.

Thus, many countries of Eastern and Central Europe, which are the members of the EU, can now influence positively the social stability of society and consumption of socially important goods and services, establishing lowered VAT rates. However, in the next years the EU members can lose such right as the European Commission plans to reform this tax, in particular, by cancelling the zero and lowered rates. In many respects such decision is caused by considerable loss of income from this tax (up to 10 – 20%) in EU countries as a result of use of various criminal schemes with the purpose of receiving compensation under the VAT (Stadnik, 2016: 65). Therefore, such restriction of tax powers can negatively affect the achievement of purposes of the welfare state by a number of EU Member States.

The harmonization of the taxation in the EU which is standardly fixed in relation to indirect taxes and aimed at elimination of tax obstacles for effective functioning of the uniform market did not practically extend until recently to direct taxes (income taxes for the natural persons and organizations, a tax on income from capital, etc.) the establishment of which is in the exclusive competence of Member States and for which the principle of the tax competition works. In particular, this principle in many respects has influenced reforming of the taxation on mobile factors of production (the capital and highly skilled work) in the developed countries of the world by decrease in rates of enterprise taxes and taxes on the capital. The tax competition in many respects promotes economic growth (it is not by chance that a number of the countries of Central and Eastern Europe have introduced the proportional taxation of income of natural persons) and is unprofitable for the countries of Western and Northern Europe with a rather high tax burden which generally lays down on natural persons.

In legal literature there is no uniform position concerning the limits of tax harmonization in EU countries. Thus, on the one hand, N.Yu. Andreyev correctly claims that according to the analysis of sources of the EU tax law of directive and not directive character of the EU, any harmonization and respectively restriction of the state tax jurisdiction are possible only concerning the indirect taxes directly connected with capital movements of goods, works, and services. However, this author draws a disputable conclusion that the problems connected with the need of restriction of tax jurisdiction of EU Member States and, especially, tax sovereignty refusal in general aren't relevant for the European tax law.



At the same time, according to him, the tendencies testifying to the need to transform direct taxes within the EU can be one of the arguments for further EU centralization, but currently they are not observed (Andreyev, 2017)

It should be noted that besides the founding agreements, directives and other regulations, the EU sources of law also include the decisions of the European Court of Justice, which are obligatory for all Member States and contain interpretations of the founding agreements, and standards of the secondary law which actually represent new precepts of law (Glotov, 2010: 131). In this regard, the point of view about the impact of decisions of the EU on the process of harmonization of direct taxes looks reasonable (Ponomareva, 2015: 155). Thus, according to K.K. Baranova and V.B. Belov, in spite of the fact that the direct taxes *de-jure* are excluded from the harmonization process as in joint decision-making concerning these taxes, Member States can use the veto, *de-facto* this harmonization gradually and more and more intensively affects the sphere of direct taxes that finds reflection in practice of the EU Court (Baranova, Belov, 2010: 113). The task of this body is to check the compliance of national law to precepts of the EU law, in particular, with regard to manifestations of unfair competition, for the purpose of implementation of Art. 12 of the EU Treaty in respect of the principle of ensuring fundamental freedoms and inadmissibility of national origin discrimination. In the field of the direct taxation (for example, returns on capital) unfair competition can be expressed in emergence of “tax oases” and granting preferential terms of taxation (for example, for attraction of foreign investments and qualified specialists). Thus, if the positive law of the EU doesn’t really establish the norms on harmonization of direct taxes, then the case law of the EU points in a different direction, allowing it in the case of unfair tax competition and respectively limiting tax jurisdiction of the state. Nevertheless, the Court of the EU has to seek to observe balance between tax sovereignty of the Member States and obligations arising from the European contracts (Ponomareva, 2016: 256).

The financial crisis of 2008 became the key moment for EU Member States having various attitudes to the tax harmonization. It concerns both the countries opposing it, which offer the preferential taxation (for example, Austria, Luxembourg), and the countries supporting it, of which rather high taxes and high social expenses are characteristic (Germany, France). As a result of the above-stated crisis, the countries of Eastern Europe mostly affected and getting support from the budget of the EU couldn’t insist unconditionally on free competition any more, and the large states of Western Europe which have increased the expenses and a public debt in the conditions of the crisis have tried to resolve considerably this issue by moving their capitals to “tax oases” (Baranova, Belov, 2010: 115 – 116). In the crisis conditions many countries were compelled to introduce changes into the legislation on the corporate taxation as during this period the competition between the old and the new EU countries has increased. According to Yu.S. Ranchinskaya’s remark, “if the new countries reduced rates for bigger compliance of the tax systems to the systems of the old countries to crisis, then in the crisis conditions the

old countries were forced to reduce the rates of direct taxes” (Ranchinskaya, 2011: 24). According to K.K. Baranova and V.B. Belov, in the EU countries “understanding of the circumstance that in the conditions of globalization prohibitive fiscal barriers can do more harm than good is growing. Therefore, any state, both large social ones as Germany and France supporting harmonization, and the small “privileged” countries of Europe benefiting from the tax competition – first of all Switzerland and some other small European countries – have to build the financial systems on the basis of transparency and trust” (Baranova, Belov, 2010: 127).

## **2.2 Socially oriented tax and legal policy of the Central and Eastern European countries during economic crises**

In the conditions of the global financial and economic crisis of 2007 – 2009 and the European debt crisis of 2010 – 2014, which have led to essential delay of economic dynamics, the welfare states independently took various measures in the field of tax and legal policy both in the field of the direct and indirect taxation. During this period each European country tried to keep in its own commitment to the chosen way of the social development directed to the preservation and enhancement of the human capital (Ayzinova, 2013: 8). The tax and legal incentives became the main legal instrument in conducting the above-stated policy directed to support the real sector of economy and the standard of living of the population. They were expressed, in particular, in the reduction of tax rates, revision of a scale of the taxation or granting tax deductions on income taxes.

In this research tax and legal incentives are understood to be legislatively established legal means inducing taxpayers to lawful behavior in the sphere of the taxation and creating favorable conditions for satisfaction of their legitimate interests. In the conditions of formation and development of social statehood in the countries of Central and Eastern Europe, the tax and legal incentives (privileges, withdrawals, encouragement, etc.) also become an important way for improving the well-being of the population as their use reduces tax base on taxes and promotes redistribution of income of their taxpayers for their personal and other purposes. Therefore, in a broad sense it is possible to speak about social (public) orientation of the majority of tax and legal incentives irrespective of the purpose of their establishment. Moreover, in recent years the tax legislation of the countries in question has established different tax and legal incentives (in narrow sense) for separate categories of citizens having pronounced social character, for example, of income taxes. Thus, tax and legal incentives of social orientation act as the most important legal instrument of socially oriented tax and legal policy and at the same time as an indicator of its efficiency (Belikov, 2014)

During 2009-2010 in the EU countries the decrease of taxation burden on households (first of all with a smaller level of income) became the main way to increase their income

and maintain consumer ability of the population. In 10 EU countries (including Hungary, Lithuania, Latvia, Poland, Romania) there was a decrease in rates of individual income tax. In Hungary, for example, the reduction of the income tax rate was followed by the change of the taxation scale. In many EU countries (in particular, Bulgaria, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia) the tax base of the tax under consideration was reduced. The majority of new tax deductions were related to the income taxation of socially vulnerable segments of the population: elderly people, incapacitated citizens, women taking maternity leave for child care. In some countries, for example Bulgaria, for the purpose of maintenance of the market of the residential real estate the percentage of the expenses connected with the repair or acquisition of housing was deductible from the tax base. At the same time, in a number of EU countries there was an increase in the size of individual income tax rates concerning taxpayers with a high income (Slovenia) or tax base, for example, as in Hungary and Estonia (Ranchinskaya, 2011: 22).

Legal regulation of the corporate taxation in EU countries during financial crisis of 2008-2009 was characterized by application of similar legal means: reduction of tax rates and also optimization of tax administration. In some countries (Hungary, Slovenia, the Czech Republic) the general tax rates were lowered; in a number of the states, for example Lithuania, the rates for certain kinds of activity were lowered. In Romania changes in the field of tax administration affected the extension of tax payment terms, and in Slovakia and the Czech Republic, for example, simplifications of the mode of taxation for medium-sized and small enterprises took place. Changes in the corporate taxation during the crisis were basically temporary; at the same time the individual income tax optimization is a goal of all EU Member States in the long term.

During the crisis the greatest receipts in the budgets of EU countries (for example, Hungary, Latvia, Lithuania) were the share of income from the VAT and excises. At the same time, one group of the countries didn't change the size of standard rates on the VAT, and another group has made this increase. In the majority of the countries the lowered rates were also left unchanged, which in general was connected with the need of maintenance of demand of the end customers, namely the population. Therefore, changes were generally directed to the reduction of terms on the VAT compensation, increase in terms of payment the VAT and other measures in the field of tax administration (Ranchinskaya, 2011: 24).

During the financial crisis there was also no uniform policy concerning social contributions in EU countries. In some countries (Hungary, Poland, Romania, the Czech Republic) a rate of social contributions concerning some categories of the insured persons (for example, the employees with low qualification) was lowered for the purpose of cumulative offer support. In particular, in Poland insurance contributions for provision of pensions were lowered from 7.3 to 3% of the salary (Ayzinova, 2013: 16). At the same time, in the Czech Republic taxable the basis on these payments was increased. In a number of the countries (Hungary, Romania, Slovakia, Estonia) the rate of social contributions was increased.

The most independent and at the same time radical for foreign investors was tax and legal policy in Hungary in 2010 – 2013. In order to replenish deficiency of the state budget and to protect national economy several new anti-recessionary, in fact extraordinary, taxes were temporarily introduced. They had an impact on banks, energy and telecommunication companies, and large retail chain stores and had discriminatory character concerning foreign investors in whose hands there was more than 80% of the financial market of Hungary. At the same time, tax burden on small and medium businesses was reduced. Since 2013 the transaction tax on financial transactions whose rate was 3–6% from a turn depending on a type of operation was imposed: (Volotov, Volotov, 2014: 78–80). Besides, as it was already noted, during the crisis periods in Hungary indirect taxes considerably raised, and income taxes, in particular for natural persons decreased at the same time. In 2017 the rates of taxes on income in this country became one of the lowest in Europe: for the organizations – 10.8%, for natural persons – 15%.

Thus, all crisis response measures taken by the majority of Central and Eastern European countries, EU members, during 2008 – 2010 generally corresponded to tendencies of development of the taxation in Europe in last decades (decrease in a share of the direct taxation, for example due to lowering of the rates on a corporate tax, reduction of a tax burden concerning the income on natural persons, and increase in a share of the indirect taxation) and considered to some extent the interests of socially vulnerable and other segments of the population. According to Yu.S. Ranchinskaya, “the majority of tax changes have taken place in that group of taxes which was the least harmonized. It has significantly increased opportunities for maneuver taking into account need for fast decision-making”. At the same time, the above-mentioned author fairly notes that the attention paid by EU countries to direct taxes is “the initial stage of their harmonization in response to strengthening of the competition between tax systems” (Ranchinskaya, 2011: 26).

### **2.3 Modern socially oriented tax and legal policy in the countries of Central and Eastern Europe**

In 2014-2015 the recession in the economies of the countries of Central and Eastern Europe changed into growth. In particular, in 2016 the volume of GDP of these countries increased by 18% in comparison with 2010, which was caused by some revival of demand in construction and trade, increase in export of goods and services, reduction of oil prices, and economic policy of these states (Sheinin, 2017: 38).

As has been mentioned, one of the main objectives of modern tax and legal policy of the leading countries was ensuring social stability of economic development (Pogorletsky, 2012: 71). Currently, the tax burden including social contributions in EU countries, which in their majority are the welfare states, is rather high and in 2015 averaged 38.7% (1.2% higher than the level of 2005). At the same time, the general tax burden in the “old”

EU Member States is traditionally much higher in comparison with the countries of Eastern and Central Europe. For example, in 2015 the tax burden (in relation to GDP) in Denmark was 46.6%, France – 45.9%, Finland – 44%, Sweden – 43.3% while in Romania it equaled 28%, in Bulgaria – 29%, Lithuania – 29.1%, Latvia – 29.2%, the Czech Republic – 34.3%. At the same time, over ten years (comparing the data of 2005 with the data of 2015) the tax burden reached its maximal level in Greece (by 4.5%), Italy (by 4.3%), Estonia (by 3.9%); it reached its minimal level in Ireland (by 6.2%), Sweden (by 3.4%), Denmark (by 1.4%), and was practically the same in Great Britain (+ 0.1%), the Czech Republic (+ 0.2%), Lithuania (-0.1%).

Social contributions hold a significant place in the structure of fiscal payments in EU countries – on average they stayed at 30.9% in 2015, which is only 0.4% less than a similar indicator in 2005. In 2015 the maximum level of social contributions was noted in the Czech Republic (42.3%), Slovakia (42.9%), Lithuania (40%), and the minimum level – in Sweden (6.4%), Ireland (16.4%), Malta (17%). At the same time, over ten years (comparing the data of 2005 with the data of 2015) the level of social contributions reached its maximal level in Lithuania (by 9.6%), Ireland (by 3.7%), the Netherlands (by 3.2%); it reached its minimal level in Romania (by 5.8%), in Greece (4.2%), Germany (3.6%), and was practically the same in Hungary (+ 0.1%), Sweden (0%), Austria and Denmark (-0.1%).

As for the individual income taxation in EU countries, on average the maximum tax rate in 2017 was 39.2%, in comparison with 2002 it has decreased by 3.7%. At the same time, the lowest rates are established in the countries of Eastern and Central Europe where the proportional taxation of income of the population is applied, – Bulgaria (10%), the Czech Republic, Lithuania and Hungary (15%). The highest rates are established in the countries of Western and Northern Europe with the ascending scale of taxation, which is considered as more fair in the social plan, such as Sweden (57.1%), Portugal (56.2%), Denmark (55.8%), Belgium (53.2%). At the same time, in these countries citizens with modest income are exempted from income tax or pay it at the lowest rates. It should be noted that a classical individual income tax remains in Slovenia (50%) and Croatia (42.4%), in the welfare states as they have proclaimed themselves. Over fifteen years (in comparison with the data of 2002 and 2017) the main rate of income tax has reached its maximal level in Greece (by 15%), Portugal (by 16.2%), Luxembourg (by 6.8%); it has reached its minimal level in Romania (by 24%), Hungary (by 25%), Lithuania (by 18%); and was practically the same in Slovenia (0%), though from 2007 to 2012 it went down to 41%.

In the countries of Eastern and Central Europe the receipts from the individual income tax, as a rule, go to the (central) state and only in some states the similar tax with a small rate in parallel also exists at the local level (Galishnikova, 2017: 63). In general, the tax income of municipal territorial units as a part of income of the consolidated budget in the countries under consideration in general is not significant. In particular, the highest share of municipal tax income is characteristic of Estonia (13.36%), Poland (12.91%)

and Slovenia (10.63%), though in comparison with other unitary countries of Europe it isn't so high (for example, in Sweden it makes up 37.03%). The lowest share of local tax income is in Slovakia (2.75%) and the Czech Republic (1.22%).

Practically all countries of Central and Eastern Europe are unitary states where two-level budgetary and tax systems function. Delegation of separate powers on establishment and introduction of taxes by the state to the administrative-territorial units in its territory is one of substantial characteristics of its tax sovereignty (Sadchikov, 2016: 17). OECD experts have developed the whole system of indicators of a condition of the interbudgetary relations, one of which is tax autonomy of territorial units of local and regional levels. In scientific literature 4 levels of tax autonomy of territorial units are underlined on the basis of OECD experts' classifications: wide, moderately wide, moderately narrow and narrow autonomy (Gracheva, 2017: 234, 242). Generally, moderately wide and moderately narrow tax autonomies are characteristic for the countries of Central and Eastern Europe which are OECD members. Moderately wide autonomy provides the right to municipal governing bodies to establish independently only rates or privileges on local taxes, first of all on the property tax (Hungary, Slovakia, the Czech Republic). At the same time, the rate of the property tax in these countries is determined generally per square meter whereas the tax base is defined on the basis of real estate area. When establishing differentiated rates on this tax the social factor often is considered: lower rates are provided for the residential real estate (Czech Republic) or for low cost ones (Slovenia). Besides, in Hungary a municipal unit at own discretion can choose the characteristic which is the cornerstone of definition of tax base on a land tax: quantitative (the area of the land plot) or cost – in the form of the corrected market value of the land plot (Loginova, 2016: 57). Moderately narrow tax autonomy is characteristic of Poland, Slovenia, Estonia and it generally assumes participation of municipal unit in distribution of tax income between the state and local budgets (Gracheva, 2017: 234, 242).

Any improvement of the independent and socially oriented stimulating tax and legal policy in the countries of Central and Eastern Europe is possible in several directions. First, it can concern both the change of substantial part of a number of incentives concerning some taxes (for example, the increases in the size of deductions concerning the income tax and cancellations of restrictions on their use), and complex reforming of the institute of tax and legal incentives in general in order to achieve a compromise between economic efficiency and social justice. Secondly, for the purpose of equitable (proportional) distribution of a tax burden by the state on the population and business it is necessary to seek for achievement of an optimum ratio of the fiscal and regulating functions of the taxation of the organizations and persons. Strengthening of the regulating influence of taxes by means of establishment and application of various tax and legal incentives and other legal means will allow, first, conscientious taxpayers, being the organizations and individual entrepreneurs to direct the profit they make to material and other stimulation of workers more actively, expressing thereby their socially responsible behavior, development of the activity and economy of the respective territory in general;

secondly, the conscientious taxpayers (individuals) can use their income and property for free development and improvement of their well-being. Thirdly, it is expedient to consider more actively social factors in the tax legislation: financial position of the taxpayers – individuals (for example, by means of establishment of a free minimum of the taxation for those with a low income); their family composition (for example, in fixing the taxation of their income), etc.

### 3 Conclusion

Thus, many countries of Central and Eastern Europe realizing or seeking realization of the principles of the welfare state (creation of socially oriented market economy, social justice, etc.), have acquired a certain positive experience in realization of their independent socially directed tax and legal policy being a consequence of tax sovereignty of the above-stated states. The accession of a number of the countries under consideration to the EU has demanded fulfillment of integration principles by them, including in the sphere of the taxation to limiting to some extent their tax sovereignty. Nevertheless, these states manage to carry out rather independent socially oriented policy not only in the field of establishment and collection of direct taxes, but also partly of indirect ones which are more subject to harmonization.

Active and consecutive use of various legal means of social orientation by the countries of Central and Eastern Europe during implementation of independent tax and legal policy will promote realization of the principles of welfare state and improvement of well-being of citizens, including in the period of crisis phenomena in the world economy. At the same time, the development of stimulating function of national tax system will promote further realization of the social and economic rights of citizens. However, with the integration strengthening the danger of negative impact of restrictions of tax sovereignty over the achievement of purposes and principles of the welfare state by the countries of Central and Eastern Europe, EU members, remains.

### References

Andreyev, N.: Модель налогового суверенитета Европейского союза (аналитический материал подготовлен с использованием материалов М.В. Сенцовой (Карасевой), А.Г. Пауля, А.В. Красюкова) (Model of tax sovereignty of the European Union (analytical material is prepared with use of materials of M.V. Sentsova (Karasyova), A.G. Paul, A.V. Krasnyukov)). <https://drive.google.com/file/d/13GP2C96iPj7-nesoJB2F4PjHwjf0OujL/view>.

Лузина, И.: Европейская социальная политика в период кризиса: обзор систем пенсионного обеспечения и здравоохранения в странах ЕС, в: Научные труды:

- Институт народнохозяйственного прогнозирования РАН (The European social policy during crisis: the review of systems of provision of pensions and health care in EU countries, in: Scientific works: Institute of economic forecasting of RAS), М.: (Moscow) vol. 11 (2013).
- Baranova, K., Belov, V.: Практика Европейского суда в области прямого налогообложения (Practice of the European Court of Justice in the field of the direct taxation), Современная Европа (Modern Europe) no. 1 (2010).
- Belikov, E.: Налоговые стимулы социальной направленности (Tax incentives of social orientation), Налоги (Taxes) no. 1 (2014).
- Belikov, E.: Социальные аспекты налогово-правовой политики в России в современных условиях (Social aspects of tax and legal policy in Russia in modern conditions), Налоги (Taxes) no. 5 (2015).
- Belikov, E.: Финансовое право и его институты: проблемы социальной эффективности (Financial law and its institutes: problems of social efficiency), М.: ЮрЛитинформ (Moscow: Yurlitinform), 2016.
- Bogovac, J.: The Paradox of Tax Incentives in Developing Countries, in: System of Financial Law. System of Tax Law, Brno: Masaryk University, 2015.
- Galishnikova, E.: Роль администрирования доходов или контроля за доходами в налоговой политике стран ЕС (Role of administration of income or control of income in tax policy of EU countries), Вектор экономики (Vector of economy) no. 5 (2017).
- Glotov, S.: Право Европейского Союза в редакции Лиссабонского договора (Law of the European Union in edition of the Treaty of Lisbon), М.: Издательство Международного юридического института (Moscow: Publishing house of the International legal institute), 2010.
- Gracheva, M.: Бюджетная децентрализация в странах ОЭСР: особенности федеративных и унитарных государств, Государственное управление (The budgetary decentralization in the countries of OECD: features of the federal and unitary states, Public administration), Электронный вестник (Electronic messenger) no. 60 (2017).
- Наванова, И.: Фискальный (налоговый) суверенитет и его границы в интеграционных образованиях (Fiscal (tax) sovereignty and its borders in integration educations), Журнал российского права (the Magazine of Russian law) no. 11 (2013).
- Nimicheva, N., Rokachalova, E.: Финансово-правовая политика, в: Правовая политика России: теория и практика (Financial and legal policy, in: Legal policy of Russia: theory and practice), М.: ТК Велби, Изд-во Проспект (Moscow: Shopping Mall Velbi, Publishing house Avenue), 2006.



- Karasyova, M.: Бюджетное и налоговое право России (политический аспект) (Budgetary and tax law of Russia (political aspect)), М.: Юрист (Moscow: Lawyer), 2003.
- Laychenkova, N.: Стимулы в налоговом праве (Incentives in the tax law), Саратов (Saratov), 2007.
- Loginova, T.: Реформирование налогообложения недвижимого имущества в России и в зарубежных странах (Reforming of the taxation of real estate in Russia and in foreign countries), Проблемы современной науки и образования (Problems of modern science and education) no. 36 (2016).
- Malko, A.: Стимулы и ограничения в праве (Incentives and restrictions in law), М. (Moscow), 2003.
- Miroshnik, S.: Теория правового стимулирования (Theory of legal stimulation), Ростов-на-Дону (Rostov-on-Don), 2003.
- OECD Fiscal Decentralisation Database // OECD [Official Site]. <http://www.oecd.org/ctp/federalism/fiscal-decentralisation-database.htm> (accessed: 28.11.2016).
- Rogorletsky, A.: Налоговая политика ведущих зарубежных стран: современные аспекты (Tax policy of the leading foreign countries: modern aspects), Финансы и кредит (Finance and credit) no. 13 (2012).
- Ronomareva, K.: Проблемы налогового суверенитета в практике Европейского Суда по вопросам прямого налогообложения (Problems of tax sovereignty in the practice of the European Court of Justice on the issues of direct taxation), Актуальные проблемы российского права (Current problems of Russian law) no. 3 (2015).
- Ronomareva, K.: Налоговый суверенитет в условиях взаимодействия интеграционного и национального права (Tax sovereignty in the conditions of interaction of the integration and national law), Вестник Воронежского государственного университета. Серия: Право (the Bulletin of Voronezh State University. Series: Law) no. 3 (2016).
- Ranchinskaya, Yu.: Сравнительный анализ антикризисной налоговой политики стран ЕС и СНГ (The comparative analysis of anti-recessionary tax policy of EU countries and the CIS), Экономика и управление в XXI веке: тенденции развития (Economy and management in the 21st century: tendencies of development) no. 3 (2011).
- Raritska, V.: Tax Sovereignty as a Fundamental Characteristic of Tax Law, in: System of Financial Law. System of Tax Law, Brno: Masaryk University, 2015.
- Sadchikov, M.: Понятие налогового суверенитета (Concept of tax sovereignty), Налоги (Taxes) no. 1 (2016).

- Sheinin, E.: Инвестиции в экономике стран Центрально-Восточной Европы (Investments in economy of the countries of Central Eastern Europe), Вестник Московского городского педагогического университета. Серия: Экономика (the Bulletin of the Moscow city pedagogical university. Series: Economy) no. 4 (2017).
- Smirnikova, Yu.: Финансовое право и политика: соотношение и взаимодействие, (Financial law and policy: ratio and interaction), М.: РПА Минюста России (Moscow: RPA of the Ministry of Justice of the Russian Federation), 2011.
- Stadnik, M.: Европейский НДС: ставки и оценка экономического эффекта от их изменения, в: Современная налоговая система: состояние, проблемы и перспективы развития (European VAT: rates and assessment of economic effect of their change, in: Modern tax system: state, problems and prospects of development), Уфа (Ufa), 2016.
- Taxation Trends in the European Union. Data for the EU Member States, Iceland and Norway.
- Volotov, O., Volotov, S.: Венгрия спустя четверть века после смены строя (Hungary later quarter of the century after change of a system), Новая и новейшая история (Modern and contemporary history) no. 4 (2014).

---

# ISSUES AROUND THE PRESERVATION OF MONETARY SOVEREIGNTY BY THE EUROPEAN UNION MEMBER STATES IN THE CONTEXT OF EUROPEAN INTEGRATION

*Yulia Gorosh<sup>1</sup>, Aleksander Ponomarev<sup>2</sup>*

## **Abstract**

The given article highlights the problem of the preservation of monetary sovereignty by the EU Member States in the course of European integration. The goal of the article is to find an answer to the question, whether EU Member States preserve, partly lose or lose their monetary sovereignty completely in the process of EU integration. To achieve the given goal the author analyses monetary sovereignty as a legal category and as part of the financial sovereignty, and characterizes monetary sovereignty in the narrow and broader sense of the word. The author claims that it would be more correct to understand monetary sovereignty in its broader sense, when it implies the authority to control the financial system of one's territory on the whole, not just the currency unit. In this article there is an analysis of the modern concept of monetary sovereignty formed under the influence of the processes of European integration. According to the author, in terms of the modern concept of monetary sovereignty, it should be considered a divisible value, which can be divided among several subjects and as result there appear several levels of monetary sovereignty. It is suggested that monetary sovereignty should not be considered as a static construction of rigidly fixed authorities, but as a dynamic system where sovereign powers can be temporarily delegated to the supranational organization. The author points out that to estimate to what extent the state has preserved (or lost) its monetary sovereignty the "status" of delegated authorities matters (i.e. the amount of delegated authorities; whether they are delegated temporarily or for good; whether the state has lost or preserved the right to make an impact on these authorities). Besides, the author determines the "boundaries of loss" of monetary sovereignty. A conclusion is made that in case of membership in an economic or monetary union as part of the European Union, one cannot speak of a complete loss of monetary sovereignty by the Member States, but only of a temporary restriction of exercising their sovereign authorities, caused by the delegation of most of the competences to the transnational level. The author used inductive cognitive methods and made an analysis based on the comparison of particular European countries.

---

<sup>1</sup> Candidate of Legal Sciences, Doctoral student for Financial Law, Department of Financial Law and Economics, Faculty of Law, Masaryk University, Czech Republic. The author specializes in tax law and local government finance. She is the author of more than 20 reviewed articles in prestigious journals. She is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. Contact email: 450824@law.muni.cz.

<sup>2</sup> Candidate of Legal Sciences, Deputy Chief of Inter-District Inspection Office 13 of Federal Tax Service of Rostov region, Russia. The author specializes in tax law and local government finance. He is the author of more than 10 reviewed articles in prestigious journals. He is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. Contact email: taxproff@icloud.com

**Key words**

Public financial activity; fiscal sovereignty; monetary sovereignty; tax sovereignty; financial policy; monetary policy; currency; currency unit.

**JEL Classification:** K34, K40

**1 Introduction**

The goal of the article is to find an answer to the question, whether EU Member States in the course of European integration preserve their monetary sovereignty, lose it partly or lose it completely. According to the author, firstly, monetary sovereignty should be considered through the prism of financial sovereignty, which consists of two relatively separate parts (namely monetary and tax sovereignty). Secondly, in the broader sense, when monetary sovereignty is understood as the sovereign's power to control the financial system in one's territory on the whole, and not only the currency unit. Thirdly, it should be done through the prism of modern concept of monetary sovereignty, which allows one to take into account all the transformations that the given legal and economic category has undergone in the course of its historic development, including the process of European integration of the recent years. Based on one's own analysis and taking into account other authors' opinion (Zimmermann, 2013: 21) the author comes to the conclusion that the key element of monetary sovereignty stems from *lex monetae* principle, and is expressed in the ability of the state to determine and change its monetary unit. Despite the fact that EU Member States delegated most of their monetary sovereignty to the currency union, they have preserved their right to refuse and replace the single currency. Based on this, the boundary of loss in terms of monetary sovereignty (as applied to the states of the Eurozone) is the situation when a state refuses from its power to change the monetary system. So the membership in the economic or currency union as part of the EU cannot be considered to be a complete loss of monetary sovereignty, but just a temporary restriction of exercising of one's sovereign authorities, caused by the delegation of most of the competences to the transnational level.

**Monetary sovereignty as part of financial sovereignty**

Financial sovereignty stems from the territorial sovereignty that public power possesses. All in all, financial sovereignty is independent (sovereign) power over the financial sphere in the territory of a particular state; it is the right to receive relevant resources to perform the tasks and to cover the expenses related to them.

The state is sovereign in case it can provide sufficient finances to manage the state. Historically, as part of its sovereignty the state has a sovereign power to determine its monetary and tax policies.

Financial sovereignty consists of two relatively separate parts, namely the monetary and the tax sovereignty. This division stems from the theory of financial sovereignty, which is

divided into two parts – the tax part and the non-tax one. The parts of financial sovereignty mentioned above have different development, functions and limitations. The state that has complete financial sovereignty must be independent (sovereign) both in terms of monetary and tax sovereignty simultaneously. In case of loss or a significant restriction of tax or monetary sovereignty, one can speak of restricted financial sovereignty or of its loss. However, even the state with restricted financial sovereignty can preserve its sovereignty on the whole. So one cannot state that the state that does not have complete financial sovereignty automatically loses its sovereignty on the whole.

#### Monetary sovereignty as a legal category

Each state is inseparably connected with its monetary unit. Traditionally monetary sovereignty is connected with the state and its independent authorities regarding money.

As a legal category monetary sovereignty first and foremost stands for having the authorities and exercising the authorities regarding a monetary unit and a monetary policy in a particular territory.

From the viewpoint of the extent of rights, monetary sovereignty can be characterized both in the narrow and broad sense of the word.

**In the narrow sense of the word monetary sovereignty includes** three basic exclusive rights of the state: the right to establish and issue a currency unit in its territory; the right to establish and change the value of currency; the right to regulate and use their currency in their territory (Gianviti, 2004: 2).

*The right to establish and issue money* is the right that can be delegated to an independent body, e.g. State Central Bank. Some states delegate the authorities to a joint body, such as the European Central Bank. One should keep in mind that the right to issue money is much broader than the right to print banknotes and cast coins. First and foremost, it is the opportunity to influence the monetary policy of the state by issuing money in the form of commercial banks lending or using other operations on the free market. The right of the state to issue its currency is protected from the interference of other states in the process by the international law. Currency protection against counterfeit is guaranteed by the Geneva Convention adopted back in 1929.

*The right to establish the currency value* is also an important attribute of monetary sovereignty of a state. The state is entitled to devalue the currency and by international law is not responsible for doing any harm to the holders of this currency that may lose its value at a certain stage of its circulation. The right of the state to determine the currency value includes the right of the state to establish the currency exchange rate against another currency or, as it used to be done, to determine the currency unit value against the gold standard. However, this right has its limits – mainly for the members of the International Monetary Fund. And the bearer of sovereignty cannot guarantee a stable external purchasing power of the currency. The state can influence and change the currency value by means of a particular monetary policy, but does not guarantee its invariable value.

*The third right in terms of monetary sovereignty is the right of the state to regulate the use of its own and foreign currency in its territory.* In accordance with this right the state can restrict or forbid foreign currency in domestic and international transactions both for cash and non-cash settlements. For example, in the Czech Republic there is a Law of limitation of cash payments (Act on Limitation of Cash Payments) and a Law on selected measures against legitimisation of proceeds of crime and financing of terrorism (Act Certain Measures Against the Legalization of Proceeds from Crime and the Financing of Terrorism).

**In the broader sense monetary sovereignty** includes the following rights of the state: the right to regulate the banking system and other financial institutes; the right to regulate currency policy; the right to protect one's own currency unit.

Despite the fact that with the exception of the right to protect the currency unit other rights are indirectly related to currency (currency unit), these powers are most important rights in terms of realization of the state's monetary sovereignty. Taking this into account, *it would be more correct to consider monetary sovereignty of the state in its broader sense.*

*The right to regulate the banking system and other financial institutes.* In terms of monetary sovereignty first and foremost the state has a right to the financial territory in its territory. This applies to the control over commercial banks, insurance companies and the capital market – from the right to award a statutory license and register financial institutes to the right to fulfill the functions of state oversight and audit control of financial institutes. One should note here that in different countries these authorities can be distributed among various institutions and it is absolutely not obligatory to delegate these powers to the Central Bank only (Frait, 2017: 2).

*The right to regulate the currency policy.* Currency policy is an effective economic tool. Currency authorities include the authorities to manage currency reserves, currency market and currency regulation. First and foremost it is with the help of currency intervention that the state can regulate the level of inflation in the country.

*The right to protect one's currency unit* is one of the most important authorities of the state in terms of monetary sovereignty. This right can be interpreted in the narrow sense, just as the right to protect the means of payment, namely banknotes and coins. The realization of this right is ensured by the norms of criminal law. In the legal system of the Czech Republic there is special part in the Criminal Code called "Criminal offences against the currency unit of the country and the means of payment". In the broader sense, the protection of the state currency unit can be considered as the the protection of its value in accordance with the currency law or its protection in terms of international law and the principle of *lex monetae*.

Inside the state most of the powers related to monetary sovereignty are delegated to the Central Bank of the country. In well-developed countries the Central Bank is a highly independent institution that should not be influenced by the fiscal policy pursued by the executive bodies of the state. As a rule, the statute on the Central Bank as an institute is

enshrined in a legal act of utmost legal power in the country. Thus, for example, in the Czech Republic the statute on the Czech National Bank as an institute is enshrined in the Constitution of the country as a document of utmost legal power, namely Article 98 of the Constitution. Particular authorities, including the structure and organization of the National Bank in the Czech Republic are determined by the Act on the Czech National Bank (Act of the Czech National Council on the Czech National Bank, Art. 4–11, 23–26). The situation is different for the European Monetary Union Member States, where most of the authorities are delegated to the European Central Bank, which is enshrined in the fundamental law of the European Union.

## 2.2 Modern concept of monetary sovereignty

As a result of its historic development, monetary sovereignty has transformed and turned into the acknowledged principle of international law, *lex monetae*. This principle was first established by the Permanent Court of International Justice, in relation to the Case Concerning the Payment of Various Serbian Loans Issued in France (France versus the Kingdom of Serbia, Croatia and Slovenia) of 1929 (Permanent Court of International Justice: Afs 14/1929), where the Court confirmed the generally accepted principle that a State is entitled to regulate its own currency.

The current concept of *lex monetae* consists of the following statements: each state has monetary sovereignty, including the right to create and change their currency; sovereign rights of each state shall be acknowledged by other states and their judicial and executive bodies; it is possible to reject the state's sovereign rights regarding its currency only in case it is discriminate towards other states (Chalupecká, 2009: 3).

Speaking about the modern concept of monetary sovereignty, it is necessary to note that according to the international law monetary sovereignty is one of the attributes of a modern state, though today it is more and more threatened by globalization and economic integration.

The right to regulate the monetary system belongs to the state, however, it can be delegated to an international organization or to another state, but not permanently, as the power to regulate the monetary system of the state is one of the key elements of state sovereignty. The act of delegating powers related to monetary sovereignty can have a temporary character; otherwise the independence of the state will be doubtful (Antik, 2012: 3). Michal Tomasek, on the contrary, notes that monetary sovereignty should be understood as autonomous, which is separated from the state and can be delegated to a supranational institution. (Tomášek, 2004: 36). *Most authors agree that in case of European integration monetary sovereignty has been delegated to a new bearer, i.e. the supranational organization of the European Union.*

Which gives rise to a question, whether it is complete delegation of monetary sovereignty or it should be considered as a certain restriction of Member States' monetary sovereignty.

As opposed to the classical understanding of monetary sovereignty as a purely static concept (i.e. total independence of the state from external interference in managing its money), one should consider *monetary sovereignty as a dynamic concept*. While national economies become more and more interdependent and financial markets intertwine more than they have ever had, exercising sovereign authorities related to monetary sovereignty requires closer cooperation between the states. This cooperation in the context of changing economic restrictions does not mean the end of *concept of monetary sovereignty*, but it seems more reasonable to speak of *the concept of monetary sovereignty as a concept of joint realization of monetary sovereignty as a separate form of cooperative sovereignty* (Zimmermann, 2013: 16).

In today's globalized world exercising some authorities that stem from monetary sovereignty is in fact restricted. This applies to the issues related to fighting tax evasion or financing illegal activity. A sovereign state is not capable of protecting itself well enough against these problems *in accordance with the principle of subsidiarity, the logical choice is delegation of certain sovereign authorities from the lower level to the higher one, where high quality realization of sovereign authorities can be ensured in the sphere of monetary policy for the benefit of certain countries*.

In the monetary sphere a relevant level of management could be such an organization as, for example, International Monetary Fund or a European Monetary Union at the regional level. The states that have formed a full-fledged monetary union, such as the Economic and Monetary Union of the European Union, for example, have delegated a considerable amount of their powers related to monetary sovereignty to the supranational level. What matters most is that the members of the monetary union *signed over their rights* to form their own currency and pursue national monetary policy *for the time of their membership (i.e. temporarily)*. On the one hand, they really deprived themselves of an effective economic tool, but on the other hand, *they acquired the opportunity to take part in the formation and managements of joint demand and supply* (Zimmermann, 2013: 39). If the states decide not to cooperate, it may become a more significant restriction of their sovereignty. However, international groups integration without losing sovereignty is possible only in case the state expresses its will freely and all the parties accept single values and goals in terms of monetary and economic policy; exercise their authorities and perform obligations in a transparent and predictable way.

*From the modern point of view, monetary sovereignty should be seen as a divisible value and allow for the possibility of being divided.* The process of creation of the currency union in the European community was carried out in several stages, in the course of which Member States gradually delegated part of their sovereign authorities in the sphere of monetary sovereignty. First, before the introduction of Euro, Member States could not require that goods should be paid for in their national currency. Besides, Member States were considerably restricted in their right to devalue their national currency, as they had to stick to the fixed fluctuation diapason as part of the EU currency exchange mechanism. In addition to delegating the competences to the European Union, one should also take



into account the delegation of competences to other international organizations, such as International Monetary Fund, World Trade Organization, etc. This extent of “splitting” monetary sovereignty proves the conclusion that it is a divisible value.

Currency Union is not the only form of possible restriction of monetary sovereignty. As it has been noted above, most of the states of the international community are members of the International Monetary Fund (IMF). Only those states that are currently not members of the IMF (at present there are 188 members) can be considered to possess complete monetary sovereignty.

The IMF restricts monetary sovereignty from the viewpoint of several questions: a) the state cannot establish the rate of their currency against gold; b) the state cannot manipulate exchange rates if it benefits from the unconscionable competition to the detriment of other members; c) not a single member of the IMF can take part in the discriminatory currency activities. At the regional level there are other currency unions except the eurozone. For example, West-African Economic Monetary Union, which is much more integrated than the European one (Gianviti, 2004: 2). *Based on the examples mentioned above one can draw a conclusion that monetary sovereignty can be divided among several subjects, and there is a system of several levels of monetary sovereignty.*

Despite the fact that the author draws a conclusion that monetary sovereignty can be divided, it is necessary to clarify the “status” of delegated authorities. In case of delegation of authorities, one can speak of a real transfer of authorities (not only temporary delegation), despite the fact that states still have the exclusive right to quit the international organization. If the states have no control over the realization of the authorities that they delegated and the international organization can realize these authorities, one can speak of a transfer of monetary sovereignty in the amount of transferred authorities.

### 3 Conclusion

*The element of monetary sovereignty stems from the principle of *lex monetae* and is about the ability of the state to determine and replace its currency unit. Though the state transfers most of its monetary sovereignty to the monetary union, it still preserves its right to refuse from and to replace the single currency. Regulation of the monetary law in the eurozone is undoubtedly the right of the European Union. The Member States have preserved only part of their authorities. But what happens if there is a need for a monetary reform? Who is entitled to replace euro with a new monetary system? It is still the Member States that will replace euro with a new currency in case it is necessary. This change can be made only by the Member States and only provided each of them gives their consent. Thus, the boundary of loss of monetary sovereignty (as applied to the states of the eurozone) is the situation when the state refuses from its authority to change the monetary system. Taking all this into account, in case of membership in the Economic or Monetary union as part of the European Union, one cannot speak of a loss of monetary sovereignty by the Member States, but only*

*of a temporary restriction of sovereign authorities due to the delegation of most of the competences to the supranational level.*

Though this conclusion is not a generally accepted one, some authors, e.g. D. Zimmermann, agree that delegation of authorities does not mean a transfer of monetary sovereignty as such (Zimmermann, 2013: 21).

Another argument in favour of the fact that the Member States of the eurozone have preserved their monetary sovereignty is based on the above-mentioned criteria of a joint (cooperative) realization of sovereignty. Of the European Union as a eurozone one can say that its Member States share common values and a common goal, which is a high quality realization of the authorities that stem from the monetary sovereignty to ensure financial stability. In this case monetary sovereignty in the narrow sense is not lost, but there is its delegation to the supranational level, which allows the states to cooperate permanently with other states in terms of developing a single monetary policy, despite the fact that they cannot realize their own voluntary monetary policy anymore.

In conclusion, it should be noted that despite considerable effort made in terms of European intergration, Member States still preserve their sovereignty. The concept of sovereignty should be perceived as a dynamic phenomenon, and one can agree with the concept of allocation (division) of sovereignty between the Union and the Member States. At the same time it is important to remember that Member States preserve their right to make independent decisions about the powers delegated to the Union. If they lose this right, from the viewpoint of international public law, they will face losing their sovereignty.

## References

- Ahtik, M. et al.: Legal aspects of central banking in Slovenia and Croatia from their beginnings to membership of the euro area, Hrčak, 2012. [https://www.researchgate.net/publication/260907647\\_Legal\\_aspects\\_of\\_central\\_banking\\_in\\_Slovenia\\_and\\_Croatia\\_from\\_their\\_beginnings\\_up\\_to\\_membership\\_of\\_the\\_euro\\_area](https://www.researchgate.net/publication/260907647_Legal_aspects_of_central_banking_in_Slovenia_and_Croatia_from_their_beginnings_up_to_membership_of_the_euro_area)
- Chalupecká, K.: Vymezení základních principů měnové regulace v právním systému se zaměřením na EMS. (Identifying the Key Principles of Monetary Regulation in the Legal System with an Emphasis on EMS), Dny práva – 2009 (Days of Law: the Conference Proceedings, Brno: Masaryk University, 2009. [https://www.law.muni.cz/sborniky/dny\\_prava\\_2009/files/obecna\\_cast.html](https://www.law.muni.cz/sborniky/dny_prava_2009/files/obecna_cast.html)
- Frait, J.: Bankovní dohled a stabilita finančního systému. (Banking Supervision and Stability of the Financial System), Česká národní banka (Czech National Bank). [https://www.cnb.cz/cs/verejnost/pro\\_media/konference\\_projevy/vystoupeni\\_projevy/frait\\_bd\\_fs\\_020903.html](https://www.cnb.cz/cs/verejnost/pro_media/konference_projevy/vystoupeni_projevy/frait_bd_fs_020903.html)

Gianviti, F.: Current Legal Aspects of Monetary Sovereignty. General Counsel IMF, 2004. <https://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/gianvi.pdf>

Kurzový mechanismus ERM II a kurzové konvergenční kritérium. (ERM II Exchange Rate Mechanism and the Convergence Criterion of the Exchange Rate), Česká národní banka (Czech National Bank), 2003. [https://www.cnb.cz/cs/menova\\_politika/zpravy\\_o\\_inflaci/2003/2003\\_cervenec/boxy\\_a\\_prilohy/mp\\_zpinflace\\_prilohy\\_c\\_03\\_cervenec\\_p1.html](https://www.cnb.cz/cs/menova_politika/zpravy_o_inflaci/2003/2003_cervenec/boxy_a_prilohy/mp_zpinflace_prilohy_c_03_cervenec_p1.html)

Tomášek, M.: Evropské měnové právo (European currency law) Praha: C.H. Beck, 2004.

Zimmermann, C.: The Concept of Monetary Sovereignty Revisited, Oxford University, 2013. <http://www.ejil.org/pdfs/24/3/2425.pdf>

## **Legal Acts**

Act no. 254/2004 Coll., on Limitation of Cash Payments, as amended.

Act no. 253/2008 Coll., on Certain Measures Against the Legalization of Proceeds from Crime and the Financing of Terrorism.

Act no. 6/1993 Coll., of the Czech National Council on the Czech National Bank, as amended.

Permanent Court of International Justice: 14/1929. [http://www.worldcourts.com/pcij/eng/decisions/1929.07.12\\_payment1.htm](http://www.worldcourts.com/pcij/eng/decisions/1929.07.12_payment1.htm)

---

# ON THE ROLE OF REPRESENTATIVE ORGANS OF POWER IN THE REALIZATION OF THE TAX SOVEREIGNTY

*Valentina Ivanova*<sup>1</sup>

## **Abstract**

The article is devoted to the study of the realization of the tax sovereignty and tax federalism in the norms of the Constitution of the Russian Federation and the Tax Code of the Russian Federation. The purpose of the article is to confirm that the tax sovereignty is a distinctive feature only of the Russian Federation in its supreme representative body of the Federal Assembly of the Russian Federation. The article also emphasizes the existence of tax federalism in the relations between the Russian Federation, subjects of the Russian Federation and municipalities, expressed in the order of distribution of tax powers between them in accordance with the norms of the Tax Code of the Russian Federation.

To this end, methods of logical and system analysis of the provisions of law were used.

## **Key words**

State sovereignty, tax sovereignty, tax federalism.

**JEL classification:** K34, H20

## **1 Introduction**

The concept of tax sovereignty has not been sufficiently studied in Russian legal science. We think that while studying this phenomenon, one should proceed from the concept of state sovereignty, which has been studied well in the legal science of Russia and foreign countries. In the most general form the supremacy throughout the territory and independence in international relations peculiar to the state is thought of as the state sovereignty (Matuzov, Malko, 1997: 52). Denis Lloyd, an English expert in the field of the philosophy of law proposed to consider the sovereignty of the state in two aspects: internal and external state sovereignty. The internal sovereignty, in his opinion, is represented by the supreme legislator of the state (Lloyd, 2007: 196). In other words, the sovereignty of the state is expressed by consolidating its will in laws adopted by the highest legislative authority. In the Russian Federation, this organ of state power is the Federal Assembly of the Russian Federation.

---

<sup>1</sup> Head of the department of state and administrative law of Ulyanovsk State University, doctor of Law, associate professor. She specializes in financial and tax law. She is the author of the textbook on tax law (2016), of three trainings manuals on tax law, four monographs and 17 scientific articles in reviewed journals. She is a member of the Center for Information and Researches in public finances and tax law of the countries of Central and Eastern European countries. Ivanovavn73@gmail.com

## **2.1 Legislative consolidation of tax sovereignty and tax federalism in the provisions of the Constitution of the Russian Federation and the Tax Code of the Russian Federation**

In accordance with paragraph 2 of article 4 of the Constitution of the Russian Federation, the Constitution of the Russian Federation and federal laws possess supremacy throughout the whole territory of the Russian Federation. The item “h” of article 71 of the RF Constitution establishes that federal taxes and charges are in the exclusive jurisdiction of Russia, and in accordance with item “i” of article 72, joint jurisdiction of Russia and its subjects is the establishment of general principles of taxation and charges in the Russian Federation. The exclusive powers of the subjects of the Russian Federation are enshrined in article 73 of the Constitution of the Russian Federation, which proclaimed that the territorial entities of the Russian Federation have full authority, outside the jurisdiction of the Russian Federation and the powers of the Russian Federation and the subjects of the Russian Federation.

Moreover, paragraph 4 of article 76 of the RF Constitution states that outside the jurisdiction of the Russian Federation and the joint jurisdiction of the Russian Federation and the subjects of the Russian Federation, republics, territories, regions, cities of federal significance, the autonomous regions and autonomous districts exercise their own legal regulation, including the adoption of laws and other regulatory legal acts. The right of local self-government bodies to establish local taxes and charges is enshrined in paragraph 1 of article 132 of the RF Constitution. The Constitution of the Russian Federation does not specify the establishment of not only legal structures of regional and local taxes, but also their types.

Thus, proceeding from the provisions of the current Constitution of the Russian Federation, the following procedure for the establishment of taxes and charges is formed:

- types of federal taxes and charges and legal structures for specific taxes and fees are established by the Federal Assembly of the Russian Federation;
- types of regional taxes and fees and legal structures of specific taxes and fees are established by the legislative assemblies of the entities of the Russian Federation;
- types of local taxes and fees and legal structures of specific taxes and fees are established by the representative bodies of local government.

At the same time, studying the provisions of the Tax Code of the Russian Federation, we can state that the federal legislator has laid down another vision of the distribution of powers between the federation, regions and municipalities. For instance, the types of federal, regional and local taxes respectively are given in articles 13, 14 and 15. Legal structures for all the types of federal, regional and local taxes are established in Part 2 of the RF Tax Code. At the same time, the norms determining the characteristics of legal structures of regional and local taxes are mandatory for the formation of regional laws and decisions of municipalities on regional and local taxes. In accordance with the

provisions of article 12 of the RF Tax Code, regions and municipalities have the right to determine the characteristics of elements of legal structures of taxes when they are introduced in their territory, such as: tax rates, order and terms of payment of taxes, if these elements are not provided by the Tax Code of the Russian Federation.

The specific features determining the tax base, tax benefits, grounds and procedure for their application may also be established in the manner and within the limits provided for by the Tax Code of the Russian Federation. The study of regional legislation on taxes and decisions of representative bodies of local self-government shows that regions and municipalities limit themselves to listing only specified elements of legal structures of certain taxes in regulatory acts on taxes. This creates significant inconveniences for taxpayers who must simultaneously use two normative acts belonging to different levels on regional (local) tax – the norms of the second part of the Tax Code of the Russian Federation and the regional law (the decision of the municipality). It has been found that federal, regional and local taxes and charges are canceled only by the Tax Code of the Russian Federation.

Establishing tax regimes, the Tax Code of the Russian Federation also reserved the right for the federal legislator to determine the procedure for their establishment, enactment and application, including the exemption from payment of certain federal, regional and local taxes and charges specified in articles 13 – 15. Legislative bodies of state power of the entities of the Russian Federation and representative bodies of municipalities have the right to establish only certain conditions defined by the Tax Code of the Russian Federation in special tax regimes.

The provision of paragraph 4 of article 3 in the RF Tax Code is directed towards strengthening the internal sovereignty of Russia. It prohibits the establishment of taxes and charges that break the integrated economic space of the Russian Federation and, in particular, directly or indirectly restrict the free movement of goods (works, services) or financial resources within the territory of the Russian Federation, or otherwise restrict or create the obstacles not prohibited by law to the economic activity of individuals and organizations. No one can be made responsible to pay taxes and charges, as well as other fees and payments that possess the signs of taxes or charges specified in the RF Tax Code which are not provided for by the Tax Code of the Russian Federation or established in a different order than defined in it.

So, the analysis of the main legislative acts in the field of taxation – the Constitution of the Russian Federation and the Tax Code of the Russian Federation, shows that these legal acts set conflicting legal provisions. At the same time, the Constitution of the Russian Federation is fully independent not only of the entities of the Russian Federation, but also of municipalities in determining the main sources of the formation of their material base in the form of taxes. In this case, it would be necessary to consolidate the types of federal, regional and local taxes in the norms of the RF Constitution, as well as to set up appropriate control and supervisory bodies that monitor the payment of taxes at the appropriate level.

We believe that this would mean the manifestation of people's sovereignty, enshrined in article 3 of the RF Constitution, since it was adopted by people's voting in a referendum on December 12, 1993.

The Tax Code of the Russian Federation adopted by the supreme representative organ of state power – the Federal Assembly of the Russian Federation, on the contrary, deprives the regions and municipalities of the right to determine the types of taxes, and also establishes the framework laws in the chapters of the second part of the RF Tax Code on certain types of taxes, secures the legal status and powers of a single federal supervisory body – the Federal Tax Service. In other words, the system of taxes and control over their introduction into the federal, regional and local budgets is strictly centralized, with the exception of certain conditions that are not crucial.

We think that in the shaped legal conditions, one can speak of the tax sovereignty of the state as a political-territorial entity. We should agree with I. I. Kucherov's opinion, who pointed out that the right to establish and introduce taxes and fees is essentially an integral part of the state sovereignty, which can be designated as sovereignty in the field of taxation (tax sovereignty) (Kucherov, 2009: 190).

Proceeding from the fact that the entities of the Russian Federation do not have their own sovereignty, and the sovereignty of Russia extends to its entire territory, according to paragraph 1 of article 4 of the RF Constitution, it follows that the regions do not possess the tax sovereignty. Since the Russian Federation is a federal state, it would be more correct to talk about tax federalism. At the same time, one should proceed from the general concept of federalism as the fundamentals of the constitutional system of Russia, established by the provisions of article 5 of the Constitution of the Russian Federation, which ensures the unity of the country, as well as the decentralization of power on the basis of differentiation of the subjects of jurisdiction and authority between the Russian Federation and its subjects (Sukharev, 2004: 653).

Thus, the use of the notion of tax federalism in relations between the Russian Federation as a subject that possesses exclusive state and, consequently, tax sovereignty and the subjects of the federation, municipalities that do not have sovereignty, by definition of their legal status, implies that subjects of the federation and municipalities are endowed with the laws of the state, within the limits established for them, in determining the characteristics of certain elements of legal structures of regional and local taxes.

## **2.2 The manifestation of tax federalism in the powers of representative organs**

Tax federalism in the Russian Federation is manifested through the distribution of powers of representative bodies of power in the sphere of taxation. The legislation activity of representative bodies of power is implemented through the legislation activity of the

Federal Assembly of the RF, legislative assemblies of the RF subjects and adoption of normative decisions by representative bodies of local self government. The activity of such organs of power has a special meaning in forming the make-up of legal structures of certain laws and defining legal meanings and their elements. The highest organ of legislative power of the state must introduce such a number of taxes and with such qualitative characteristics which would facilitate to avoid double taxation and excessive increase of a tax burden.

At each level of power: federal, regional and municipal, representative bodies are empowered with their own authority in the sphere of taxation, and also in the normative and legal make-up of a legal structure of a certain tax. The Federal Assembly of the Russian Federation possesses the powers:

- to determine the levels according to which the groups of taxes are distributed: federal, regional and local;
- to set the types of federal, regional and local taxes;
- to establish the typical model of a legal structure of a tax by stating its elements and characteristics in the norms and definitions of the first part of the RF Tax Code;
- to provide the typical make-up of a legal structure of a certain tax in the second part of the RF Tax Code or in a specially adopted tax law. The Federal Assembly of the Russian Federation gives legal structures of not only federal taxes, but also regional and local ones. In respect to legal structures of regional and local taxes framework laws are passed placed in the second part of the RF Tax Code;
- to establish special tax regimes.

The authority of regional and municipal representative organs of power is applicable to:

- the determination of legal structures of regional (local) taxes in respect to such elements as: tax rates, the procedure and terms of tax payment, if these elements are not provided by the RF Tax Code. The specific features of determining the tax base, tax benefits, grounds and procedure for their application may also be established in the procedure and within the scope provided for by the Tax Code of the Russian Federation;
- putting into effect, the change and rescission of regional (local) taxes;
- has the authority under special tax regimes to establish: the types of entrepreneurial activity in respect of which the relevant special tax regime can be applied; restrictions on the transition to a special tax regime and the application of a special tax regime; tax rates depending on the categories of taxpayers and types of entrepreneurial activity; features of determining the tax base; tax benefits, as well as the grounds and procedure for their application.



The fact that tax sovereignty is only expressed in the Russian Federation at the federal level is confirmed by the procedure for the formation of legal structures of specific taxes and the adoption of tax laws. In accordance with article 104 of the RF Constitution a range of subjects of the legislative initiative is determined. From the meaning of the constitutional norm it follows that along with the federal government representatives, draft laws on taxes are also brought in by the legislative (representative) authorities of the subjects of the Russian Federation. However, paragraph 4 of article 104 indicates that bills to put into effect or rescind taxes, exemption from their payment can be brought in only if there is a conclusion of the Government of the Russian Federation. Thus, control is kept over the observance of the RF Tax Code norms regarding the adoption of the Tax law or modification of a legal structure of the acting law. This confirms the above-mentioned opinion about the tax sovereignty which the RF possesses, but manifestations of tax federalism are associated with the fact that some actions, in the framework specified by the law can be made by the subjects of the Russian Federation and municipalities.

The realization of tax federalism impels the Federal Assembly of the Russian Federation, the legislative bodies of the constituent entities of the Russian Federation and representative bodies of municipalities to solve a whole range of tasks in the process of legislation activity:

- 1) the necessity to introduce a certain law to fund the expenditures of the federal, regional and local budget is substantiated;
- 2) the share of a new tax in the general tax burden of a taxpayer is determined, that is economic expediency, as well as the availability of a sufficient source from the point of view of paying a tax;
- 3) the legal structure of a certain tax is created in accordance with its model. Here the choice of the main and additional elements of the legal structure of a certain tax should fit the model of a legal structure of tax developed in financial law and enshrined in the RF Tax Code;
- 4) political interest of the party with the majority in the State Duma is taken into account in view of political interests of other groups in Parliament. Political interests of the voters and population as a whole are taken into account only through the forms of Parliament activity. Taxpayers directly do not participate in passing tax laws which is conditioned by the ban to put the tax issues to a referendum;
- 5) the issues of social significance are solved. On the one hand, a tax law being adopted is intended for the replenishment of budget revenues and implementation of social programs, on the other hand, a legislator must take into account the social state of a taxpayer while introducing some or other benefits in the tax imposed;

- 6) the boundaries of a taxpayer's economic resources are determined. Depending on the economic policy pursued in the state the legislator sets the proprieties of the tax regulation: creates favorable conditions for the taxpayer as a commodity producer or taxpayer as a user of natural resources. In this case the determination of a legal structure of a specified tax will serve as the tax method of regulating economic processes (Ivanova, 2006: 118 – 120; 126 – 127).

If tax federalism manifests itself mainly in the distribution of tax powers between the Russian Federation, the subjects of the Russian Federation and municipalities, the tax sovereignty of the state is also manifested in the nature of legal relations that arise between the state and taxpayers. There are a number of scientific views on the nature of the relations that arise between the state and the taxpayer when establishing a tax. In some cases, the relationship is indicated on the provision of services to the taxpayer by the state and, accordingly, the consent of the taxpayer to pay tax, in others the emphasis is on the obligatory nature of the tax payment and the lack of coordination of the will of the state and the taxpayer. In accordance with the norms of the Tax Code of the Russian Federation, the legal relations arising between taxpayers and the state are of strict nature, which is due to the imperative nature of tax rules.

### 3 Conclusion

1. The study of the norms of the current Constitution of the Russian Federation and the Tax Code of the Russian Federation lead to the conclusion that their content is contradictory and does not give complete understanding of the tax sovereignty. In this connection, the norms of the Constitution in articles 71 – 73 and article 132 need to be added with the specific content, which vests the powers of the Russian Federation, RF subjects and municipalities in the sphere of taxation more precisely.
2. The legal concept of the tax sovereignty is derived from the concept of the state sovereignty and belongs only to the Russian Federation represented by its highest representative body – the Federal Assembly of the Russian Federation.
3. The distribution of powers in the field of taxation between the Russian Federation, the subjects of the Russian Federation and municipalities is carried out in the framework of tax federalism, stemming from the content of the constitutional principle of the federal structure of Russia.

### References

- Иванова, В.: Правовая характеристика системно-структурного анализа налоговой системы (Legal characteristics of the system-structural analysis of the tax system), Ульяновск (Ulyanovsk), 2006.

Kucheron, I.: Теория налогов и сборов (Theory of taxes and levies), М.: ЗАО «ЮрИнфоР» (Moscow: CJSC “YurInfo”), 2009.

Lloyd, D.: The idea of law, Translation from English by M.A. Yumashev. 4<sup>th</sup> ed., Moscow, 2007.

Matuzov, N., Malko, A.: Теория государства и права. Курс лекций (Theory of the state and law. A course of lectures), М.: Юристъ (Moscow: Lawyer), 1997.

Sukharev, A. (ed.): Большой юридический словарь (Large law dictionary), М.: Инфра-М (Moscow: Infra-M), 2004.

### **Legal Acts**

The Constitution of the Russian Federation. Adopted in a nationwide referendum on December 12, 1993. [www.consultant.ru](http://www.consultant.ru).

The Tax Code of the Russian Federation. [www.consultant.ru](http://www.consultant.ru)

---

# SPECIFIC FEATURES OF TAX SOVEREIGNTY IN THE SPHERE OF THE TAXATION OF CREDIT CONSUMERS COOPERATIVES UNDER THE LEGISLATION OF THE RUSSIAN FEDERATION

*Nikolay Mikhaylovich Konin<sup>1</sup>, Konstantin Alekseevich Tikhonov<sup>2</sup>, Kirill Sergeevich Krotov<sup>3</sup>*

## **Abstract**

The article is devoted to the analysis of the actual system of the taxation of credit consumers cooperatives. The current tax-law status of credit consumers cooperatives is considered. The authors prove the necessity of additional government support measures for credit cooperation subjects, caused by the objective of consumers cooperatives – to provide the availability of financial services for people. Therewith, a series of the subjects who has a special status and similar objective, have tax benefits. The article proposes the establishment of tax benefit for credit consumers cooperatives property and also researches advantages and disadvantages of the proposed measure. As a result, the authors develop the draft of related amendments to the tax law of the Russian Federation. The methods used include formal-legal method, comparative method, and analysis.

## **Key words**

Credit consumers cooperatives, taxation, tax benefits, credit consumers cooperatives property.

**JEL Classification Code:** K230

## **1 Introduction**

Tax sovereignty in the Russian Federation is the autonomy, independence and supremacy of the government in the exercise of the functions of taxation and collection of taxes. Such sovereignty covers the financial legal status of the credit consumers cooperatives (hereinafter – CCC; see Act On Credit Cooperation, Art. 1 (hereinafter – Credit Cooperation Law), and exercises significant influence on their tax legal status.

---

<sup>1</sup> Professor of the Department of Administrative and Municipal Law, Saratov State Law Academy, Doctor in Law, Honored Scientist of the Russian Federation, Honored Worker of Higher Education, Russian Federation. E-mail: koninnm@mail.ru

<sup>2</sup> Lecturer of the Department of Administrative and Municipal Law, Saratov State Law Academy, Russian Federation. Candidate in Law. E-mail: Shtirlec2201@yandex.ru

<sup>3</sup> Postgraduate student of the Department of Administrative and Municipal Law, Saratov State Law Academy, Russian Federation. E-mail: kirillkrotov@mail.ru

A CCC tax legal status characterizes the legal status of these organizations in tax legal relations and includes a set of rights and duties in the sphere of the taxes and charges legislation, which is focused on achieving the assigned goals and performing appropriate functions.

In accordance with the taxes and charges legislations, the organizations which are lawfully bound to pay the taxes and (or) charges are taxpayers. The founding of the economic entity results in its tax legal capacity. This is the starting point for the tax relations between the economic entity as a taxpayer and the government represented by tax authorities (Andreeva, et al, 2014). Consequently, CCCs and other subjects of consumer cooperation become the taxpayers from the moment of their foundation, cooperating with the government according to the standard procedure. CCCs as the employers take on the role of tax agents (in the sphere of personal income taxpaying both for the CCC employees and such individuals as the CCC shareholders). Meanwhile, CCCs are the subjects of financial law, which have a specific financial legal status, thereby we should emphasise not only the tax legal CCC status (as a part of their financial legal status), but also their special tax legal status. Chapter I of this article is devoted to the consideration of general positions of tax legal CCC status. The specific tax legal status and a legislative initiative suggested within this framework are considered in detail in Chapter II.

## **2.1 The General Provisions of Tax Legal Regulation of Credit Cooperation**

Tax legal CCC status is primarily determined by the cooperative status as the ordinary legal entity. Particularly, we could emphasise such kind of taxes for cooperatives as:

1. Value added tax. Under the sub-item 1 of item 1 of Article 146 of The Russian Tax Code (hereinafter – RTC), the taxation object of the value added tax is the operations of selling goods (services, works) on the territory of Russia regardless of the source of funding. The core business area of a CCC is the provision of financial services.
2. Organisation profit tax. In accordance with the Article 247 of the RTC, the taxation object of the organization profit tax is the profit on selling goods, services, works, property rights and the non-sale income, decreased by the incurred cost value. The specific of the CCC income and expenses is defined by the provisions of Articles 297.1, 297.2 of the RTC, which detail the types of income and expenses forming the cooperative tax base for the organization profit tax (for more information see Chapter II).
3. Property tax. Under item 1 of Article 373 of the RTC, at present all of the Russian organizations are the taxpayers of the property tax. A CCC as an organization is also included in this taxpayer category.

Moreover, a CCC as a tax agent deducts and remits personal income tax for the individuals, hired by the credit cooperative (RTC, Art. 24, 226), and also the insurance contributions (for the compulsory pension insurance, compulsory social insurance for the case of temporary incapacity to labour and relative to childcare) for the cooperatives employees (RTC, Art. 419, 420).

The measures of tax control over a CCC have no specific features. The Federal Tax Service of Russia (hereinafter – FTSR; see: Act Concerning Approval of the Statute on the Federal Tax Service, hereinafter – FTSR Statute) controls and supervises the compliance with cash-register equipment requirements, the order and conditions of its registration and exploitation. The FTSR also establishes lists of cash-register equipment which could be used by the paying agents (sub-agents) during the acceptance of payments from individuals.

The regional office of the FTSR, which has made tax registration of a CCC, conducts tax control of the economic activity of a CCC concerning timeliness and completeness of the performance of their duties for the government or municipal entity. In case of the tax offences by a CCC, the regional office arraigns cooperative on a tax liability.

Article 82 of the RTC establishes the types of the tax control, conducted by the officials of the tax entities within the limits of their competence in the forms of the tax inspections, reception of explanations by taxpayers, chargepayers and tax agents explanations, the inspection of books and records, view of places and territories used for profittaking. CCCs as the taxpayers are included in the list of the entities under the tax control.

One of illustrative examples of the exercise of tax control measures for the credit cooperatives is the judgement of the Inter-District Inspectorate of the Federal Tax Service of the Russian Federation no. 25 in the Republic of Bashkortostan so far as the relevant to the additional profit taxation, against CCC Mutual Loan Society “FINPO”. The Arbitration court of the Siberian Region confirmed the legality and well-foundedness of this judgment in the Resolution on the case no. A07-10592/2015. The Inspectorate made tax inspection of the cooperative and found the understatement of the non-sale income and overstatement of the non-sale costs for organization profit tax. This is the violation of the provisions of Articles 250, 251 of the RTC.

Tax legal influence by the government consists in the protection of the financial services consumers of a CCC by means of the control and supervisory measures, regulating activity of the paying agents in the acceptance of payments from individuals. Other important measures are the supervision of the compliance with cash-register equipment requirements during the cash and non-cash payments.

Therefore, the general tax legal status of a CCC is determined by its legal nature as a legal entity and includes a set of requirements to the taxpaying organizations standard for the Russian legal system. However, a more interesting issue is the tax sovereignty of the

Russian Federation in determination of the specific of tax legal status of special subjects. The legal status of a CCC is an illustrative example in this manner. The special tax legal status of a CCC is the subject of research in the next chapter.

## **2.2 Specific Features of the Tax Legal Status of Credit Consumers Cooperatives**

Despite the fact that the Credit Cooperation Law (2009) was adopted long time ago, tax legislation did not have any amendments for a long period (before the end of 2013), while the legal establishment of the specific features of a CCC is necessary.

Before the adoption of the Federal Law of 11.02.2013 no. 301-FZ, the RTC had no provisions taking into account the specific of consumer cooperatives activity. This fact was systematically making difficulties coming from determining the tax base incorrectly. For resolving this problem, the above-noted Law made legislative changes to the RTC. These changes establish the specific of the CCC income and expenses and special types of income and expenses, which determine the tax base for the organization profit tax and some other amendments.

For example, on January 1, 2014 Articles 297.1, 297.2 of the RTC were amended. Article 297.1 is devoted to the CCC income and includes the following types:

- 1) income in the form of interest on a loan;
- 2) income in the form of amounts received in respect of repaid loans, losses from the writing-off of which were previously included in the expenses that reduced the tax base;
- 3) income in the form of amounts received in respect of repaid loans, which were charged to created reserves where allocations for the creation of those reserves previously were taken into account in the cost structure while determining the tax base.

Category “CCC expenses” (RTC, Art. 297.2) includes:

- 1) expenses in the form of interest on a loan, credits and other debt obligations;
- 2) expenses associated with guarantees, warranties granted to a CCC by other organizations and individuals;
- 3) amounts of allocations to the reserve against possible losses on loans;
- 4) amounts of insurance contributions under insurance agreements against the death or disablement of a borrower of a CCC.

Considering that a CCC operations have common features with banking operations, the provisions of Articles 297.1 and 297.2 of the RTC are analogous to the Articles 290

and 291 of the RTC, which establish special features relating to the determination of the income and expenses of banks. While CCCs, like banks, are professional financial intermediaries, the Federal Law of 11.02.2013 no. 301-FZ amended Article 266 of the RTC. This amendment involves the CCC right to form doubtful debt reserves for indebtedness arising in connection with the non-payment of interest on loan and possible losses on loans.

CCCs also have the right to create reserves against possible losses on loans (RTC, Art. 297.3). Amounts of allocations to those reserves, which are created according to the procedure established by the Central Bank of Russia, must be included in the composition of non-sale expenses during the accounting (tax) period. This procedure must be approved by the Directive of the Central Bank of the Russian Federation. According to this document, reserves against possible losses on loans are created by the credit cooperatives quarterly as of the last day of the quarter for the outstanding commitments by the borrowers of the CCC.

We have to emphasise one more important attribute of the CCC in the considered sphere – the possibility of using the simplified taxation system (hereinafter – STS) under Chapter 26.2 of the RTC. Up to a point the eligibility of STS for a CCC had polemical character, caused by the absence of the prohibitive and permitting legal rules. Therewith, microfinancing organizations, which are similar to CCCs in their primary activity – the lending, have no right to use STS after 01.01.2014 under the provisions of sub-item 20 of item 3 of Article 346.12 of the RTC. The Federal Tax Service of Russia made this issue clear in its letter of 5.05.2014 no. GD-4-3/8608 “On the writing direction by the Ministry of Finance of the Russian Federation of 04.14.2014 no. 03-11-09/16840”, confirming the possibility of using the STS by the subjects of credit cooperation in case of the compliance of general conditions.

As referred to above, a CCC has a duty of the tax agent to remit standart taxes, actual for all legal entities, on the ground of its general tax legal status. At the same time, financial legal CCC status includes the duty of a CCC to deduct and remit the personal income tax for the cooperative shareholders, who deliver cash assets to the cooperative under the contract of the transference of personal saving (RTC, Art. 214.2.1, 226). Herewith, the shareholder could be a non CCC employee, the most important attribute here is the status of the member of a cooperative.

The specific of determining the tax base during the income generation in the form of the payment for using the finances of the CCC members (under the contracts of the transference of personal saving) is established by Article 214.2.1 of the RTC. The tax base for this type of a CCC shareholders income is determined as the excess of the amount of this payment, the interest accrued according to the conditions of the contract, over the amount of payment, interest, charged on the basis of the refinancing rate of the Central Bank of the Russian Federation, increased to 5 percentage points and is relevant during the period when this interest was charged. The tax income rate



in the form of payment for using the finances of the CCC members is 35 % under sub-paragraph of item 2 of Article 224 of the RTC. Considering the fact that the CCC activity as a non-profit organization is attributed to the provision of financial services (in this case – saving taking under the terms and conditions of urgency, refundability and, what is most important, repayment), we have to consider this tax CCC duty as a special duty determined by the specific features of a CCC as a subject of financial law, not as an ordinary legal entity.

The specific of the tax legal CCC status is embodied in broad informational and explanatory work done by the tax agencies in the sphere of credit cooperation. For example, FTSR offers an explanation about jurisdictional issues to the legal entities and individuals in the special acts – in the letters.

The illustrative examples are the letters of 06.29.2012 no. ED-21-3/91 “On the registration of membership fees for the taxation of the credit consumer cooperative income” (devoted to the issue of the registration of different kinds of membership fees, forming the income structure of the CCC) and the letter of 12.26.2014 no. AS-4-16/26970 “On the strategy of the Sample program of the complex financial audit” (also devoted to the financial audit of the CCC) and others.

Considering the issue of the explanatory work done by the tax agencies in the field of credit cooperation, we have to emphasise the active efforts by the Department of Tax and Customs Policy of the Ministry of Finance of the Russian Federation (Order Concerning Approval of the Decree on the Department of Tax and Customs Policy; hereinafter – Decree on the Department of Tax and Customs Policy).

Under item 4.3.1 of the Decree on the Department of Tax and Customs Policy, the competence of this authority includes giving written explanations devoted to the issues of the application of Russian tax and charges legislation and also other legal acts related to the scope of FTTCR (under Department competence).

The considered Department activity is embodied in a large number of its letters, which cover the activity of the subjects of credit cooperation, particularly: of 07.22.2015 no. 03-04-06/42082 (devoted to the changes to the taxation procedure for the personal income of the members of CCC); of 04.14.2014 no. 03-11-09/16840 (devoted to the eligibility of STS for CCC), of 01.16.2012 no. 03-03-06/3/1 (devoted to the order of registration of membership fees in consumer cooperatives, which have to be paid on the conditions of membership in self-regulatory organizations).

Based on the above, we may conclude that the tax legal status of a CCC includes a broad list of specific features and requirements and illustrates the nature of a broader term – the financial legal status of the CCC. Moreover, it should be borne in mind that a CCC, under the civil legislation and Credit Cooperation Law, is a non-profit organization, primarily oriented at satisfying the requirements of its members, but not at generation of profit.

Article 123.2 of the Civil Code of the Russian Federation includes the legal characteristic of a consumer cooperative (and a CCC as one of its kinds) as a non-profit organization and defines it as “the voluntary membership-based community of citizens or citizens and legal entities, which is oriented at satisfying material and other requirements, and is realized on the ground of the consolidation of property shares of its members”. A distinguishable feature of a CCC is its main purpose – satisfying the material requirements of the members. We could also specially emphasise the financial requirements of shareholders, embodied both in the investment of temporary free finances in CCC funds for the income generation (according to the interest rate established by the cooperative), and in taking out a consumer loan by these subjects (under the provisions of the Consumer Loan Law).

The issue of a non-profit purpose of a CCC is considered in this article not occasionally. Namely, these organizations have a special social assignment and use such stimulating tax measure as a tax benefit. Particularly, Article 381 of the RTC is devoted to the limited list of recipients of tax benefits (tax exemption). This list includes: religious organizations; governmental scientific centres; ship-building organizations, which have the status of the resident of industrial production special economic zone; bar associations, law bureaus and others. The common attribute of these subjects is the non-profit base of activity.

Hereby, considering such attributes as:

- specific of tax legal status of a CCC;
- high loading based on the remits of taxes, actual not only for a CCC and its employees, but also for its shareholders (members);
- significance of a CCC as the subject which provides access to the financial services for population,

we suggest to grant a benefit for credit cooperatives in such kind as the tax exemption for the taxation of a CCC property and to amend Article 381 of the RTC with item 27 of following content:

“27) Consumer Credit Cooperatives Property”.

The realization of such amendment will allow to decrease the burden on credit cooperatives in some degree, but also provide the profitable kind of a CCC activity for budgets of different levels, which is attributed to the remission of other kinds of taxes (organization profit tax, value added tax, personal income tax of the CCC members).

### 3 Conclusion

Consequently, a credit consumer cooperative:

- a) *as an ordinary legal entity* remits value added tax, organization profit tax, property tax;

- b) *as an employer* deducts and remits personal income tax for the individuals, who are hired by the credit cooperative;
- c) *as a special subject* deducts and remits personal income tax for the shareholders (members) of this credit cooperative, using graduated rate (13% and 35% in case and to the extent required under applicable legislation).

Taking into account the specific features of financial legal and tax legal CCC statuses, their roles in providing access to financial services to the population, we suggest mitigating tax legal influence by the government on the credit cooperatives. This measure seems in prospect as one of fundamental factors providing the financial sustainability of the considered subjects of financial law.

Considering the above mentioned, the objectives of this article – to study the specific of tax legal regulation of the a CCC and to prove the necessity of the establishment of tax benefit for the CCC property – must be regarded as achieved.

## References

Ershova, I. (eds.): Малое и среднее предпринимательство: правовое обеспечение (The Small and Medium Business: Legal Coverage). М. (Moscow), 2014.

## Legal Acts

Act no. 51-FZ/1994, The Civil Code of the Russian Federation (Part I), as amended.

Act no. 146-FZ/1998, The Tax Code of the Russian Federation (Part II), as amended.

Act no. 117-FZ/2000 The Tax Code of the Russian Federation (Part I) , as amended.

Act no. 03-11-09/16840/2014, The letter of FTSR “Concerning Approval of the Letter by the Ministry of Finance of the Russian Federation”.

Act no. 506/2004, Decree of the Government of the Russian Federation “Concerning Approval of the Statute on the Federal Tax Service”.

Act no. 267/2016, Order “Concerning Approval of the Decree on the Department of Tax and Custom Policy”.

Act no. 7-FZ/1996, On non-profit organizations, as amended.

Act no. 190-FZ/2009, On Credit Cooperation, as amended.

---

# ESTABLISHMENT OF TAX LEGAL GUARANTEES OF THE TAXPAYER'S RIGHTS AS A MANIFESTATION OF TAX SOVEREIGNTY

*Maria Mardasova*<sup>1</sup>

## **Abstract**

The article is devoted to the consideration of tax legal guarantees of the taxpayer's rights, the establishment of which follows from the tax sovereignty of the state. The purpose of this article is to analyze some guarantees of the realization of the taxpayer's rights and their protection and determine in what each of the types of these guarantees is expressed. For the analysis of the Russian tax legislation and decisions of the Constitutional Court the formal legal method has been used. The basis of the research of certain legal guarantees established by the tax legislation of some foreign countries is the comparative method.

## **Key words**

Tax sovereignty, tax legal guarantees of the taxpayer's rights, tax legal relations, guarantees of the realization of the taxpayer's rights, guarantees of the protection of the taxpayer's rights.

**JEL classification:** K34

## **1 Introduction**

Tax law is focused on regulation of public legal relations in the sphere of taxation. In this connection the institute of tax legal guarantees of the rights of the taxpayer initially has special significance. From the statutory definition of the concept of "tax" it is obvious that in these relations the state aims at a financial support of its activities, as well as municipalities. In tax legal relations, as well as any other public legal relations, an optimal balance of public and private interests should be ensured. Therefore, although the state, having tax sovereignty, grants the taxpayer certain rights, it must also establish a system of guarantees for their realization and protection.

The purpose of this article is to analyze some guarantees of the realization of the taxpayer's rights and their protection and determine in what each of the types of these guarantees is expressed. For the analysis of the Russian tax legislation and decisions of

---

<sup>1</sup> Candidate of legal sciences, Lecturer of the Financial Law Department, Voronezh State University; the area in which the author specializes is tax law; the number of books published is 1; the number of articles in peer-reviewed journals is 10; member of the Center for Information and Research Organization in Public Finance and Tax Law of Central and Eastern European Countries; E-mail: manyu6@rambler.ru.

the Constitutional Court the formal legal method has been used. The author also uses a comparative method to research certain legal guarantees established by the tax legislation of some foreign countries.

A great number of modern scientific papers is devoted to the problem of tax sovereignty, namely, its definition and content (for example, Sadchikov, 2016; Shakhmamev, 2014; Andreev, 2016). Among the studies devoted to the legal guarantees of the rights of the individual it is necessary to highlight the works by N. Vitruk (Vitruk, 1979) and L. Voevodin (Voevodin, 1997).

## **2 Establishment of tax legal guarantees of the taxpayer's rights as a manifestation of tax sovereignty**

As noted by scientists, “the concept of “tax (fiscal) sovereignty” has no legal definition in the Russian legislation and is not provided in legal precedents” (Shakhmamev, 2014: 28).

The Constitutional Court of the Russian Federation noted in one of its cases that the statutory form of establishment of a tax, the obligatory character of its withdrawal, the unilateral nature of tax obligations are connected with the public legal character of the tax and the public treasury and with fiscal sovereignty of the state (Constitutional Court of the Russian Federation: 20-P/1996).

At the same time, according to the court opinion, the validity of delegation to the tax authority to act in a power-binding way at the uncontested recovery of tax payments can only be discussed when such actions do not abate or diminish the rights and freedoms of man and citizen.

Increasingly, the term “tax sovereignty” is used in the scientific literature and decisions of the Constitutional Court of the Russian Federation. It should be understood as “the exclusive right of the state to independently perform the function of taxation and collection of taxes within the territory to which its jurisdiction extends” (Sadchikov, 2016: 18).

In the opinion of some researchers, the concepts of “sovereignty” and “legal personality” are synonyms. In turn, their content is reduced to the granting of rights to natural and legal persons by the state, the recognition of the latter as subjects of law (Andreev, 2016: 16). This point of view is exactly applicable to tax sovereignty.

As noted by some of the authors, “sovereignty requires providing by the state of the appropriate standard of political goods and services in order to ensure the protection and wellbeing of their citizens” (Raritska, 2015: 349).

Therefore, it is important to understand that the recognition of certain rights for taxpayers (natural persons or organizations) is impossible without the establishment by the state of

tax legal guarantees that ensure their effective realization and protection. In connection with this, we can say that the establishment of these guarantees of the taxpayer's rights is implied by the tax sovereignty of the state.

Despite the fact that the term "guarantee" is used only a few times in the Tax Code of the Russian Federation, it is obvious that the realization of the taxpayer's rights and their protection are impossible without tax legal guarantees.

There are many scientific studies devoted to the research of the legal guarantees of the rights, duties and legitimate interests of the personality. So, some authors suggest that they mean the conditions and means that ensure their actual realization and reliable protection for everyone (Vitruk, 1979: 194).

In the opinion of others, primarily, rights, freedoms and duties require guarantees. The realization of rights, in turn, requires the vigorous activity of the state, its bodies, and the citizens themselves, supported by effective means (Voevodin, 1997: 221-222).

The above statements are fully applicable to tax legal guarantees of the taxpayer's rights. These guarantees are designed to ensure not only the actual realization of the taxpayer's rights, but also their protection. Therefore, we can say that among the considered guarantees there are both guarantees of the realization of the taxpayer's rights and guarantees of protection of the taxpayer's rights.

It is interesting to note that the Constitutional Court of the Russian Federation in its decisions often analyzes the norms of the tax legislation through the prism of guarantees of the taxpayer's rights. However, it uses either the general words "guarantees of the rights of the taxpayer" or "guarantees of protection of the taxpayer's rights", without using separately "guarantees of the realization of the taxpayer's rights". At the same time, this does not mean that the latter do not really exist.

In tax legal relations the main role is given to the tax authorities, which perform procedural activity, often timeliness and quality, which can be considered as the tax legal guarantee of one or another rights of the taxpayer.

We should agree with the authors' opinion that "a well-defined procedure is the most important guarantee of the rights and legitimate interests of all participants in tax legal relations" (Demin, 2015).

As scientists note, "in law directions for procedural order of the realization of rights it is critically important when it depends not only on the actions of the right holder, but also other individuals and organizations when their cooperation is necessary ..." (Vitruk, 1979: 214). This approach is especially characteristic of tax legal relations, where the main role is assigned to the subjects with state-authoritative powers. These subjects, on the one hand, follow state's will in the relations concerned, and on the other hand, lay the foundation for the realization by the taxpayers of their rights.

The tax authorities are participants of virtually all tax legal relations. There are a few examples when a taxpayer acts on his own authority, without recourse to these authorities. As M. Karaseva notes, there are examples “when the rights of various subjects enshrined in the legislation are provided with extended procedural guarantees for their realization and do not require the law enforcement activity of the competent authorities” (Karaseva, 2003: 142-143). But in this case, it is more about independent fulfillment of an obligation by a taxpayer, but not about exercise of his rights.

### **3 Guarantees of the realization of the taxpayer’s rights**

Let’s consider some examples of guarantees of the realization of the taxpayer’s rights which are expressed in commission of certain actions by tax authorities.

So, among the rights of the taxpayer fixed in Art. 21 of the Russian Tax Code, it is possible to emphasize the right to be granted a deferral, installment or investment tax credit in accordance with the procedure and subject to the conditions which are established by this Code. Obviously, the exercise of this right is impossible without committing certain procedural actions by the authorized bodies.

In spite of the fact that the initiator of the granting of a deferral, an installment for the payment of tax and levy or an investment tax credit is a taxpayer, the decision to grant or refuse to grant depends on discretion of the authorized body. However, it is established in the legislation that the decision to refuse to grant both deferral and installment must be substantiated (Tax Code, Art. 64). This requirement testifies to the desire of the state to strengthen the guarantees for the realization of the taxpayer’s rights. The refusal will be substantiated, if there are circumstances which preclude the alteration of the time limit for the payment of a tax (Tax Code, Art. 62), as well as a taxpayer does not submit the documents required to grant a deferral or installment (Tax Code, Art. 64). A similar rule has been established in the legislation of foreign countries (Code of the Republic of Kazakhstan “On Taxes and Other Mandatory Budget Payments”, Art. 51).

A similar guarantee of the realization of the taxpayer’s rights is established in the event of an appeal against a decision on the imposition or non-imposition of sanctions for the commission of tax offences which has entered into legal force. So, he has the right to file an application for a stay of enforcement of the appealed decision before adoption of a decision on the appeal. For its realization, it is necessary to provide a bank guarantee, under which the bank undertakes to pay a sum of money of the amount of tax, levy, penalty, fine not paid on the appealed decision.

However, a higher tax authority may refuse to grant a stay of enforcement of the appealed decision. At the same time, as in the previous example, such a refusal should not be arbitrary. The only reason for refusal is the inconsistency of the bank guarantee

provided by the person who has submitted an appeal with the requirements established by the Russian Tax Code.

A similar example is the tax legal relations arising in connection with the refund of excessively collected or overpaid taxes. So, a taxpayer has a right to the timely crediting or refund of amounts of taxes, penalties and fines which have been paid or collected in excess (Russian Tax Code, Art. 21).

This right is a guarantee, envisaged by Art. 35 of the Constitution of the Russian Federation, of the right to private property and provides the owner with a return of the property that he has been deprived of without appropriate legal foundations (Kilinkarova, 2008: 137).

For its realization, a taxpayer must submit a written application to the tax authority (Tax Code, Art. 78, 79), which in turn is a prerequisite for the refund procedure by this authority.

Initially, on the basis of this application the tax authority adopts the decision of the refund of overpaid or excessively collected amounts of taxes, penalty, fines, and then, with the participation of the territorial body of the Federal Treasury, directly refunds. It turns out that the mere legal fact, expressed in filing an application by a taxpayer, is insufficient for the full realization of the considered right by him. Obviously, for this, it is necessary for the authorized bodies to perform the aggregate of the procedural actions following in a certain sequence.

Such a procedure regulated by tax statutory provisions of subjects with state-authoritative powers is a guarantee of the realization of the taxpayer's right to refund the amounts of excessively collected or overpaid tax.

#### **4 Guarantees of the protection of the taxpayer's rights**

Moreover, any procedure must meet the timeliness criterion. Therefore, the refund by the tax authorities is clearly regulated in time.

Untimely refund prejudices the taxpayer's right, enshrined in Art. 21 of the Russian Tax Code. In this regard, for the tax authority in this case, there are certain negative legal consequences, expressed in the calculation of interest on the amount of tax which has not been refunded within the established time limit.

So, in respect of overpaid tax, interest is calculated from the day by which the time limit for the refund to the taxpayer is exceeded, in respect of excessively collected tax it is calculated from the day following the day of collection.

The provisions of the Russian Tax Code, which fix the rule on the calculation of interest in the above cases, were the subject of consideration by the Constitutional



Court of the Russian Federation. Thus, the Court noted that the provisions of Art. 79 of the Tax Code, envisaging the calculation of interest on the amount of excessively collected tax, represent supplementary guarantees for the protection of the rights of citizens and legal persons from illegal actions (inaction) of public authorities. With regard to the provisions of Art. 78 of the Tax Code, such interest is compensatory-restorative in character, as they are paid in cases where the public authority has not fulfilled the obligations assigned to it by law (Constitutional Court of the Russian Federation: 832-O-O/2009).

In our opinion, irrespective of the differences in the calculation, in both cases a taxpayer is denied the opportunity to dispose of that part of the property that he either voluntarily transferred as a tax amount to the state budget or that was collected by the tax authorities. These interests are compensatory in nature (Tsvetkova, 2016). In both cases, calculation of interest is a guarantee of the protection of the rights of the taxpayer. In case of untimely refund of excessively collected tax it is a guarantee of the protection from illegal actions (inaction) of tax authorities, in the second case – from untimely fulfilling the assigned obligations. The calculation and further transfer of this interest to the taxpayer's account is compensation for damage caused to the person by such actions (omission of actions) by state-authoritative bodies.

Fixing the rule on the calculation of interest (penalty) on the amount of overpaid or excessively collected tax is typical not only for Russian legislation. Thus, for example, the Law of the Republic of Latvia “On Taxes and Levies” (Act 1995) provides that in the case of a violation by the tax administration of the time limit for refund of incorrectly collected payments or overpaid amounts of taxes to the taxpayer, the refunded amounts increase by penalty of 0.05 per cent of incorrectly collected amount of payments and 0.03 per cent of the overpaid amount of taxes for each overdue day, respectively.

Also, the Code of the Republic of Kazakhstan “On Taxes and Other Mandatory Budget Payments” provides that if the tax authority violates the time limit of the crediting and (or) refund on the taxpayer's tax application for the overpaid (excessively collected) amount of tax, payment to the budget under which the credit and (or) refund is made in violation of the time limit, the tax authority charges penalty for each day of delay for the benefit of the taxpayer. Penalty is charged in the amount of 1.25 times of the refinancing rate of the National Bank of the Republic of Kazakhstan, effective for each day of delay, starting from the day following the expiration of the time limit of the crediting and (or) refund, including the day of such crediting and (or) refund.

It is interesting that in case of violation of the time limits for refund, the legislators of the above states prefer to use the term “penalty”. At the same time, on the basis of the legal definitions of this concept, in both cases it is about payments paid in connection with violations of the time limits of payment of tax, duties, and payments to the budget. Therefore, it is not entirely clear why in the case of a violation of the time limits of

tax refund by the authorized bodies the term “penalty” is also used that in principle contradicts its definition.

The calculation of interest is provided not only in case of untimely refund of overpaid tax or tax collected in excess, but also in the event that a tax authority unlawfully issues a decision ordering the suspension of operations on a taxpayer – organization’s bank account or the time limit for sending it to a bank. This interest payable to the taxpayer for each calendar day by which the time limit is exceeded.

The researchers note that the interest specified in Art. 76 of the Russian Tax Code is similar to the interest accrued on excessively collected (untimely refunded) amounts of taxes, including in the procedure of accruing. Nevertheless, in the author’s opinion, these are various legal categories. The difference is that the monetary resources are not transferred to the state disposal, as in cases of excessive collection (untimely refund) of taxes, but remain on the taxpayer’s accounts with banks, while limiting their use to the latter (Dolgopolov).

As another example of guarantees of the protection of the taxpayer’s rights, we can consider an adoption of a recovery decision of arrears out of monetary resources held in bank or out of other assets of the taxpayer-organization at strictly defined intervals. The maximum time limit for taking this procedural action should not exceed two months in the first case and one year in the second, from the date when the time limit specified in a tax payment demand has expired.

These time limits are of a preclusive nature. So, the statutory defined negative consequences of their violation, which are expressed in recognition of recovery decisions adopted after the expiry of the abovementioned time limits, are deemed invalid and shall not be enforceable. It is the invalidity of these decisions by virtue of legislation and the impossibility of further uncontested recovery of arrears which are a guarantee of protection of the taxpayer’s right from an excessively protracted procedure.

Among the preclusive procedural time limits, it is also possible to emphasize the period of limitation on the imposition of sanctions for the commission of tax offences. It is a maximum period of time during which the tax authority has the right to decide on the imposition of sanctions. The failure by these authorities leads to deem this decision as invalid, and, as a consequence, to the inability of the imposition on a taxpayer of the type of legal liability in question.

As the Constitutional Court of the Russian Federation rightly argued, this time limit is a supplementary guarantee directed at protecting from the unlawful restriction on the right of property at a time when the tax offense is significantly away from the fact of its detection (Constitutional Court of the Russian Federation: 9-P/2005).

The loss by the authorized law enforcement bodies of the opportunity to exercise the power established for them, namely, the imposition of sanctions for the commission of a tax offence is a guarantee of protection of the rights of the taxpayer.

## 5 Conclusion

Granting to the taxpayers certain rights, the state establishes tax legal guarantees of their realization and protection, which is a manifestation of the state's tax sovereignty. Also, by establishing these guarantees, the state aims at ensuring the optimal balance of public and private interests in tax legal relations. Among the tax legal guarantees of the taxpayer's rights there should be distinguished guarantees of realization and guarantees of protection of the taxpayer's rights. Among the first, a special place is held by the guarantees expressed in the timely and qualitative procedural activities of the tax authorities, leading to the exercise of the taxpayer's rights. The second type of guarantees takes place in case of the failure to fulfil or improper fulfilment by bodies with state-authoritative powers of their duties, having a direct impact on the rights of the taxpayer.

## References

- Andreev, N.: О трех аспектах налогового суверенитета (On three aspects of the tax sovereignty), *Финансовое право (Financial Law)* no. 9 (2016).
- Demin, A.: Принцип определенности налогообложения (The principle of certainty of taxation), М.: Статут (Moscow: Statut), 2015.
- Dolgorolov, O.: О некоторых вопросах правовой природы процентов, начисляемых на излишне взысканные (несвоевременно возвращенные) суммы налогов (On some issues of the legal nature of interest accrued on excessively collected (untimely refunded) tax amounts). [www.consultant.ru](http://www.consultant.ru)
- Karaseva, M.: Бюджетное и налоговое право России: (политический аспект) (Budget and tax law: the political aspect), М.: Юристъ (Moscow: Jurist), 2003.
- Kilinkarova, E.: О распространении правил статей 78 и 79 Налогового кодекса Российской Федерации на суммы излишне уплаченных и излишне взысканных косвенных налогов (On the extension of the rules of articles 78 and 79 of the Tax Code of the Russian Federation on the amounts of the overpaid and excessively collected indirect taxes), *Налоги и финансовое право (Tax and Financial Law)* no. 6 (2008).
- Raritska, V.: Tax Sovereignty as a Fundamental Characteristic of Tax Law System, Radvan, M. (ed.): *System of Financial Law: System of Tax Law: Conference Proceedings*, Brno: Masaryk University, 2015.
- Sadchikov, M.: Понятие налогового суверенитета (The Tax Sovereignty Concept), *Налоги (Taxes)* no. 1 (2016).
- Shakhmamatov, A.: *Международное налоговое право (International Tax Law)*, М.: Международные отношения (Moscow: International Relationships), 2014.

- Tsvetkova, E.: Способы защиты прав и законных интересов налогоплательщиков в налоговых спорах (Means of protection of rights and legal interests of taxpayers in tax disputes), *Финансовое право (Financial Law)* no. 7 (2016).
- Vitruk, N.: Основы теории правового положения личности в социалистическом обществе (Basics of the theory of legal status of the individual in socialist community), М.: Наука (Moscow: Nauka), 1979.
- Voevodin, L.: Юридический статус личности в России (Legal position of the individual in Russia), М.: ИНФРА-М-НОРМА: Изд-во МГУ (Moscow: INFRA-M-NORMA: MSU Publishing), 1997.

## Legal Acts

Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended.

Act 1995, the Law of the Republic of Latvia “On Taxes and Levies”. [http://www.smartlatvia.lv/zakon-o-nalogah-i-poshlinah/#\\_Тoc414285431](http://www.smartlatvia.lv/zakon-o-nalogah-i-poshlinah/#_Тoc414285431)

Act no. 120-VI ZPK/2017, the Code of the Republic of Kazakhstan “On Taxes and Other Mandatory Budget Payments”. [http://online.zakon.kz/Document/?doc\\_id=36054980&doc\\_id2=36054980#activate\\_doc=2&pos=66;0&pos2=1836;6](http://online.zakon.kz/Document/?doc_id=36054980&doc_id2=36054980#activate_doc=2&pos=66;0&pos2=1836;6)

Constitutional Court of the Russian Federation: 20-P/1996

Constitutional Court of the Russian Federation: 9-P/2005

Constitutional Court of the Russian Federation: 832-O-O/2009

---

# REALIZATION OF TAX SOVEREIGNTY IN VALUE-ADDED TAXATION OF CROSS-BORDER TRANSACTIONS<sup>1</sup>

*Aleksei Paul*<sup>2</sup>

## Abstract

This contribution deals with tax sovereignty realization in value-added tax regulation. The main aim of the contribution is to confirm that value-added taxation has some peculiar properties concerning cross-border transaction, especially in case if the transactions take place between countries who are member of economic union. The author uses formal method for analysis of statutory acts and legal precedents as well as a comparative method analyzing experience of EU and its applicability for EEU.

## Key words

Tax sovereignty, value-added tax, import of goods, export of goods, zero rate, destination principle, source principle, European Union, Eurasian Economic Union.

**JEL classification:** K34, H20

## 1 Introduction

Value added tax (hereinafter – VAT) is widely spread in European and in some other countries. It has sales of goods (services) as an object of taxation. It leads to some special regulation for sales when a seller and a buyer are located in different states. States should respect tax sovereignty of other states in VAT regulation concerning cross-border sales. So, the main aim of the contribution is to confirm that value-added taxation has some peculiar properties concerning cross-border transaction, especially in case if the transactions take place between countries who are member of economic union. The author uses formal method as well as a comparative method for analyzing.

---

<sup>1</sup> Публикация подготовлена в рамках поддержанного РФФИ научного проекта no. 17-03-00702 «Налоговый суверенитет и защита прав налогоплательщиков: опыт ЕС и ЕАЭС» (The publication was prepared within the framework of the RFBR-supported scientific project no. 17-03-00702 "Tax sovereignty and protection of taxpayers' rights: the experience of the EU and the EAEC").

<sup>2</sup> Professor of Financial Law Department, Faculty of Law, Voronezh State University, Voronezh, the Russian Federation. Author specializes in budget law and tax law. He is the author of 3 books and the co-author of 7 textbooks. He presented his scientific research in 17 reviewed articles in prestigious journals and in more than 70 another journals and conference proceedings. He is a member of the Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. ORCID: 0000-0003-3955-5479. Contact email: pag@law.vsu.ru.

## 2.1 An Indirect Nature of VAT

VAT is an indirect tax. The indirect tax is paid to the budget system by legal taxpayers. However, a tax burden of the tax is borne by another person. As some experts say, “the bearer of VAT is the end consumer who buys goods (work, services) the price of which already including the tax” (Milyakov, 2007: 5).

This characteristic of VAT as an indirect tax is not directly specified in the Russian tax legislation. At the same time, Russian courts take into account its indirect nature when considering certain categories of disputes. For example, the Constitutional Court of the Russian Federation in one of its case considering the constitutionality of the refund of the other indirect tax (excise) indicated that “by its legal nature excise is a tax the payer of which is the person selling the goods (other tangible assets), but at the same time the payer passes along the tax to the consumer... Legislator does not stipulate realization of the taxpayer’s right to refund of overpaid excise with the return or non-return of the excise amounts to the consumer of goods. Nonetheless, simultaneous return from the budget to the taxpayer of overpaid excise with no refund of the overpaid excise amount to the consumer means unjust enrichment for the taxpayer of excise” (Constitutional Court of the Russian Federation: 317-O/2003). Currently, this position with some clarifications is taken into account in the decision of the Plenum of the Supreme Commercial Court of the Russian Federation, connected to VAT. The Court says that in case if a taxpayer refers to the fact that the relevant transaction was not subject to taxation or had to be taxed at a lower rate and claims a refund from the budget of the overpaid VAT, the courts should check whether the VAT paid to the budget corresponds to the amount of the tax that was imposed on the transaction. And it is necessary to keep in mind that the refund in this case should not entail unjust enrichment for the taxpayer; so such refund is possible only if the taxpayer return the overpaid VAT to its consumer (Supreme Commercial Court of the Russian Federation: 33/2014).

## 2.2 VAT and Tax Sovereignty

The indirect nature of VAT has the other meaning as well. As noted by scientists, “one of the purposes for the classification of taxes on direct and indirect was the delimitation of jurisdiction between countries” (Ben, 1995: 9). The discrepancy between the legal taxpayer (who pays VAT to budget system) and a person who bears the burden of the tax (consumer) requires taking into account the location of the consumer in the establishment and collection of the tax. It has a great importance when the seller and the consumer of goods are in the territory of different states.

Mentioned circumstances should be taken into account in relation to the existence of a tax sovereignty which is a continuation (element) of a state sovereignty. Taxes have always been called as one of the signs of the state (Melekhin, 2009: 34). In this regard scientists note that “collection of taxes – the legal compulsory seizure of the property – is part of the sovereignty of the state” (Kudryashova, 2005: 35).

In literature there are various concepts of tax sovereignty, in some cases it is identified with fiscal sovereignty. For example, the following definitions are proposed: “fiscal sovereignty is the possession by the supreme state authority of the power to determine the revenue sources of the state, which implementation does not depend on any other state or society. In other words, the realization of the principle of “fiscal sovereignty” means the absolute power of the state to identify profitable sources of the treasury without being dependent on the will of payers or other subjects of law” (Orlov, 2006: 19); “tax (or fiscal) sovereignty is the right of a state acting as a subject of public law through federal or regional authorities to impose on the territory of its jurisdiction (the so-called fiscal territory) any tax law and to control its collection” (Pogorletsky, 2005: 10).

Value added taxation due to its indirect nature could lead to the intervention of one state in the tax sovereignty of another state in process of cross-border movement of goods. In the event of the export VAT is paid by the legal taxpayer to one budget system, however the consumer who bears a burden of taxation is in the territory under the jurisdiction of another state. As a result, the tax is eventually collected in the territory of another state (where the consumer is located). Another problem is the violation of taxpayers’ rights by multiple taxation. The researchers therefore identify two interrelated problems: “firstly, this situation potentially creates conditions for international indirect multiple taxation, since involved states may hypothetically seek to receive the relevant taxes; secondly, it allots a task of finding the optimal avoidance of double taxation or the minimization of its negative consequences (and not just a one-time in the context of this transaction, but at the system level and from the point of view of all entities affected by the application of indirect taxes)” (Shakhmametev, 2014: 702).

Tax legislation developed certain approaches to solve these problems.

The fundamental rule concerning VAT is its imposition on transactions within the territory under the jurisdiction of the state where they are conducted. The literature is pointed out “the state shall have exclusive territorial jurisdiction over indirect taxes. In other words, the state has jurisdiction to collect indirect taxes if the object of taxation is located within its territory (or within the territory in which the state has exclusive sovereign rights), as well as if there is a presumption of the fact that the object of taxation is located within the territory of the state” (Kudryashova, 2005: 36). In the Russian tax legislation Art. 146 of the Tax Code set up that transactions that are objects of VAT should take place within the territory of the Russian Federation.

Mentioned approach raises the question of determining the place of VAT-taxable transactions. There are special rules in the Russian tax legislation defining the place of sale of goods (Tax Code, Art. 147) and the place of realization of works (services) (Tax Code, Art. 148). The provisions of the articles correlate with the Title 5 of Council Directive 2006/112/EC of the European Union on the common system of value added tax. This is due to the fact that “Russia is focused on integration with the world economic community primarily with the European Union. Hence, it is necessary to adapt the

Russian tax legislation to the European one as much as possible and minimize the cases of double taxation” (Solovyeva, 2006: 27).

These rules allow determining the place of sale of goods (works, services). However, cross-border sales could make certain adjustments to the above approaches. In international tax law there are “the following approaches of territoriality in the application of indirect taxes for respect of international operations:

- 1) In the country of destination of the goods, i.e. in the territory of the state where foreign goods were imported for consumption;
- 2) In the country of origin of the goods, i.e. in the territory of the state where the goods were produced and exported;
- 3) In both the states” (Shakhmametev, 2014: 703).

Currently, the destination principle is dominated in the regulation of the value-added taxation of cross-border transactions. According to the principle VAT is levied on the import of goods (works, services) into the country. According to scientists, “the collection of VAT on the destination principle in combination with the credit method is considered the most effective way to maintain exports. That is why this principle has been chosen by many countries for taxation of foreign economic activity. An adoption of the Sixth Council Directive 77/388/EEC of May 17, 1977 on the harmonization of the laws of the Member States relating to turnover taxes made large contributed to the implementation of this principle. The destination principle realized as a rule with help of use of zero tax rate. It should be noted that VAT refund (credit) is made only to the taxpayers of this tax, but the destination principle requires to exempt exporters from VAT. The application of the zero rate creates the appearance of taxation (without its payment), but the taxpayer has a fundamental right to reimbursement of the tax paid to suppliers” (Salnikova, Shynkarev, 2006: 19).

These rules make it possible to comply with the principles of national sovereignty of states and at the same time to protect taxpayers from double taxation. An important point in the implementation of the mentioned order of taxation is the existence of customs authorities who provide control over the movement of goods across the customs border. For example, under art. 165 of the Russian Tax Code taxpayers-exporters could receive refund VAT applying zero tax rate when they submit to tax authorities tax return with some documents including a customs declaration with the marks of the Russian customs authority, which carried out the export procedure.

### **2.3 VAT and Economic Unions**

World practice shows the establishing of various economic associations and unions of states which creation could limit state sovereignty. To some extent, this may relate, among other things, to limitation of tax sovereignty. Although, as it is noted by the scientists,



“states show moderation in matters of integration and cooperation concerning the tax sovereignty” (Tolstopyatenko, 2001: 162).

Nowadays an example of such unions is the European Union and the Eurasian Economic Union.

The establishing of such unions leads to the fact that in addition to regulation of the cross-border movement of goods to other countries, it is necessary to regulate the movement of goods between the member states of the unions. It should be borne in mind that there may be no customs clearance for the movement of goods between the member countries of such unions.

An example of a tax integration within the unions in respect of VAT regulation is carried out in the framework of European Union. The main target of European Union has been the foundation of the common market. So, the member states should harmonize their indirect taxation.

In terms of the functioning of taxation in the European Union scientists have drawn attention to the fact that “the most noticeable positive integration is manifested in the adoption by member states of directives in the field of indirect taxes (excise duties and value added tax) which total number exceeded thirty. Quite strict legal regulation of indirect taxes at the level of directives and regulations is due to the need to create a single economic and monetary Union which is impossible without compliance by all states with the same law” (Leshenko, 2007: 2).

Currently one of the main documents concerning the regulation of indirect taxation in the European Union is Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax. Previously, the Sixth Council Directive 77/388/EEC of May 17, 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax was in force.

Assessing the dynamics of VAT integration in the EU countries, the experts point out that “in the trade and economic relations of the EU member states with other states the “traditional” VAT scheme based on the destination principle is used... Situation is more complicated in supply of goods between the EU member states. Since January 1, 1993, the internal borders were abolished and their territories became a single economic space (a single domestic market and a common customs territory) of the EU. Prior to these events, the European Union documents provided for some peculiarities in indirect taxation on the supply of goods “inside” the EU. The rules based on the destination principle were initially applied to these supplying. The EU documents adopted in late sixties – early seventies established the transition to collection of VAT on the basis of the source principle, which at early stages regards just some transactions between countries (for example, delivery of the goods by mail, selling of excisable goods and certain types of vehicles). Initially, the complete transition was planned by the end of the previous century. However, the current system of VAT payment concerning EU “internal” transactions is not fully consistent with the source principle (Shakhmametev, 2014: 723).

In 1985, in para 212 of the White paper from the Commission to the European Council concerning Completing the internal market it was pointed out that the final element of the VAT reformation should be the new arrangements for treating sales and purchases across borders in the same way as those within member states. It was offered to establish a Clearing house system so that the VAT collected in the exporting member state and deducted in the country of import could be credited to the latter.

On our opinion, the proposed system of taxation would be the highest level of integration of States in the collection of VAT in economic unions.

With regard to the economic unions where the Russian Federation participates attention should be paid to the Eurasian Economic Union (EEU). The principles of indirect tax collection in the EEU member states are defined in art. 72 of the Treaty on the Eurasian Economic Union and in the Annex no. 18 to the Treaty. According to the Treaty a collection of indirect taxes in intra-union trade is performed on the destination principle that providing for application of the zero rate of VAT at export of goods, an indirect taxation at import as well as collection of indirect taxation of works (services) performing in the member state which territory is recognized as the place of their realization. In other words, the Eurasian Economic Union still applies the principles previously characteristic for the EU countries.

Annex 18 to the Treaty defines special rules for submitting documents to confirm the right to receive deductions when the zero rate is applied. This is due to the absence of customs clearance and the need for other document execution to confirm the movement of goods across the borders of the EEU member states for tax purposes.

There is an integration with respect to the interpretation of preferential lists of transactions that are not subject to VAT. The preferences are prescribed by the Tax Code of the Russian Federation. However, as it is noticed relatively EU “in the event that the national law gives rise to some doubt or ambiguities, a national court is obliged to construe this law in order to adapt it to the requirements of the directive” (Mudrecki, 2015: 330). Russian court realized the same approach. The importation of goods from EEU member states shall apply the privileges not only provided for the importation from any state (Russian Tax Code, Art. 150) but prescribed for domestic sale (Russian Tax Code, Art. 149) as well. For example, the Supreme Court of the Russian Federation with reference to art. 72 of the Treaty indicated that the rates of indirect taxes on imported goods in intra-state trade should not exceed the rates of indirect taxes which are levied on similar goods of domestic production. In this regard, it was concluded that the norms of international agreements provide for the need to apply for taxation of import of goods from EEU member states not only art. 150 of the Tax Code containing a list of goods not subject to taxation (tax exempt) when they are imported into the territory of the Russian Federation (regardless of the country of origin of goods) but also art. 149 of the Tax Code which determines the taxation of the domestic market (Supreme Court of the Russian Federation: A76-16715/2014).

### 3 Conclusion

Tax sovereignty has a significant impact on the legal regulation of value added taxation. These features are fully manifested in the cross-border movement of goods. At the same time, the formation of various economic unions requires some self-restraint by states of their national sovereignty as well as unification and integration of legal regulation. At present, such integration takes place, including with regard to the European Union and the Eurasian Economic Union. Taking into account the history of these unions the experience of the European Union may be applied in the regulation of the value-added taxation in the Eurasian Economic Union which at the same time will contribute to closer tax unification within Europe as a whole.

### References

- Ben, G.: Введение в налог на добавленную стоимость в ЕС (Introduction to Value-Added Tax), М.: Терра (Moscow, Terra), 1995.
- Kudryashova, E.: Юрисдикция (суверенитет) государств и налоговый иммунитет в области косвенного налогообложения (Jurisdiction (Sovereignty) of States and Tax Immunity in the Field of Indirect Taxation, Финансовое право (Financial Law) no. 10 (2005).
- Leshenko, S.: Сближение налоговых систем государств-членов Европейского Союза (Convergence of the Tax Systems of the Member States of the European Union), 2007. [http://elib.bsu.by/bitstream/123456789/12508/1/6\\_leshchenko.pdf](http://elib.bsu.by/bitstream/123456789/12508/1/6_leshchenko.pdf)
- Melekhin, A.: Теория государства и права (Theory of State and Law), М.: Consultant-Plus, 2009. [www.consultant.ru](http://www.consultant.ru)
- Milyakov, N.: Налог на добавленную стоимость (Value-Added Tax), М.: КНОРУС (Moscow: Knorus), 2007.
- Mudrecki, A.: The Influence of “Good Faith” on the Taxable Person’s Right to Deduct the Value-added Tax in the Light of the Case Law of the Court of Justice of the European Union, in: Radvan, M. (ed.): System of Financial Law: System of Tax Law: Conference Proceedings, Brno: Masaryk University, 2015.
- Orlov, M.: Налог как форма разумного ограничения фискального суверенитета государства (Tax as a Form of Reasonable Limitation of Fiscal Sovereignty of the State), Финансовое право (Financial Law) no. 2 (2006).
- Pigolkin, A. (eds.): Теория государства и права (Theory of State and Law), М.: Городец (Moscow: Gorodets), 2003.
- Rogorletsky, A.: Принципы международного налогообложения и международного налогового планирования (Principles of International Taxation and International

- Tax Planning), СПб.: С.-Петербург. гос. ун-т (Saint-Petersburg: Saint-Petersburg University Publishing), 2005.
- Salnikova, E., Shynkarev, V.: Международные принципы взимания НДС: проблемы применения (International Principles of VAT Collection: Problems of Application), Налоговая политика и практика (Tax Policy and Practice) no. 5 (2006).
- Shakhmatetev, A.: Международное налоговое право (International Tax Law), М.: Международные отношения (Moscow: International Relationships), 2014.
- Solovuyeva, M.: “Местные” НДС-поправки: критерии – старые, правила – новые (комментарий к изменениям в НК РФ, внесенным Федеральным законом от 22.07.2005 no. 119-ФЗ в правила определения места реализации работ и услуг) (“Local” VAT Amendments: Criteria are Old, Rules are New (Comment to the amendments to the Tax Code Introduced by the Federal Law of 22 July, 2005 no. 119-FZ in the Rules for Determining the Place of Sale of Works and Services), Главная книга (Gross Book) no. 3 (2006).
- Tolstopryatenko, G.: Европейское налоговое право. Сравнительно-правовое исследование (European Tax Law. Comparative Legal Research), М.: Издательство НОРМА (Moscow: Norma Publishing), 2001.

## Legal Acts

- Act no. 2006/112/EC, Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0112&from=en>
- Act no. 77/388/EEC, Sixth Council Directive 77/388/EEC of May 17, 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment. <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31977L0388&from=en>
- Treaty on the Eurasian Economic Union of May 29, 2014, as amended. <http://www.eurasiancommission.org>.
- Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985). [http://europa.eu/documents/comm/white\\_papers/pdf/com1985\\_0310\\_f\\_en.pdf](http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf).
- Act no. 117-FZ/2000, The Tax Code of the Russian Federation, part 2, as amended.
- Constitutional Court of the Russian Federation: 317-O/2003.
- Supreme Commercial Court of the Russian Federation: 33/2014.
- Supreme Court of the Russian Federation: A76-16715/2014.

---

# THE SOVEREIGNTY OF THE COUNTRIES OF THE EUROPEAN UNION IN THE AREA OF THE CUSTOMS UNION AND COMMON COMMERCIAL POLICY

*Anna Reiver-Kaliszewska*<sup>1</sup>

## **Abstract**

Member States of the European Union have delegated their powers in the field of customs and commercial policy and jointly decide on matters which were earlier reserved to their exclusive competence. Customs union and the common commercial policy have been covered by the exclusive competence of the European Union, which means that only the Union may legislate and adopt legally binding acts, whereas Member States can do it only with the authorization of the Union or to implement Union acts. The subject of this study is an attempt to answer the question whether, as a result of integration with the European Union, the Member States have lost their sovereignty in terms of customs and common commercial policy.

The hypothesis to be confirmed or disproved is that, as a result of integration, European Union Member States have not lost their sovereignty in the field of customs and common commercial policy. To achieve the abovementioned goal, it will be necessary to examine the concept of sovereignty in the legal doctrine, to analyze what the customs union and common commercial policy of the European Union are and to answer the question of the consequences of adopting the customs union and the common commercial policy for the EU countries.

Research method used is analysis of the legal texts, in particular the text of the Treaty on the Functioning of the European Union.

## **Key words**

Sovereignty, European Union, customs union, common commercial policy, the competences of the European Union.

**JEL Classification:** H250, K330, K220

## **1 Introduction**

Modern states must face strong international economic competition. States that are single and isolated from the global market find it much harder to achieve a competitive

---

<sup>1</sup> Anna Reiver-Kaliszewska, is Doctor of Law, Department of Financial Law, Faculty of Law and Administration, University of Business and Administration in Gdynia, Poland. The author specializes in tax and customs law, especially in the issues concerned with the trade defense instruments. She is the author and co-author of numerous reviewed articles. She is a member of Information and Organization Centre for Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. Contact email: areiver@yahoo.co.uk

advantage over others. The remedy for the constantly changing economic situation is regional supranational organizations associating countries that jointly face challenges (Raczkowski, 2005: 163).

As a result of the globalization and internationalization process, the traditionally understood meaning of sovereignty of the state in the economic, social and political sphere is less and less frequent (Woś, Hnatyszyn-Dzikowska, 2005: 173). National states lose their sovereign competences, which are replaced by co-decision with other states and institutions. The European Union as a customs union is a good example of such cooperation. Member States delegate their powers in the field of customs and common commercial policy and co-decide on matters which were earlier reserved as their exclusive domain.

The purpose of this article is to examine whether the Member States of the European Union have lost their sovereignty as a result of the adoption of the customs union and common commercial policy. The hypothesis to be confirmed or disproved is that European Union Member States have not lost their sovereignty in terms of customs and common commercial policy as a consequence of integration. To achieve the abovementioned goal it will be necessary to examine the concept of sovereignty in the legal doctrine, to analyze what the customs union and common commercial policy of the European Union are and to answer the question of the implications of adopting the customs union and the common commercial policy for the EU countries.

Research method used is analysis of the legal texts, in particular the text of the Treaty on the Functioning of the European Union.

## **2 The issue of the state sovereignty**

The content of the concept of state sovereignty has evolved over the centuries. Not everywhere was it treated equally rigorously. At the end of the eighteenth century, individual states of North America, although being connected by very strong economic ties, considered themselves sovereign and independent. At the same time, European states were economically independent, even self-sufficient. As a result of liberalization processes, a departure from the strict criteria of economic independence as a condition of sovereignty can be noticed. This change in attitude to the concept of sovereignty has been of a lasting nature. Currently, even countries that have just gained independence and for whom this sovereignty is a condition for economic development, appreciate the importance of economic cooperation and various types of economic ties within the international organizations created for this purpose (Guzek, 1976: 21-22).

A legal definition of sovereignty in the international law has not been adopted. The lack of a definition of this concept results in a variety of proposals and, as a result, a multitude of approaches to sovereignty (Caia, Wacinkiewicz, 2005: 335). Among contemporary

views on state sovereignty two extreme and many indirect concepts can be distinguished. One of these extreme concepts assumes that the position of a traditionally perceived state systematically weakens, while according to the second, states participating in the integration process do not lose or limit their sovereignty, but even strengthen it, which takes the form of combined sovereignty (Wierzchowiecka, 2005: 141-142).

State sovereignty is traditionally seen in the aspect of external and internal sovereignty. External sovereignty means that the state is independent from another international entity, whereas internal sovereignty refers to the exclusiveness and independence of exercising its competences. The existence of sovereign power results from the existence of sovereignty of the state. The sovereign power means that the state authorities, both internally and in international relations, act according to their own discretion, and above all in accordance with the interests of their state (Wierzchowiecka, 2005: 145).

### **3 Competences of the European Union in the field of customs union and common commercial policy**

The Treaty on the Functioning of the European Union (Consolidated version from 2012, C326/01) organizes the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences. In a simplified way, the competences of the Member States, shared competences and exclusive competence of the EU can be distinguished.

In the case of Member States' competences, the Union has the competence to carry out actions to support, coordinate or supplement the activities of the Member States. The areas of such action include: protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation<sup>2</sup>.

The competences transferred to the Union by treaties are usually shared between the European Union and the Member States. In the case of such competences, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. To this category of competences, there applies the principle of subsidiarity, according to which the European Union takes action only if and only to the extent that the objectives of specific actions cannot be sufficiently achieved by the Member States. This principle is about carrying out individual tasks and functions by those institutions that are closest to the unit. Shared competences are listed in art. 4 par. 2 TFEU and apply in the following principal areas:

---

<sup>2</sup> It is important that fiscal policy also remains at nation state level. However, the issues of tension during the last financial crisis in Eurozone are out of the scope of this paper.

the internal market, social policy, for the aspects defined in the Treaty, economic, social and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice, common security concerns in public health matters, for the aspects defined in the Treaty.

Covering a given field with Union's exclusive competence means that only the Union may legislate and adopt legally binding acts. Member States may do so themselves only if so empowered by the Union or for the implementation of Union acts.

According to art. 3 TFEU the Union has exclusive competence in the following areas:

- a) customs union;
- b) the establishing of the competition rules necessary for the functioning of the internal market;
- c) monetary policy for the Member States whose currency is the euro;
- d) the conservation of marine biological resources under the common fisheries policy;
- e) common commercial policy.

In addition, the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

To sum up, it should be stated that both issues: customs union and common commercial policy have been covered by the exclusive competence of the European Union, which means that only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. The principle of the primacy of the application of EU law has been repeatedly confirmed in the case law relating to customs matters of the Court of Justice. In its judgment of 10 December 2015 (Court of Justice: C-427/14), the Court of Justice stated that "whilst the Member States retain the power to provide for procedural rules in the scope of the Customs Code, they must also ensure that they comply with the Customs Code and, more generally, the requirements and relevant principles of the EU law" (Kalka, 2017: 8).

#### **4 The European Union as a customs union**

The customs union began operating at the end of the 1960s, when six then-member states of the European Community: Belgium, the Netherlands, Luxembourg, France, Germany and Italy adopted the Common Customs Tariff. This customs tariff was based on the



arithmetic mean of the external customs duties of the abovementioned countries. These countries have abolished tariffs and quantitative restrictions and measures with similar effects and at the same time introduced a common external tariff to third countries.

The next step was the creation of a common internal market in 1993. The concept of the internal market should be understood as an area without internal borders on which the free movement of goods, persons, services and capital is ensured. Border controls between Member States have been abolished and from that point on internal controls and checks are carried out by the customs administrations of the Member States.

The Common Customs Tariff was not enough to implement the customs union. The unification of the customs law was also necessary. Therefore, on January 1, 1993, Council Regulation (EEC) no. 2913/92 of October 12, 1992 establishing the Community Customs Code entered into force, compiling the customs legislation of the European Union. On April 23, 2008 a Regulation of the European Parliament and Council (EC) no. 450/2008 laying down the Community Customs Code (modernized Customs Code) was passed. This act replaced the Community Customs Code from 1992, however although the Modernized Customs Code from 2008 entered into force on the twentieth day following its publication in the Official Journal of the European Union, only those provisions of the Modernized Customs Code were applied which formed the basis for the elaboration and adoption of implementing provisions, while the remaining provisions were to be applied after the entry into force of its implementing provisions. However the implementing provisions of the Modernized Customs Code never entered into force and on October 30, 2013, Regulation (EU) no. 952/2013 of the European Parliament and of the Council of October 9, 2013 establishing the European Union Customs Code entered into force. This regulation repealed the Modernized Customs Code from 2008. The European Union Customs Code entered into force on October 30, 2013 but began to apply from May 1, 2016, with the exception of the provisions indicated in art. 288, delegating powers to the European Commission to adopt delegated and implementing acts. The full application of the EU Customs Code, based on ICT systems, is planned to take place by December 31, 2020.

The main strategic goals of the Customs Union include the creation of a friendly development structure of foreign trade, based on stable and transparent rules, granting adequate budgetary resources to individual Member States and the Union and protecting the society against unfair practices and their consequences in foreign trade (Raczkowski, 2005).

## **5 Common commercial policy of the European Union**

At the beginning of the 1980s the internally divided Europe was not able to compete with other countries. In 1973-81, the share of European countries in global exports decreased by 1.5%, while the share of the United States and Japan increased by 15.5%

and 42.8% respectively. The need to move away from market segmentation and the need to achieve large economies of scale was pointed out (Raczkowski, 2007: 169).

The introduction of a common commercial policy was a consequence of the creation of the customs union. According to art. 206 TFEU by establishing a customs union, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

The common commercial policy shall be based on uniform principles, particularly with regard to:

- 1) changes in tariff rates,
- 2) the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property,
- 3) foreign direct investment,
- 4) the achievement of uniformity in measures of liberalization,
- 5) export policy
- 6) and measures to protect trade such as those to be taken in the event of dumping or subsidies.

The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

From 1973, national competences regarding commercial policy were transferred to the EU level. As a result of the adopted solutions, the European Union took over powers in relation to economic cooperation and concluding agreements with third countries in this scope. The competences of national governments have been transferred to the European Commission. From then on, the European Commission is preparing proposals for the Council. The Council's task is to implement a comprehensive policy. Adoption of the Single European Act (1986), signing of the Maastricht Treaty (1992), the Amsterdam Treaty (1997) and the Lisbon Treaty (2007) increased the number of policy areas in which the Council decides by qualified majority votes and not by unanimity. Also, the role of the European Parliament has been strengthened as since 2014 the qualified majority votes to approve a decision has required at least 55 percent of Member States, representing at least 65 percent of the population of the European Union (Dabrowski, 2017).

However, even in the areas where the Treaty allows for qualified majority votes there has been a tradition of seeking a consensus between the Member States as first and best solution. Although the economic integration has outpaced the political integration, both economic and political integration are interconnected. A good example of it is the interrelation between the European single market and the Schengen travel area. The danger of collapsing of the Schengen area, resulting from the refugee crisis and terrorist

threat, has reminded how important EU open-border regime is for proper functioning of the single market (Dabrowski, 2017). The end of Schengen area would be costly for everybody (Wolff, 2016).

The European Union has created its own legal system, which has become an integral part of the legal system of the Member States. Member States have limited their sovereignty and created a law that directly affects countries and their citizens. Therefore, it should be assumed that EU law is an independent source of law that anticipates national legal norms (Czaputowicz, 2008: 5).

The European Parliament and the Council, acting by means of regulations, shall adopt the measures defining the framework for implementing the common commercial policy. The Common Customs Tariff has the form of the Regulation and the commercial protection measures including those concerning dumping and subsidies are also adopted in this form. However although the Member States cannot adopt legally binding acts in the area of common commercial policy, for example, they cannot apply dumping duties against third countries, as it is the exclusive competence of the Union, the third countries do not always treat the Member States of the Union as a whole. In some situations there are actions against the whole European Union, and sometimes there are actions against particular countries of the European Union. This also means that in case there is a dumping duty against the whole European Union, and the EU widens, this measure will also apply to this new EU Member even if this country is not selling the product using dumped prices. Such situation took place in 2004, when Poland became an EU Member and chemical products from Poland were covered by anti-dumping duties.

The provisions of the EU customs law do not regulate the structure of customs administration or the place of customs authorities in the structure of public administration. That is why the structure of customs administration is the responsibility of individual Member States and can be regulated in different countries of the European Union in different ways (Fabio, 2012: 9). The final shape of customs administration depends on a number of factors, especially the length of the external borders of the European Union, the number of border crossings, the nature and scope of trade in a given country, as well as the number of customs officers. The fact that there is no uniform customs administration in the European Union results from the need to increase the efficiency of administration and reduce costs. Internal controls and checks are therefore carried out by the customs administrations of the Member States.

The Union's customs duties are collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action. It is important that these provisions should meet the requirements of the Union rules. Customs are collected by Member States at the point when goods enter the European Union. Other levies such as anti-dumping and countervailing duties are also collected together with ordinary customs duties (Reiwer-Kaliszewska, 2017: 421-434). This revenue should

then be transferred to the European Commission, even if they have not been actually collected by national customs authorities (Limbach, 2015). Due to the collection of the duties by the national customs authorities, the services at the central level remain minimal and regard mainly controls and oversight. The Member States have the right to keep the collection costs (20% of the collected amounts). The remaining 80% contribute to the budget of the European Union.

It has been indicated on the website of the Ministry of Finance ([www.finanse.mf.gov.pl/clo/informacje-podstawowe](http://www.finanse.mf.gov.pl/clo/informacje-podstawowe)) that the tasks of the customs authorities of the EU countries are primarily to protect the financial interests of the Union as a whole, as well as the Member States, protecting the Union from unfair and illicit trafficking, maintaining a balance between customs controls and facilitating legitimate trade. I fully share the view of A. Drwillo that the tasks of modern customs administration are not limited to the administration and collection of the duties but they also include collection of value added tax on goods and services and excise duty, shaping and implementation of customs policy, as well as tasks in the field of international cooperation (Drwillo, 2007: 40).

## 6 Have the Member States lost their sovereignty as a result of accession to the European Union?

In contemporary theories of sovereignty, it is emphasized that sovereignty is not a detailed legal norm, nor a set of legal norms enumerating the minimum scope of obligations and rights of a sovereign state. It is not possible to determine in detail the functions and competences of a sovereign state. Therefore, a state that resigns from fulfilling certain tasks and transfers them to perform them in a group of countries or through other entities can be considered sovereign (Woś, Hnatyszyn-Dzikowska, 2005: 179-180). The state may, to a certain extent, surrender its competences to an international organization and, if it does so voluntarily, the principle of sovereignty will not be affected. However, the violation of sovereignty will take place when the international organization exceeds the scope of its competences and interferes in matters that the state has left in the sphere of its own competence (Guzek, 1976: 22)<sup>3</sup>.

Apart from the concept of violation of the principle of sovereignty, studies on international law also distinguish the notion of voluntary restriction of sovereign rights by the state to an international organization. In addition, the concept of restricting the exercise of sovereignty is applied. This allows to distinguish the situations when the loss of sovereignty is irreversible (for example, the sale of a part of the territory to another state) and accidents when the loss of sovereign rights may be restored, either

<sup>3</sup> It can happen that a country will have economic problems and, in that case, the European Union could act as a financial lender of last resort. And this action will not be a case of exceeding the scope of its competences. An example is Greek debt crisis and compulsory adoption of economic reforms and austerity package imposed on Greece by the EU and International Monetary Fund.

on a fixed date or at the request of the state (Guzek, 1976: 25- 26). The Treaty on the Functioning of the European Union defines the rules for the state's withdrawal from the European Union, so it can be assumed that the membership of the European Union and hence the customs union and participation in a common commercial policy is only a limitation of exercising the sovereignty, and not the limitation of the sovereignty itself. Also, A. Wasilkowski argues that we are dealing with the limitation of the exercise of sovereignty and not the limitation of sovereignty itself, since the transfer of certain competences by a Member State to EU institutions is carried out voluntarily in a treaty manner (Wasilkowski, 1996: 20-21).

Member States can leave the European Union, which lately happened in the case of Great Britain (Brexit referendum on June 23, 2016 that has led to invoking the article 50 of the Lisbon Treaty). There have also been discussions in Great Britain in spring 2018 whether to stay in the EU customs union or to exit customs union completely (Serwicka, 2018).

At the current stage of integration, the Member States have accepted the obligation to jointly perform state functions in the fields covered by transnational cooperation. European Union Member States have transferred a part of traditionally understood sovereignty to international institutions in a voluntary way, not because of their disadvantageous economic situation, but because it was in their interest. As a result of regional integration, the states are losing some of the traditional attributes of sovereignty, but in return they gain new techniques to pursue their interests. Although sovereignty is expressed in the independence of the state, it does not mean taking actions that would be incompatible with the international obligations accepted by the state on a voluntary basis (Woś, Hnatyczyn-Dzikowska, 2007: 183).

The authorities of the European Union can carry out the competences delegated to them due to the fact that states have authorized them to do so, and not themselves because they themselves do not have the attribute of sovereignty (Wasilkowski, 1996: 21). It should also be emphasized that EU authorities do not have sovereign powers for nation states. States actively participate in the decision-making process which concerns not only themselves but also all other Member States. We can therefore say that the Member States impose the sovereignty on each other (Zalcewicz, 2005).

I fully agree with J. Czaputowicz, who believes that the sovereign legal order precludes the existence of two legal orders in the same area at the same time. The sovereign legal order, however, allows the incorporation of another legal order. This is the case in the European Union, where EU law is incorporated into the national legal system either by establishing its direct applicability (as in the case of customs union and common commercial policy) or by implementing EU directives through the legal instruments of the Member States. At all times, however, there is only one law (Czaputowicz, 2008: 4).

## 7 Conclusion

Nowadays, it is assumed that the sovereignty of the state does not mean that there is no possibility of any dependence of a given country on another state or other states, provided that decisions on delegating competences are made without coercion. The dependence of the state on other countries (supranational organizations) is not a violation of sovereignty if it is based on the principles of voluntariness, equality and reciprocity. The motive for the decision to divide sovereignty in the economic sphere is the intention of better fulfilling one's own needs (Woś, Hnatyszyn-Dzikowska, 2007: 183). It should be pointed out that modern countries voluntarily give a part of traditionally understood sovereignty to international institutions, not because of their worse economic situation, but because it is in their interest. Thus, it is the functional criterion which decides about the division of the competences between the states and the European Union (Woś, Hnatyszyn-Dzikowska, 2007: 178).

The European Union is a voluntary union of sovereign and democratic countries, whose accession to the EU should be approved by its parliament or through a referendum. Each member of the European Union has the right to leave it, as it happened in the case of United Kingdom with an effective date as of March 29, 2019 at 11pm GMT time (Broth, 2018). Thus, the principle of voluntary membership is a central value of the European Union (Dabrowski, 2017).

Due to the fact that tariffs and quantitative restrictions and measures with similar effects have been abolished between Member States and at the same time the common external tariff to third countries has been introduced the European Union has compounded the strengths of its Member States. The common commercial policy of the European Union gives a better negotiating power with respect to third countries than each Member State alone could achieve. All the decisions in the Commission and in the Council are taken jointly as the first and best solution in accordance with the interests of all Member States. Of course, it does not mean that there are no frictions between the Member States even in the area of trade and free movement of people. A refugee crisis since 2015 and the perturbances connected to the functioning of Schengen area are good examples of it.

The authorities of the European Union can carry out the competences in the area of customs union and common commercial policy delegated to them due to the fact that states have authorized them to do so. The states actively participate in the decision-making process which concerns not only themselves but also all other Member States. The structure of customs administration is the responsibility of individual Member States and can be regulated differently in each of the country and due to it the administration is more efficient. It should then be concluded that the main hypothesis of this contribution that as a result of integration, European Union Member States have not lost their sovereignty in the field of customs and common commercial policy has been confirmed.

## References

- Archick, K.: *The European Union: Current Challenges and Future Prospects*, Congressional Research Service, 2017.
- Broth, J.: *The Looming Brexit Deadline: What to Expect in March 2019?* <https://moderndiplomacy.eu/2018/03/06/looming-brexit-deadline-expect-march-2019/>
- Bosoni, A.: *Sovereignty, Supranationality and the Future of EU Integration*, 2013. <https://worldview.stratfor.com/article/sovereignty-supranationality-and-future-eu-integration>
- Cała, E., Wacinkiewicz, D.: *Przyczynek do rozważań na temat europejskich relacji prawnych w kontekście współczesnego rozumienia suwerenności (A contribution to reflections on the European legal relations in the context of contemporary understanding of sovereignty)*, in: Gawłowicz, I., Wierzychowiecka, I., *Koncepcje suwerenności (The concepts of sovereignty)*, Warszawa: LexisNexis, 2005.
- Czaputowicz, J.: *Suwerenność państwa w Unii Europejskiej (The sovereignty of a state in the European Union)*, in: Czaputowicz, J.: *Administracja publiczna, Wyzwania w dobie integracji europejskiej (Public administration. Challenges in the era of European integration)*, Warszawa: Wydawnictwo Naukowe PWN, 2003.
- Dąbrowski, M.: *How to balance sovereignty and integration in a voluntary EU*, 2017. <http://bruegel.org/2017/01/sovereignty-integration-voluntary-eu/>
- Drwillo, A.: *Polska administracja celna. Stan i perspektywy reformy (Polish customs administration. The status and prospects of the reform)*, in: Gilowska, Z., Pogonowski, P., Sobczyk, I., *Przyjazna administracja skarbowa, tom 2 (Friendly tax administration, part 2)*, Warszawa: Ministerstwo Finansów, 2007.
- Fabio, M.: *Customs Law of the European Union*, The Netherlands: Wolters Kluwer, 2012.
- Guzek, M.: *Integracja gospodarcza a suwerenność państwa (Economic integration and the state sovereignty)*, *Sprawy międzynarodowe (International affairs)* no. 12 (1976).
- Broth, J.: *The Looming Brexit Deadline: What to Expect in March 2019?* <https://moderndiplomacy.eu/2018/03/06/looming-brexit-deadline-expect-march-2019/>
- Kalka, M.: *Postępowanie celne w unijnym kodeksie celnym. Praktyczne vademecum (The customs proceedings in the EU Customs Code. A practical vademecum)*, Wrocław: Unimex, 2017.
- Limbach, K.: *Uniformity of Customs Administration in the European Union*, Bloomsbury, 2015.
- Raczkowski, K.: *Krajowa Administracja Skarbowa jako stabilizator wspólnej polityki handlowej oraz unii celnej na rynku Unii Europejskiej (The National Tax Administration*

- as a stabilizer of the common commercial policy and customs union on the European Union market), in: Gilowska, Z., Pogonowski, P., Sobczyk, I., *Przyjazna administracja skarbowa, tom 2* (Friendly tax administration, part 2), Warszawa: Ministerstwo Finansów, 2007.
- Reiwer-Kaliszewska, A.: The Issue of Modernization of the XXI Century, in: *The Financial Law Towards Challenges of the XXI Century*, eds. M. Radvan, J. Gliniecka, T. Sowiński, P. Mrkyvka, Brno 2017. [https://www.law.muni.cz/sborniky/Radvan\\_Financial\\_challenges.pdf](https://www.law.muni.cz/sborniky/Radvan_Financial_challenges.pdf)
- Serwicka, I.: A Customs Union with the EU: A giant step politically but a small step for the economy, 2018. <https://blogs.sussex.ac.uk/uktpo/2018/05/01/a-customs-union-with-the-eu-a-giant-step-politically-but-a-small-step-for-the-economy/>
- Wasilkowski, A.: Uczestnictwo w strukturach europejskich a suwerenność państwowa (Participation in the European structures and the state sovereignty), *Państwo i Prawo* (State and Law) no. 4-5 (1996).
- Wierzchowicka, I.: Suwerenność państwowa w prawie międzynarodowym (The sovereignty of a state in international law) Suwerenność państwowa w prawie międzynarodowym in: Gawłowicz, I., Wierzchowicka, I., *Koncepcje suwerenności* (The concepts of sovereignty), Warszawa: LexisNexis, 2005.
- Wolff, G.: The economic consequences of Schengen, Bruegel blog, 2016. <http://bruegel.org/2016/02/the-economic-consequences-of-schengen/>
- Woś, J., Hnatyszyn-Dzikowska, A.: Koncepcje suwerenności państwa w sferze polityki gospodarczej w warunkach europejskiej integracji gospodarczej (The concepts of state sovereignty in the sphere of economic policy in European economic integration), *Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok (Year) LXIX – zeszyt (notebook) 1 – 2007*.
- Zalcewicz, A.: Polityka pieniężna państwa a jego suwerenność w kontekście integracji europejskiej (The monetary policy of the state and its sovereignty in the context of European integration) in: Gawłowicz, I., Wierzchowicka, I., *Koncepcje suwerenności* (The concepts of sovereignty), Warszawa: LexisNexis, 2005.



---

# CONCEPTUAL CAUSES OF THE TAX INTERESTS CONFLICT ARISING FROM INACCURATE INTERPRETATION OF THE ESSENCE OF STATE TAX SOVEREIGNTY

*Anatoliy Selyukov<sup>1</sup>, Levon Nariniyan<sup>2</sup>*

## **Abstract**

The article deals with the issue of inefficiency of the fiscal lawmaking concept used in Russia to achieve the goal of overcoming the conflict of interests in the tax sphere due to inadequate construction of tax sovereignty. Without challenging the right of the state to establish a mechanism of taxation, the authors show the need to take into account the state interests of society as an integral system. The article shows that the state is not only a form of organization of society, but is a secondary phenomenon in relation to society and fulfills all its functions, while society is the beneficiary of everything useful that the state gives.

The problem of overcoming the conflict of tax interests is solved through an analysis of the correlation of the concepts “taxpayer”, “state” and “society”, realized through the prism of the role of tax interest, acting as their connecting element. A system of single, general, state and public interests, which are in a dialectical relationship and determine the direction of taxation towards the optimal legal model of it, is revealed.

**The purpose** of the article is to build a legal concept on the possibility of eliminating the conflict in the tax sphere between the state and the taxpayer on the basis of the principle of the balance of interests between society as a holistic phenomenon and each of the taxpayers, where the state acts as an intermediary between society and individual taxpayers in the interests of society that, as a beneficiary, implements their interests in the indicators mandatory for the state: the preservation of the social protection population, security, the inadmissibility of its separation, etc.

The methodology of the study is the systematic method by which the essence of the state’s tax sovereignty is revealed as a legalized state activity on ensuring the interests of the whole society, coinciding with the tax interests of a conscientious taxpayer. Other general scientific and particular research methods are also used.

## **Key words**

Tax sovereignty, society, state, taxpayer, conflict of interests, balance of interests, legislation.

## **JEL classification:** H21, K34

---

<sup>1</sup> Doctor of Law, Professor of the Department of Financial Law of the Russian State University of Justice, a member of the International Association of Financial Law. A.D. Selyukov has published more than 180 scientific papers totaling over 200 printer's sheets, including 7 monographs, and is a co-author of 11 textbooks and 6 teaching aids, the author of more than 40 articles in peer-reviewed journals. Scientific specialization of A.D. Selyukov is methodology of financial law, financial and legal mechanisms of public administration. E-mail: Profsad@mail.ru

<sup>2</sup> Post-graduate student of the Department of Financial Law of the Russian State University of Justice, has published 4 articles, including 2 in peer-reviewed journals. E-mail: Lemex@rambler.ru

## 1 Introduction

The article deals with the problem of overcoming the conflict of interests in the field of taxation between authorized entities of the state, on the one hand, and taxpayers, on the other hand. The basis of the reasoning is taken by the system of coordinates: society represented by the state, and individual taxpayers. This broadens the generally accepted idea of entities of tax legal relations (taxpaying state) to the level of the whole society as a single, integral entity. On the basis of this approach, **the goal** is to build an ideal legal model of taxation without conflicts between the parties to tax relations. The way of achieving this goal is the interconnection of public interests (considered as general interests) and individual, private interests, which are considered as a whole-to-one relationship, which is the methodological basis of the research. In the sphere of tax relations the state is allocated the role of an intermediary between the society and taxpayers, where the society in the person of the taxpayers themselves is an interested party in the implementation of the state's tax sovereignty. **The hypothesis** of the analysis is the idea of the possibility of building a tax system based on the principle of balance of interests of the parties to tax relations.

Prof. A.D. Selyukov and his post-graduate student L.M. Narinyan have published several works on the subject of the article<sup>3</sup>.

### 2.1 Conflict of interests in the taxation mechanism as a consequence of inaccurate interpretation of the structure and functions of tax relations entities

The current tax law doctrine traditionally considers all the problems of the tax law through the prism of the relationship between the state, or rather its authorized entities, on the one hand, and taxpayers and other obligated persons, on the other hand. The Russian legislation does not mention the state as an immediate entity of tax relations. Only in relations with other states does our state acquire the signs of an independent entity of tax relations, in other cases its passive role is mentioned, for example, as a recipient of tax revenues.

<sup>3</sup> Selyukov, A.: Учет диалектики публичных и частных интересов в процессе осуществления финансовой деятельности государства (Accounting for the dialectics of public and private interests in the process of financial activities of the state), Публичное право сегодня (Public law today) no. 1 (2016).

Selyukov, A.: Финансовая деятельность государства как категория финансового права (Financial activities of the state as a category of financial law), Государство и право (State and Law) no. 4 (2016).

Narinyan, L.: Понятие государственных интересов и особенность их проявления в налоговой сфере (The concept of state interests and the peculiarity of their manifestation in the tax sphere), Ученые труды Российской академии адвокатуры и нотариата (Scientific works of the Russian Academy of Advocacy and Notaries) no. 3 (42) (2016).

In our opinion, such approach of analyzing the tax issues through the relations between the state and each individual taxpayer does not offer an optimal solution to the tax conflict between these parties to tax relations. We recognize the conflict between the state and the taxpayer if the state does not really want to include a mechanism for taking into account the interests of the taxpayers themselves into the tax relations, where the tax authorities strive for maximum withdrawal of property in the form of taxes from payers, and the latter are forced to defend themselves and evade taxes.

In the historical context, we cannot, perhaps, name the period or separate experience of taxation, in the conditions of which an equitable tax system would be created, which would be based on the harmony of interests of the parties to tax relations. The taxation mechanism always swings to either side of public or private interests as a pendulum. In general, public interests could often be ignored by the ruling elites, and then the interests of the elite<sup>4</sup> were opposed to the interests of taxpayers. The state was merely used by the ruling class as an instrument of tax pressure on the lower classes. P. Hansel, a scientist of the XX century, wrote on this occasion: “Since the lower classes manage to influence the financial policy of the state, the area of direct taxation is expanding, consumption taxes are being reduced and spending on broad-social goals is beginning to play an increasingly important role in the expenditure budget” (Hansel, 1907).

For this reason, we believe that it is necessary to return to the essential principles of taxation and construction of its ideal model. In this connection, in addition to the state in the person of its representatives and taxpayers, it is necessary to name society as an entity interested in the availability of a tax mechanism, which realizes its interest through the activities of the state. Definition of the tax as the result of the interaction of the whole society and an individual taxpayer can lead to understanding the potential interest of the taxpayer to transfer it to ensure the functioning of the society, as it thereby contributes to the development of the social environment within which it exists and develops.

One of the classics of the tax theory, I.I. Janzhul, expressed himself precisely on this occasion. In particular, he noted that under taxes “we must understand such unilateral economic donations of citizens or subjects who, by virtue of being representatives of society, are being levied by legal means and lawfully from private property to meet the necessary public needs and costs caused by them”. (Janzhul, 2002: 240.) In the spirit of assertion of Oliver Wendell Holmes Sr., one of the US federal judges, taxes are “the price we pay for the opportunity to live in a civilized society” (Pepeliaev, 2015: 23.).

The state is viewed as a kind of a tool for the development of society, designed to solve its problems, including finding the best way to combine the interests of each member of society and the interests of the society in which they live united by this state. Moreover, the state as a carrier of tax sovereignty in this situation orders by an authoritative method the obliged persons to pay taxes, and the latter must independently (but not voluntarily) transfer the appropriate amount of payment to the budget in due time.

---

<sup>4</sup> In this case, such interests were represented as the interests of the state itself.

In this case, you can see that taxes do not simply separate their payers and the state, but rather unite a human (a taxpayer among other) and a society consisting of individuals into the whole system. At the same time, the state, being an intermediate connecting link between them, should represent the level of the achieved balance of interests of a single taxpayer and the whole of society as a single whole organism that reflects the aggregate interest of members of society.

We admit that society has no other way, except through the actions of the state, to formulate and formalize its will on the scale of its intact body, which will fall apart into small groups and societies without the state. However, it should not be forgotten, either, that the state is secondary to society and is the product of social development designed to serve the purposes of the preservation and development of society. In this regard, it is impossible to deny the right of society to manifest its subjective nature and will, including in the tax sphere.

Why does the state, having undertaken the mission to form and ensure the realization of the ways of its development on behalf of the society, fail to justify the expectations of the society, in the tax sphere *inter alia*? There are several reasons for this: the arrangement of socio-political forces, a low level of managerial culture, etc. One of them is methodological. The flaw of many works devoted to the aspect of considering the role of the state and the ways in which it exercises managerial activity consists in the fact that the state's connection with society is lost, though it must always be regarded as a priority for the state. Therefore, the tax sphere is generally treated as a kind of administrative relations, where the main groups of entities are tax authorities and taxpayers.

## **2.2 The system of interests as the basis for building the optimal legal model of taxation**

The uniting element of the taxpayer, the state and society, as an integral phenomenon within the borders of the state, is their interests. The notion of “interest” in science is most often considered as a conscious need of an entity, which an individual can have or which is common for the majority in general form. (see also: Rudolf von Jhering, 1881: 30.) At the same time, the interest is always interpreted as the result of meaningful, deliberately chosen from a number of other options of actions aimed at ensuring the needs of the entity. The interest is commonly understood as what is important to the entity, the motive for their action, their needs and what gives the benefit (Efremova, 2001).

In our understanding, the interest as a person's perceived need for something can either be ensured by law or may contradict the norms of law. Human interests arose much earlier than law, but they received their general form as state interests through their legal support along with individual interests. The state acts as a means of implementing the interests united on a national scale and at the same time a form of realizing a life-support

system to ensure such interests. However, the simplest idea that the tax is a form of complicity in the monetary form of members of society in solving common problems is not yet understood at the level of the state.

We agree with the solution proposed in the scientific literature of a possible conflict of individual and common interest through the principle of balance of interests (Trofimova). The balance mechanism itself should be considered through a generalized form, when each individual member of the community is entitled to receive the same thing as any other member of the community, which is subject to enforcement by the rules of law. In the same way, the mechanism of certain restrictions can be considered, including property exemptions applied to an individual member of society. Any member of society may be subject to restriction or imposition of the obligation, carried out under a single criterion, to give part of his property in the form of a tax to the extent that it applies to each member of the community.

Therefore, we consider the principle of the balance of interests between general and single interest through an abstract understanding of a single interest, interpreted as an identical approach to assessing the realization of each individual interest. This means subordinating the interest of a particular person to the interests of the common in the case of a conflict of the individual and the general, but on the basis of a uniform order and the same criterion for the whole society.

Thus, the realization of personal interests cannot be considered in isolation from general interests of the whole society<sup>5</sup>. Taxes as such are part of the payer's personal interests in solving common problems. To some extent every conscientious taxpayer acts as Mother Teresa, consciously transferring the statutory share of their property to the tasks of society.

The real practice of taxation, of course, is far from a high level of taxpayers' consciousness, so it is necessary to work with a person – a taxpayer, or with the same person acting on behalf of the organization – the taxpayer. The basis for solving the dilemma – to pay or not to pay taxes – offers a well-known truth. If a person as a social being is inseparable from the society, which they belong to, then it is also necessary to recognize the unity of interests of the society and its individual member, in the presence of possible (insignificant) discrepancies between individual interests, as well as between individual and common interest. This approach should become the basis for solving the problem of conflict of interest in taxation<sup>6</sup>. We do not rule out the possibility when conscious members of the society voluntarily, but not obligatory, take care of the construction of facilities for public needs, charitable financing, etc. This indicator of the civilized

---

<sup>5</sup> The degree of consciousness of many people dictates them the need to participate in solving the problems of their society and in some cases the entire population of the planet.

<sup>6</sup> Oddly enough, the idea of the need to serve a person in a common cause and the values of Christianity, which is not yet understood in the science of tax law, serves to the maximum extent to build a balance of interests in the field of taxation.

development of society was no exception for the period of tsarist Russia. For example, a merchant multimillionaire Gavril Solodovnikov spent almost all of his money at the end of the XIX century on the construction of cultural institutions, hospitals, shelters for the poor (<https://cont.ws/@user3885/663337>).

In the tax sphere, the possibility of coincidence of the interests of the taxpayer and the state is indicated by Yu.A. Krokhtina, who writes that “a taxpayer receives public benefit from the state, a “common good” that meets his private interests”. Any taxpayer is part of a society in form of a state” (Krokhtina, 2008: 399). This theory is based on the idea that by giving the state a tax citizens thereby buy the corresponding services of the state.

However, such understanding of the relationship between the state and taxpayers does not affect the essence of taxes – a solution of issues of society at the expense of tax revenue. The state in this case is regarded as an entity independent of society. Therefore, the role of taxes, according to representatives of the liberal economic school, boils down to the right of the state to establish taxes for its financial provision, first of all, of ruling and protecting activities. In this case, the state acts as a force that is not aimed at the harmonious development of society, since the task of the state in this case is to create conditions for the development of individuality. As for the need to address social issues or infrastructure construction, including roads, these problems, according to the supporters of the liberal school, should be paid additionally by citizens themselves by paying duties and fees. Unfortunately, the concept of understanding the role of taxes and the state itself, which has a generally liberal character, has won in Russia. Therefore, the problematics of interests, dialectics of public and private interests is practically not represented in the mechanism of legal support of the tax system.

Among the Keynesian dominant these days (Keynes, 1993) and the monetarist views that oppose them, the understanding of taxes is basically a tool for regulating economic growth. The same approach is implemented in the applied concept of fiscal lawmaking. The interests of society to a certain extent in this case, of course, are present, but they act as secondary against the background of the interests of business entities. The state in this case is considered either as an active regulator of economic relations or as a mere assistant to business entities. The interests of the taxpayer, as well as of the whole society, are not generally considered.

### **2.3 The role of the state as a representative of the interests of society in taxation**

It is important for our topic that the interests of the state are formed only on the basis of the universal, public interests inherent in an indefinite range of persons. In other words, public interest is a concentrated expression of general social needs, which become the basis for the formation of state interests (Prishva, 2008: 71). The state does not and cannot have interests that are contrary to the interests of society, or, together with the whole

society, the interests of every conscious member of society. Therefore, public interests should be viewed as a broader phenomenon than public interests. At the same time, only those public interests that are of strategic importance are included in the number of state interests, which are actually provided with the resources and opportunities of the state.

In connection with the above, we believe that the tax interests of the state can simultaneously be only interests of the whole society, otherwise the following question arises: in whose interests does the state levy taxes? In the framework of the topic under consideration, it can be noted that in the tax sphere, there is often an attempt to substitute the state's interests with the interests of the state apparatus. It is practiced to replace the interests of the state with the interests of an individual agency. Authorized representatives of the state can either openly consider their interests as coinciding with state interests, as it was in monarchical states, or they covertly or partially substitute state interests for private interests, as it can be observed in the conditions of modern democracy. In the latter case, the state fully or partially passes under the control of those forces that, on behalf of the state, exercise its functions.

The goals of the state in a particular sphere in this situation are either formulated unclearly or distorted in fact contradicting the needs of society and its development. The way of adjusting the goals in the direction of greater consideration of the interests of the state and the needs of society can be the procedures for their nationwide discussion, the development of technology for making management decisions, especially the development of goals. Currently, the above-mentioned aspects of state influence on the formation of the taxation mechanism are manifested without due consideration for the strategic interests of society.

In the life of society taxes are set in isolation from the interests of the majority, but this situation cannot be expected to continue, especially when the discrepancies between the interests of society and the state's tax policy increase. The world and domestic taxation practice has repeatedly shown that the state can exert excessive tax pressure on economic entities, which, in turn, can lead to the economic decline. We believe that if the state does not meet the needs of the national society, the tax sphere *inter alia*, then social upheavals are possible. We, of course, take into account that historically the tax is a continuation of violence of a dominating society (tribute) or against society, when the absolute monarch could act at his discretion in any the field, including taxes. As the society grows more civilized, the state is increasingly forced to take into account the willingness of the society to accept the current tax policy. In this regard, the understanding of tax sovereignty should be linked in the foreign policy aspect as the absence of external pressure on the state and in the domestic political aspect as the right to independently establish taxes (Orlov, 2006: 19), which, however, should be done taking into account the possibilities of the society and in its interests. In other words, the state has the right to tax sovereignty, but has no right to tax arbitrariness. It is not an option to isolate the interests of society whilst considering tax sovereignty as the right of power to act at its own discretion in

the tax sphere (It is this right that is considered in the work of A.A. Shakhmametyev (Shakhmametyev, 2013: 76-81).

It is also important to understand that if most taxpayers considered the fact of tax payment as a phenomenon alien to their interests, then they could in this case recognize the state as a bandit as in cases when we also give the real bandit his money under threat.<sup>7</sup> But the state is not a bandit; therefore it should act as an organization where every citizen-taxpayer feels as if he were in his own house: the owner or the co-owner. Taxes in this case become a way or form of caring for their home, in person of the state.

In modern conditions, the degree of the social essence of the tax as a form of interconnection between the payer and the society in the structure of the state's activity is closely related to the purposefulness of the budget expenditures and the state fulfilling its functions. It can be said that for a bona fide taxpayer the structure of levied taxes and their aggregate amount for the purposes of accounting for the needs of the society are directly correlated with the expenditure budget. In the face of the threat to national security, the population will be more comfortable with the fact that high tax exemptions are applied and budget expenditures are directed, for example, to defense needs. But in a more peaceful period it is difficult to explain to taxpayers why tax exemptions are increasing while the social portion of budget expenditures is being reduced. Thus, the purposefulness of budget expenditures and the quality of their execution looks to the broad masses of the population as an objective indicator of the necessity or unnecessary payment of taxes. It is also important which list of taxes is preferred by the state. What is meant here is that indirect taxes are more burdensome for the broad masses of the population than direct taxes, which, as a rule, are set at higher rates for larger incomes and property objects.

With regard to taxes, it can be said that the whole society has a public interest in receiving the proper amount of taxes to the budget, and it can either be transferred through the external compulsion of the payer to give a part of its property to the budget, or, on the basis of a conscious act of man, transfer a tax to the state in order to solve problems of society. To do that the taxpayer must trust that the state will properly fulfill its mission. In this case, the principle of compulsory tax payment should be used as an incentive for the taxpayer and as a guaranteed way of tax revenue for society and the state.

### 3 Conclusion

This allows us to draw general conclusion:

1. It is necessary to recognize the decisive role of society as an integral organism existing within the state borders and in the form of the state for revealing the essence of taxes as a way of ensuring the vital activity of the entire population

<sup>7</sup> The difference is only in the presence or absence of legal provisions for such actions.



within the borders of the state. Society, therefore, is the source, the real reason for the state's tax sovereignty, while its needs are the goal for such sovereignty realization.

2. The interests of the state in the tax sphere are formed on the basis of common interests of society. They are a part of the latter and include the most significant ones. If the state manifests tax interests separate from society, then they reveal the fact of alienation of the state from society and the existence of contradictions between society and the state. Such a state is deemed as “privatized” by a certain group of people.
3. Since the main purpose of the application of the tax mechanism by the state is to provide the state with revenues, the question of the coincidence of the interests of each taxpayer and the interests of the state can be resolved in the most general form only in case the state directs all its actions, including expenditures from collected taxes, to interests of the aggregate number of taxpayers.
4. Issues of balance of interests cannot be solved if one is guided by the recognition of a conflict of interests between the state and taxpayers. In the case of taxes, the **balance of interests** can be viewed as the duty of each member of society or collective entities to transfer part of their property to the state to ensure public interests of society, which is applied by society, but formalized, by the state. The state as a sovereign, the source of power in this situation, is obliged to establish the obligatory in the legal form, concerning each person specified in the law, the regime of payment of taxes. At the same time the state has such an opportunity on the basis of the consent of society and provided that the state uses the revenues received for the purposes of the society itself.
5. A certain “tuning fork” of setting up the state's activities should be created exclusively to ensure the national interests and the interests of the entire society within the territory of the state. This means that society by the hands of the state, i.e. indirectly, establishes an appropriate duty for taxpayers. It is of fundamental importance in the legal mechanism of taxation to ensure that each potential taxpayer understands their connection with the whole society and would like to trust the state as an entity entitled to levy taxes and to spend the tax revenues received by it through budgetary mechanisms.
6. Since there is no direct legal connection between the tax obligations of the taxpayer and society as an integral entity in the tax sphere, this relationship is envisaged between the state, including its authorized entities, and each individually liable taxpayer. Therefore, it is necessary to strive to achieve the principle of the balance of individual and common interests in the tax sphere. Thus, it will be possible to realize cooperation between taxpayers and the state, which acts to ensure the interests of society. Therefore, at the level of the Tax Code, it is necessary to reflect

in a clear manner the purposefulness of tax revenues for the development of society, which is possible only through proper goal-setting in the financial activities of the state and, in general, in the social and economic sphere. We believe that the purposefulness of taxes to ensure the functions of the state is not enough, since this legal formula should have its logical continuation: taxes are intended to ensure the functions of the state aimed at realizing the interests of the national society.

## References

- Efremova, T.: Новый словарь русского языка (New Dictionary of Russian). Interpretative and word-building. v. 1 in Volume II, М.: Издат-во «Русский язык» (Moscow: Russkiy yazyk Publ.), 2001.
- Hansel, P.: Налог с наследства в Англии. Исследование по истории английских финансов (Inheritance tax in England. A study on the history of English finance), Ученые записки Императорского Московского университета юридического факультета (Academic notes of the Imperial Moscow University of the Faculty of Law). 29-th issue. М. (Moscow), 1907.
- Janzhul, I.: Основные начала финансовой науки: Учение о государственных доходах (Basic Principles of Financial Science: The Doctrine of State Revenues), М.: Статут (Moscow: Statut), 2002.
- Keynes, D.: Общая теория занятости, процента и денег (The General Theory of Employment, Interest and Money), Петрозаводск: Петроком (Petrozavodsk: Petrokom), 1993.
- Krokhina, Yu.: Финансовое право России: учебник (Financial Law of Russia: textbook), 3-d ed., М.: Норма (Moscow: Norma), 2008.
- Natinyan, L.: Понятие государственных интересов и особенность их проявления в налоговой сфере (The concept of state interests and the peculiarity of their manifestation in the tax sphere), Ученые труды Российской академии адвокатуры и нотариата (Scientific works of the Russian Academy of Advocacy and Notaries) no. 3 (42) (2016).
- Orlov, M.: Налог как форма разумного ограничения фискального суверенитета государства (Tax as a form of reasonable limitation of the fiscal sovereignty of the state), Финансовое право (Financial Law) no. 2 (2006).
- Pereliaev, S. (eds.): Налоговое право: учебник для вузов (Tax Law: A Textbook for Universities), М.: Альпина Паблишер (Moscow: Alpina Publisher), 2015.
- Prishva, N.: Публичные доходы: понятие и особенности правового регулирования (Public income: concept and peculiarities of legal regulation), М.: КНТ (Moscow: KNT), 2008.
- Rudolf von Jhering: Purpose of law. Volume I. St. Petersburg, 1881.

Selyukov, A.: Учет диалектики публичных и частных интересов в процессе осуществления финансовой деятельности государства (Accounting for the dialectics of public and private interests in the process of financial activities of the state), Публичное право сегодня (Public law today) no. 1 (2016).

Selyukov, A.: Финансовая деятельность государства как категория финансового права (Financial activities of the state as a category of financial law), Государство и право (State and Law) no. 4 (2016).

Shakhmatyev, A.: Налоговый суверенитет и налоговая юрисдикция государства (Tax sovereignty and tax jurisdiction of the state), Современное право (Modern law) no. 3 (2013).

Trofimova, L.: Налоговая политика в контексте дихотомии «Публичный интерес – частный интерес» (Tax policy in the context of a dichotomy “Public interest vs private interest”).

---

# POLISH MINIMAL TAX ON COMMERCIAL REAL ESTATE AS A MANIFESTATION OF SOVEREIGN TAX IMPOSING POWER

*Małgorzata Wróblewska<sup>1</sup>*

## **Abstract**

Taxation comes as the strongest manifestation of sovereign power of the state. On 1<sup>st</sup> January 2018, a new tax was implemented in Poland, namely, a minimal tax on commercial real estate. Its implementation, however, has already raised some concerns. Therefore, it seems well worth presenting this new legal regulation. The aim of this article is to analyse the structural elements of the minimal tax on commercial real estate and to evaluate advisability of the implementation of such a tax. During the analysis of the discussed legal regulations, the lexical, systemic and historical interpretation has been applied. Additionally, numerous sources which discuss problems of sovereignty and legal achievements of the European Union, such as jurisdiction of the EU Court of Justice and decisions of the European Commission on similar cases, have been also referred to in the article.

## **Key words**

Tax; law, minimum tax on commercial real estate, sovereign authority.

**JEL Classification:** K340

## **1 Introduction**

Taxes come as costs incurred by citizens to maintain their public good, namely, their state. The basic purpose of taxation is its fiscal character which implies that it has a fundamental meaning for the formation of public revenues. As tax revenues provide financial means required by the state or by local authorities to perform their activities, the possibility of their implementation is related to the question of sovereign power. Having such power, the state administration is authorised to make tax decisions inside the state territory, shaping the taxation system and its particular elements. Still, it does not have any discretionary power outside the state territory. The manifestation of sovereign power of the state exercised in the field of taxes in Poland comes as the implementation of a

---

<sup>1</sup> Ph.D. at the Institute of Law and Security Sciences at WSB University in Gdansk, Poland. The Author specializes in the WTO tax regulations and local government finance especially in real estate taxation. She is the author of more than 30 reviewed articles. She is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. Contact email: mwroblewska1@tlen.pl

new tax which is briefly referred to as a minimal tax on commercial real estate. It came in force on January 1, 2018.

The aim of the article is to present the structural elements of the new tax and to evaluate this legal regulation. It is very significant because each new levy brings about reluctance and taxpayers' resistance. It is psychologically justified, because it is associated with the intrusive character of public authority. Nevertheless, the tax cannot be identified exclusively with the "plundering" activities of the state. Hence, it is important to analyse the advisability of the newly implemented legal regulations and the aim defined by the Polish legislator. At the same time, it is also important to analyse the new regulations in terms of their compliance with the EU law, because each draft of a legal act, including one that implements a new tax, must be presented to the European Commission. It results from the fact that each legal regulation of the EU Member States may affect the functioning of the uniform market, and therefore it may lead to some distortion of market competition.

During the analysis of the discussed legal regulations the lexical, systemic and historical interpretation has been applied. Additionally, numerous sources which present problems of sovereignty have been referred to, especially a book written by A. Gomulowicz: *Podatki a etyka (Taxes and Ethics)*. Generally, considering the new tax, there are not many scientific publications in that field. The most important publication is *Commentary on the Act on Corporate Income Tax* by W. Dmoch. The article also refers to legal achievements of the European Union, such as jurisdiction of the EU Court of Justice and decisions of the European Commission on similar cases.

## 2 Tax Imposing Power of the State

Each tax burden refers to relations between the state and its citizens (Mastalski, 2008: 11). In Poland, the Parliament (the Sejm and the Senate) makes decisions on the type of taxes and on the methods in which they are imposed. In a democratic state under the rule of law, such a situation allows authorities to form tax relations based on the legal regulations (Gomulowicz, Malecki, 2018). It is because the state holds sovereign power to impose taxes and other liabilities of public law nature.

The etymology of the *sovereignty* term comes from French *souverainete*, and Latin *superanus*, and it refers to someone who holds the position above other people, and who does not respect any other authorities (Raritska: 346) The very term has been known for ages, although its meaning has been evolving (Olszewski, 1982: 76-78)<sup>2</sup>. Nevertheless,

---

<sup>2</sup> A sovereign right of the state authority to impose and to collect taxes has been its extremely important attribute since ancient times. The theory of sovereignty defining the supreme character of the state was developed in the Middle Ages, when the state authorities' right to impose and collect taxes was determined along with the right to constitute the law and the right to perform supreme judicial functions.

it has been always associated with power and its exercising. Hence, defining sovereignty through explicit determination of its attributes has stirred up some doctrinal disputes. At present, sovereignty is understood as primary, permanent power which is independent from any external and internal relations and legally unrestricted (Kosikowski, 2014: 169). While referring sovereignty to the rights of the state in the field of finance, it is possible to determine the attributes of this term, however it is still difficult to indicate a commonly recognised definition (Woś, Hnatyszyn-Dzikowska, 2007: 173-174). The financial sovereignty of a nation<sup>3</sup> is understood as a form of exercising the supremacy of that nation. The term should be associated with the internal problems of the state. It comes as an indication of the financial authority in the state and its division among public bodies and legal forms of its exercising, including the forms of control and responsibility for its execution. Frequently, the financial sovereignty of a nation is identified with independent decisions on the public finance of the state. Therefore, financial sovereignty is understood as tax imposing power (Dębowska-Romanowska, 2010: 29).

As the state holds its sovereign power to impose taxes, its tax imposing power may interfere with taxpayers' rights and liberties in an arbitrary way.

The attribute of sovereignty is tax jurisdiction of the so called primary character. It means that it does not result from any external legal order. The administrator of primary tax jurisdiction sovereignly determines the extent of exercising his right to impose taxes. Generally, it is assumed that tax jurisdiction is of an unlimited character, however, it is limited to the territory of the state which means that the unrestricted right to impose taxes is also subject to such limitation (Selera, 2010: 58).

Exercising sovereign tax control refers to the constitution of the law. A very specific character of that matter requires regulations at the constitutional level. Considering that point of view, the Article 84 of the Constitution of the Republic of Poland (the Constitution) becomes very significant. According to that Article, everyone is obliged to bear burdens and public contributions, including taxes defined in the Act. The abovementioned regulation does not only formulate a statutory obligation to pay taxes, but it also articulates the requirement referring to universality of taxation. As A. Gomulowicz observes, universality of taxation is related to the necessity of even distribution of the tax burden, because the state can be compared to a vessel. Therefore, the very essence of the idea which refers to universality of taxation comes down to the fact that neither side of the vessel can be overburdened. It is necessary, otherwise the vessel will capsize. Hence, if neither side of the vessel – the state – can be overburdened, the distribution of the tax burden must be performed in accordance with the standards of universality (Gomulowicz, 2013: 57). In other words, universality means that everyone is obliged to pay fiscal contributions, according to the idea that everybody must participate in the

<sup>3</sup> Financial sovereignty includes sovereignty of the nation and sovereignty of the state. The latter term has an international dimension, and it refers to inadmissibility or to limited admissibility of any other subjects of international public law to exercise competences of the public authorities in the field of finance.

maintenance of our common good, that is, namely, the state. The Article 217 of the Constitution comes as a complementation to the Article 84 of the Constitution. It comes as a principle of statutory exclusivity of tax concerns. In accordance with this regulation, imposing taxes and any other public contributions, defining subjects, objects and rates of taxation, defining regulations which refer to tax relief and remission and defining the categories of subjects exempted from taxation all take place through legal acts. The abovementioned constitutional regulation defines a closed catalogue of technical elements of taxation which must follow the standards defined in a legal act of the statutory force (the Supreme Administrative Court: IV SA 292/87). This comes as an indispensable requirement because taxes impinge on subjective rights. At the same time, it indicates that the legislative authority takes exclusive political responsibility for imposing and designing taxes, tax rates and principles of tax collection (the Constitutional Tribunal: U 6/06). The structure of the act (through the definition of the legislative process in the Constitution) guarantees the protection of taxpayers' rights, and it protects them against the legislator's arbitrariness in shaping the structural elements of the tax. It also comes as an expression of a democratic state under the rule of law.

Sovereign tax imposing power is of intrusive nature. By the implementation of tax obligation, the state impinges on the field of economic relations, and it leads to the restriction of the ownership right. In this way, the tax law resembles the penal law: the penal law interferes with human liberties, and the tax law leads to the restriction of (exclusion from) the ownership right (Filipczyk, 2013: 41). Such interference always requires the legislator's legitimacy and an axiological justification. Therefore, granting the competences to constitute the law to public authorities must go along with providing a control system over the legitimacy of the legislator's operations (Gomulowicz, 2013: 93-94). Undoubtedly, unlimited interference is unacceptable. In practice unfortunately, it is impossible to define a strict level of the highest revenues to the budget<sup>4</sup>. Obviously, the excessive overburdening of taxpayers may result in some negative economic and social phenomena (Oręziak, 2007: 72), and it may strengthen an opinion that it is not a form of social goods redistribution but a form of financial penalty. Considering the above, the prerogatives of the state authorities include the choice of the taxation type and structural elements of the tax.

### 3 Minimal Tax on Commercial Real Estate

The minimal tax on commercial real estate has not been implemented by a separate new legal act. It has come into force on the basis of the amendment to the Act on the Corporate Income Tax, Art. 24b and the Act on the Personal Income Tax, Art. 30g. The

---

<sup>4</sup> In the theory of economics we can find a Laffer curve – a concept developed in 1970s by Arthur Laffer, an American scientist. It presents a relation between the tax rate and the level of tax revenue. Moderate growth in tax rates increases the total tax revenues but only to a certain level defined as the optimal taxation point which corresponds to the revenue-maximising tax rate.

implementation of the abovementioned legal regulation has expressed the legislator's intention to start the fight against taxpayers' optimising activities – especially against those taxpayers who, despite the fact that they own considerable assets and properties, report loss. As it is explained in the explanatory memorandum to the draft act (parliamentary document no. 1930), in numerous cases taxpayers do not report any taxable income, or they report income at the amounts inadequate to the scale and type of their business operations. Considering the interest of the State Treasury, such a situation is unacceptable. However, in practice, running business activities is always related to some risk, and it does not always generate profits.<sup>5</sup> The character of the tax on commercial real estate has resulted in the fact that this burden is defined as the minimal tax on commercial real estate or shopping centre tax. The latter term results from the fact that the tax has been imposed mainly on shopping centres, and it comes mainly as a substitute of an idea – abandoned before by the Polish government – of a sales tax on the retail sector.<sup>6</sup> In practice, apart from shopping centers, the tax is also a burden on office area.

The legislator has not provided a separate category of taxpayers who should pay taxes on commercial real estate. The indicated regulation is included in the Act on the CIT as well as in the Act on the PIT, and therefore it is analysed altogether. Taxpayers who should pay taxes on commercial real estate are natural persons, legal persons and organisational units without legal personality. Assuming the internal systemic interpretation, such taxpayers are owners, co-owners, users who make depreciation deductions (e.g., under the financial lease).

<sup>5</sup> In 2017 a shopping centre in Sosnowiec, southern Poland, was closed and then demolished.

<sup>6</sup> On September 1, 2016 a Polish tax on the retail sector came into force. After two weeks however, under the Article 108, paragraph 2 of the Treaty on the Functioning of the European Union (TFEU), the European Commission initiated legal proceedings against the discussed tax and appealed to Poland to suspend it (decision of the European Commission of 19<sup>th</sup> September 2016). On November 30, 2016 the Republic of Poland brought an action against the Commission stating that the tax on retail sales is a direct tax on disposal of goods against payment to customers, and therefore it refers to sovereign authority of the EU member country.

On June 30, 2017 the European Commission issued its ultimate decision (Commission Decision (EU) 2018/160) in which it recognised the implemented levy as a sales tax on retail including progressive rates based on the income level. It allowed entrepreneurs with low income to gain the competitive advantage which, in fact, came as forbidden state aid. As a result, the sales tax on the retail sector was suspended until December 31, 2018. The legislator assumed that the tax was mainly applicable to foreign chain networks, and it was not intended to work against domestic entrepreneurs. The current disproportions in taxes resulted in the fact that small family shops disappeared from the market and large chain networks grew even bigger.

The subjective scope of the Act included retail sellers who sold goods (movable goods or their parts). The Act did not impose any taxes on revenues obtained by the sellers operating within large chain networks. The objective scope of the Act included revenues on sales provided to consumers. The revenues did not include the VAT. The tax base did not include sales provided to entrepreneurs. Considering the number of attendant problems, revenues gained on online sales were also exempted from taxation. There were two tax rates implemented: 0.8% on revenues at the level of PLN 17 million and PLN 170 million per month and 1.4% on revenues above the level of PLN 170 million per month. The tax-free amount was intended at the level of PLN 204 million.



The object of taxation includes fixed assets listed by the legislator. Their categorisation has been provided on the basis of the Ordinance of the Council of Ministers on the Classification of Fixed Assets (the Classification Ordinance). The legislator provides two categories. The first one includes commercial and service buildings defined in the Classification of Fixed Assets as shopping centres, department stores, independent shops, boutiques and any other commercial or service buildings. In accordance with the Classification of Fixed Assets, the second category includes office buildings.

The structure of the tax base does not directly refer to the value of real estate. The tax base is a revenue corresponding to the initial value of a fixed asset defined on the first day of each month, as stated in the records. Despite this fact, however, the method of its determination is specific, because it is identified as a surplus of the initial value of a fixed asset over the amount of PLN 10 million. It means that the tax is not imposed on all fixed assets but only on those which come as real estates of significant economic value. Hence, it mainly refers to shopping centres.

The tax on commercial real estate is calculated according to the monthly rate 0.035% of the tax base<sup>7</sup>. It means that each month taxpayers indicate the initial value of their real estate, then they deduct PLN 10 million from that amount, and they pay the tax on the difference amount, in accordance with the defined rate.

There are two categories of fixed assets exempted from the tax on commercial real estate. The first category includes real estate from which there are no depreciation deductions made, because business activities performed there have been suspended, under the Act on Freedom of Business Activity. The second category refers only to office buildings used by taxpayers exclusively or mainly for their own needs.

In accordance with A Dictionary of the Polish Language PWN, needs are understood as everything required for normal existence or to proper functioning. The term “own” refers to a person in question. Therefore, letting a particular building or its part is not qualified as using for one’s own needs. Unfortunately, the legislator has not defined the term “mainly” – it means that the term must be precisely defined by the doctrine and jurisdiction. The structure of the real estate tax<sup>8</sup> allows us to suppose that the extent of building occupancy depends on the size of the area intended for such a purpose. It is then possible to assess the proportions of the area which is not used for the taxpayer’s own needs. At the same time, however, it should be remembered that in buildings it is always possible to identify the area intended for common use. Considering the fact that there has been no definition of “mainly” provided, such a situation shall raise disputes between taxpayers and tax authorities (Dmoch, 2018, Art. 24b).

The tax on commercial real estate is paid for each month, until the 20th day of the month which follows the month in which the tax is due. The revenues gained on the discussed

---

<sup>7</sup> The explanatory memorandum to the draft act of July 6, 2017 assumed the monthly tax at the level of 0.042%. The tax was to be paid on the surplus of the real estate value over PLN 10 million.

<sup>8</sup> The tax base of the real estate tax is the area of a building – not its value.

tax go to the state budget. The bodies entitled to collect this tax are tax authorities, namely, heads of tax offices<sup>9</sup>.

As it is intended, the tax is supposed to be of a neutral character; the amount of the tax calculated for a month can be deducted from the advance payment declared for the PIT or the CIT. If taxpayers pay taxes quarterly, they are not exempted from the obligation to pay the minimal tax each month; the tax calculated for the months included in the quarter are subject to deduction. If the tax is lower than the amount of the advance payment for the tax for the particular month, taxpayers do not have to pay it.

The problem related to the implementation of the shopping centre tax refers to the question of tax obligation in a situation when a particular fixed asset is co-owned. In such a situation, the legislator defines three cases. The first case occurs when the taxpayer co-owns the building, and the initial value is accepted in accordance with the taxpayer's records. The second case is when the building is owned or co-owned by a company without legal personality. The initial value is calculated proportionally to the taxpayer's right to the share in the company's profit. The third case refers to buildings co-owned by entities affiliated with the taxpayer. In this case, the total initial value of the fixed asset is accepted.

#### **4 Evaluation of the Implemented Legal Regulation**

In accordance with the legislator's assumption (the explanatory memorandum to the draft act), the main aim of implementing the new tax is to tighten control over the system of corporate income taxation, in order to relate the level of the due tax paid by entrepreneurs operating in the international field to the place where the income is earned. The assumption fits in the Strategy for the Development of the Country (the Resolution no. 8 of the Council of Ministers, 20), which indicates that the lack of the CIT income reaches the level of PLN 10 – 40 billion annually. In order to counteract tax evasion, the legislator refers to the Article no. 84 of the Constitution of the Republic of Poland which states the principle of universality and equality in carrying public burdens. The legislator intends to prevent the situation in which large companies considerably decrease their tax base by prior planned legal actions. Such operations undermine the principles of free market and equality of business entities. Therefore, considering an axiological point of view, such actions should be eliminated by the implementation of relevant legal regulations that will prevent them. As a result, the tax on commercial real estate has been implemented as a means to counteract the so called tax optimisation and, in accordance with the government's argumentation, it does not come as a new tax but only as a complementation to the Acts on the CIT and the PIT.

<sup>9</sup> In Poland, apart from state tax bodies, there are also self-government tax bodies, such as commune heads, mayors, presidents, marshals, district heads (starosts). For example, the real estate tax is collected by self-government tax authorities and the revenues gained on this tax go to the commune budgets.

Despite the fact that the idea of protecting domestic entrepreneurs may seem advisable, in practice the implementation of the abovementioned legal solutions is controversial.

First of all, the character of the minimal tax on commercial real estate raises some concerns. The contribution has been regulated by the Acts on the CIT and on the PIT which, in accordance with the principles of tax classification, refer to income tax. In the explanatory memorandum to the Act, it has been indicated that the tax on commercial real estate is an income tax. Hence, if its tax base is a revenue, it becomes a revenue tax, and it means a different type of a tax. Considering this context, it should be indicated that the tax on commercial real estate resembles a property tax, because taxation does not depend on gained revenues but on the very fact of owning the property. It could be implied that it comes as a real estate tax. Such an assumption, in turn, could suggest that the discussed regulation could be found in some other legal act – other than the Act on the CIT – which provides regulations on real estate taxation<sup>10</sup>. It should also be noticed that the object of commercial real estate taxation indicates the value of the real estate. The Polish real estate tax is not a tax of *ad valorem* nature. As a result, the tax base for the implemented tax does not depend on the size of the area, as it is in the case of buildings which are subject to the real estate taxation. At the same time, it should be also indicated that the new regulation brings about double taxation of the same object, as the same real estate is burdened in accordance with the rates proper for the real estate taxation, and it is also burdened in accordance with the rates proper for the tax on commercial real estate.

Additionally, tax exemption of particular subjects raises concerns about the compliance of the regulation with the state aid law. Such exemption is of selective nature, as it applies to subjects who own buildings worth less than PLN 10 million. In this way, the State Treasury voluntarily waives a part of its budget income, and it grants such subjects privileges of investing those financial means, for example, into development of their business activities. In accordance with the Article 107, paragraph 1 of the Treaty on the Functioning of the European Union, it may disturb competition and trade among the EU member countries. It should be remembered that the European Commission has questioned the possibility referring to the implementation of progressive revenue taxes by the EU Member States, because it would come as forbidden state aid provided to enterprises with lower revenues. (Hungary-Advertisement tax case, Hungary – Health contribution of tobacco industry businesses, the Republic of Poland versus the Commission)<sup>11</sup>. In accordance with the practice of the European Commission, exemption of a part of revenues from taxation below a specified level means that such revenues are subject to 0% tax rate, and such a situation refers to the tax on commercial real estate.

---

<sup>10</sup> The real estate tax is regulated in accordance with the article 2-7b of the Act on Local Taxes and Charges.

<sup>11</sup> France also comes as an interesting example. In 2010 a trade tax, *Tascom*, was implemented there. The legal structure of the tax combines taxation on area and sales. It is paid by the owners of stores the area of which is bigger than 400 m<sup>2</sup> and whose sales exceed the level of EUR 460 000 annually. So far, the European Commission has not questioned the advisability of the implementation of that tax. This situation may be related to the position held by France in the EU.

## 5 Conclusion

The implementation of the minimal tax on commercial real estate to the Polish law goes along with the legislator's intensive fight against tax optimisation performed by the largest economic entities. Considering that aspect, the purpose of the discussed regulations seems rightful, however, the method of their preparation does not deserve approval. The regulations are inconsistent, and they give rise to numerous substantive concerns. Moreover, there is not any analogical tax structure in any EU Member State.

The legislator justifies the implementation of the shopping centre tax with the Article 84 of the Constitution of the Republic of Poland. In the author's opinion, it is quite the opposite: the new regulation impinges on the Article 84 of the Constitution of the Republic of Poland, considering the fact that it divides real estate owners into those who are obliged to pay the tax and those who are exempted from that tax obligation.

The author believes that the legislator erroneously assumes that each commercial property generates revenues. Practically, the tax on commercial real estate is related to the ownership rights to a specific property, irrespective of whether the real estate generates revenues or not. The legislator does not assume any situation when real estate can include vacant shopping centre or office area which has not been let or leased.

In the author's opinion, owners of commercial buildings, such as shopping centres will transfer the increased costs incurred to pay the tax on commercial real estate onto lessees of shops which are located in their shopping centres. In practice, such actions will raise numerous interpretation disputes with tax authorities. It results from the fact that most frequently the taxes related to the real estate are put on the lessees of buildings under the leasing agreement. The problem refers to the classification of this particular tax, because on one hand it refers to the real estate, on the other hand, however, it has been implemented under the amendment of the Acts on the CIT and the PIT. As a result, it will be disputable whether lessors who are owners of the real estate are rightfully authorised to transfer the tax burden onto their lessees.

Summing up, the structure of the new minimal tax on commercial real estate is erroneous, and it is very likely to be thrown into question by the European Commission.

## References

- Dębowska-Romanowska, T.: *Prawo finansowe. Część konstytucyjna wraz z częścią ogólną* (Financial Law. The Constitutional Part with General Provisions), Warszawa, 2010.
- Dictionary of the Polish Language, PWN. <https://sjp.pwn.pl/szukaj/potrzeby.html> [access on: 2018-04-05]

- Dmoch, W.: Komentarz do Art. 24b. Podatek dochodowy od osób prawnych (Comment on Art. 24b. Corporate Tax), Wyd. 7, Warszawa, 2018.
- Druk 1930. Uzasadnienie do projektu zmian do ustawy o podatku dochodowym od osób prawnych. (Parliamentary document no. 1930. An Explanatory Memorandum to the Act on Corporate Income Tax). <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1930> [access on: 2018-04-04]
- Filipczyk, H.: Postulat pewności prawa w wykładni operatywnej prawa podatkowego (A Postulate of Legal Certainty in the Interpretation of Operative Tax Law), Warszawa: Wolters Kluwer, 2013.
- Gomulowicz, A., Malecki, J.: Aspekt ustrojowy podatku, in: Podatki i prawo podatkowe (The Systemic Aspect of Tax, in: Taxes and TaxLaw) [online], Wydawnictwo Prawnicze LexisNexis, 2018. <https://sip.lex.pl/#/monograph/369301384/54>. [access on: 2018-03-28]
- Gomulowicz, A.: Podatki a etyka (Taxes and Ethics), Warszawa: Wolters Kluwer 2013. <http://sip-1legalis-1pl-1legalis.han.wsb.gda.pl/document-view.seam?documentId=mjxw62zogi3damjyqztknboobqxa1ruga3tsnrzgmya> [2018-04-04]
- Kosikowski, C.: Finanse i prawo finansowe Unii Europejskiej (Finance and Financial Law of European Union), Warszawa: Wolters Kluwer, 2014.
- Mastalski, R.: Stosowanie prawa podatkowego (Implementation of Tax Law), Warszawa: Wolters Kluwer, 2008. <https://sip.lex.pl/#/monograph/369183807/5> [access on: 2018-03-28]
- Olszewski, H.: Prawo doktryn politycznych i prawnych (The Law of Political and Legal Doctrines), Warszawa, 1982.
- Oreżiak, L.: Konkurencja podatkowa a międzynarodowe przepływy kapitału (Tax Competition and International Capital Flows), Zeszyty Naukowe Kolegium Gospodarki Światowej (Scientific Notebook of World Economy College) no. 21 (2007).
- Raritska, V.: Tax Sovereignty as a Fundamental Characteristic of Tax Law System. <https://www.law.muni.cz/sborniky/system-of-financial-law/system-of-tax-law.pdf> [access on: 2018-05-17]
- Selera, P.: Międzynarodowe a unijne prawo podatkowe w kontekście opodatkowania zysków przedsiębiorstw (International and EU Tax Law in the Context of Taxation of Corporate Profits). Warszawa: Wolters Kluwer, 2010.
- Uzasadnienie do projektu ustawy z dnia 6 lipca 2017r. o zmianie ustawy o podatku dochodowym od osób fizycznych, ustawy o podatku dochodowym od osób prawnych oraz ustawy o zryczałtowanym podatku dochodowym od niektórych przychodów osiąganych przez osoby fizyczne. (An Explanatory Memorandum on the draft

Act of 6th July 2017 on the amendment of the Act on the Personal Income Tax, Corporate Income Tax and Flat-Rate Income Tax on Some Revenues Earned by Natural Persons). <https://legislacja.rcl.gov.pl/docs//2/12300402/12445390/12445391/dokument298547.pdf> [access on: 2018-04-04]

Woś, J., Hnatyszyn-Dzikowska, A.: *Koncepcje suwerenności państwa w sferze polityki gospodarczej w warunkach europejskiej integracji gospodarczej* (The Concept of State Sovereignty in the Sphere of Economic Policy in the Conditions of European Economic Integration), *Ruch prawniczy, ekonomiczny i socjologiczny* (Legal, economic and sociological activity) no. 1 (2007).

## Legal Acts

Ustawa z 15.02 1992 r. o podatku dochodowym od osób prawnych (Act on the Corporate Income Tax of February 15, 1992, as amended).

Ustawa z dnia 6 lipca 2016r. o podatku od sprzedaży detalicznej (Act of July 2, 2016 on the Tax on Retail Sales).

Ustawa z dnia 2 lipca 2004 r.o swobodzie działalności gospodarczej (Act of July 2, 2004 on Freedom of Business Activities).

Ustawa o podatkach i opłatach lokalnych z dnia 12 stycznia 1991 r. (Act on Local Taxes and Charges of January 12, 1991, as amended).

Traktat o funkcjonowaniu Unii Europejskiej (Treaty on the Functioning of the European Union).

Rozporządzenie Rady Ministrów w sprawie Klasyfikacji Środków Trwałych (KŚT) z dnia 3 października 2016 r. (Ordinance of the Council of Ministers of October 3, 2016 on the Classification of Fixed Assets).

The Resolution no. 8 of the Council of Ministers of February 14, 2017 on the Strategy for Sustainable Development to 2020 (including a 2030 perspective).

Decision of the Commission of September 19, 2016 on the State Aid SA.44351 (2016/C) (ex 2016/NN) – Poland – Polish tax on the retail sector, notified under the document C(2016) 5596.

Commission Decision (EU) 2018/160 of June 30, 2017 on the State Aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector. Notified under the document C(2017) 4449).

Republic of Poland versus the Commission (case T - 836/16).

Hungary – Health contribution of tobacco industry businesses. State aid SA.41187 (2015/NN).

Hungary-Advertisement tax case. State aid SA.39235 (2015/C) (ex 2015/NN) – Hungary – Advertisement tax.

Wyrok Trybunału Konstytucyjnego z 11 grudnia 2007 r.: U 6/06 (The sentence of the Constitutional Tribunal of December 11, 2007: U6/06).

Wyrok Naczelnego Sądu Administracyjnego z 27 października 1987: IV SA 292/87 (The sentence of the Supreme Administrative Court of October 27, 1987: IV SA 292/87).

---

# TAX SOVEREIGNTY IN RUSSIA: PREFERENTIAL TAXATION REGIMES PROVIDED BY SUB-CENTRAL GOVERNMENTS

*Aleksey Zhutaev<sup>1</sup>, Michael Sadchikov<sup>2</sup>*

## **Abstract**

This paper deals with some issues of tax sovereignty, for example, preferential tax regimes on the sub-central governmental levels and harmful tax practices. The main purpose of the paper is to confirm or disprove the hypothesis stating that national governments are responsible for the existence of preferential regimes on subnational levels. The following research methods have been used: logical method, comparative method, and deductive method.

## **Key words**

Tax; law; sovereignty; preferential tax regimes.

## **JEL Classification:** H2

## **1 Introduction**

An effective taxation system is crucial for the successful development of the country's economy. Tax exemptions and preferences are important elements of the tax regulation.

Using these elements, the government can influence the ongoing processes in the economy either by stimulating or by oppressing them. For example, tax exemptions and preferences can help the State control modernization and innovatization as well as different investment prospects. These measures also urge solutions to social and political problems to a great extent.

The notion "tax exemption" has been fixed in Article 56, paragraph 1 of the Tax Code of the Russian Federation (Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended). Tax and fee exemptions shall be understood to mean privileges over other taxpayers and fee payers which are provided by tax and fee legislation and are granted to particular categories of taxpayers and fee payers, including the right not to

---

<sup>1</sup> Assistant Professor of the Department of Financial, Banking and Customs Law of the Saratov State Law Academy, Russian Federation, Candidate of Legal Sciences. The author specializes in tax law. He is the author of 2 books and 6 reviewed articles in prestigious journals. Contact email: [alekseizhutaev@mail.ru](mailto:alekseizhutaev@mail.ru)

<sup>2</sup> Assistant Professor of the Department of Financial, Banking and Customs Law of the Saratov State Law Academy, Russian Federation, Candidate of Legal Sciences. The author specializes in tax law and international tax law. He is the author of 2 books and 19 reviewed articles in prestigious journals. Contact email: [taxprofy@mail.ru](mailto:taxprofy@mail.ru)



pay a tax or a fee or to pay a lesser amount thereof. By virtue of Article 56, paragraph 2 of the Tax Code of the Russian Federation (Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended), a taxpayer shall have the right to refrain from using an exemption or to suspend the use thereof for one or more fiscal periods unless otherwise stipulated by the Code.

The listed definitions reflect the essence of tax exemptions and the principles of their functioning only from the point of taxation. But this view makes the notion narrower than it actually is, putting aside many economic elements. In the above-mentioned definition, tax exemptions are not considered as a regulating tax tool.

It is noteworthy that the definition of tax exemption, which is fixed in the Russian Tax Code, has been phrased not clearly enough from the legal viewpoint. As a result, other mechanisms, which under the Code have nothing to do with tax exemptions, are often interpreted as such.

S.V. Barulin has proposed a better definition that describes a tax exemption from many aspects: “tax exemptions are a number of means, rights and obligations, which are aimed at the complete or partial tax liabilities lessening for a taxpayer. It shall be done in any statutory way of providing tax privileges and reductions in order to regulate the economy on behalf of the State and solve social problems” (Barulin, 2010).

While analyzing Russian tax privileges, as well as the mechanisms of their functioning and affecting the country’s economy, one can come across an almost identical notion of *tax preference*. A tax preference is the governmental provision of priorities and indulgences in order to create a supportive environment for taxpayers. In this sense, “tax exemption” and “tax preference” are identical notions. But in fact, it is not true because they are functioning in different ways.

A.S. Baladina defines tax privileges stressing their obligatory nature while exemptions are not obligatory: “a tax privilege is the advantage provided by the State for certain categories of taxpayers in the form of tax reductions. It is obligatory and shall be used on the condition of counter obligations on the part of the taxpayer” (Baladina, 2011).

The present-day taxation system of the Russian Federation includes about 200 different tax exemptions and privileges. By providing them the State is implementing its sovereignty. In federal countries, like Russia, it is impossible to fix tax exemptions and privileges by law without taking into consideration the interests of the constituent entities and municipalities. It also seems necessary to coordinate the content of such exemptions and privileges with the generally accepted principles and rules of fighting tax avoidance, e.g. BEPS.

The view of Viktoria Raritska that tax sovereignty is a fundamental characteristic of tax law system which provides a foundation for relations between the state and the taxpayer in taxation, should be accepted (Raritska, 2015).

The authors have already analyzed the notion of tax sovereignty in their previous works. M. Sadchikov points out the following elements of tax sovereignty:

1. The exclusive right of the State to impose and collect taxes in the territory under its jurisdiction. Its entities, social institutions, and foreign governments have no right to impose taxes in the territories of Russia.
2. The State's independence with regard to taxation. The State independently determines the number of taxpayers, objects to tax, and other points related to taxation. It is unacceptable to somehow interfere with the State's taxation activities.
3. The unification of tax sovereignty. Taxation is implemented by the unified State power. Russia, being a democratic country, has no other sources of power except its people belonging to different ethnic groups. The unification of tax sovereignty is expressed in the unified Russian taxation system. The constituent entities of the Russian Federation as well as its municipalities do not enjoy sovereignty. They are involved in regional and local taxation as much as it is allowed by the federal center. Thus, the corresponding powers are of secondary character.
4. Tax sovereignty comes from the people's sovereignty. Taxes are imposed and enacted by the regulatory legal acts of the representative agencies of the State power, which are the part of participatory democracy. Tax sovereignty is the consequence of democracy. Taxation issues are the responsibility of the representative agencies. It proves that the taxation system is actually the implementation of the people's will.
5. Tax sovereignty can be implemented only legally. Under Article 57 of the Russian Constitution, everyone shall pay lawful taxes and fees. Thus, tax sovereignty cannot exist without supportive legal environment.

The gist of tax sovereignty can be realized through the way the State regulates taxation. The elements of this regulation are the following:

1. Introduction of taxes in the territories under the jurisdiction.
2. The State can introduce a tax as well as eliminate it.
3. The State can delegate some taxation powers to different public and territorial units in the territories under the jurisdiction.
4. The State collects taxes, controls whether the payments are full and done on time, as well as imposes liability on persons who do not follow tax laws.
5. International cooperation in the sphere of taxation (Sadchikov, 2016).

## 2.1 Overview of the preferential tax zones in Russian Federation

Article 8, Part 1 of the Constitution of the Russian Federation guarantees the integrity of the economic space in Russia. Nevertheless, this rule does not mean that the principles of economic relations regulation should be unified all over the country.

The economic relations can be exclusively controlled by the State (e.g. financial regulation by virtue of Article 71, (paragraph g) of the Russian Constitution), fall within the joint jurisdiction of the federal center and the constituent entities (e.g. the establishment of common principles related to taxes and fees under Article 72 of the Constitution), or be controlled only by the constituent entities and municipalities (e.g. the legal environment for the social and economic development of the territories in question). Regulatory acts of the regional and local levels shall not infringe the integrity of the economic space or endanger the unity and integrity of the Russian Federation on the whole.

Bearing all these things in mind, we believe that the idea to create the territories with special economic regimes in Russia is rather interesting. In particular, these are special economic zones, priority social and economic development areas and some others. The legal environment of such territories is very complex. One of the points in their functioning is that the State is using different taxation mechanisms to achieve the desired goals. As we have noted above, financial regulation is exclusively controlled by the federal government. It means that only the federal center can use “taxation tools”, of course, with all the due respect for tax laws.

A special economic zone is an enclosed and marked area of the country in which businesses are operating according to the exclusive laws on special zones. Actually, it is not a Russian invention. Territories of that type are in Belgium, Brazil, Great Britain, China, Latvia, the Netherlands, Portugal, Romania, Syria, Serbia, Montenegro, the US, Turkey, France, and in a number of other countries.

There are also countries, which officially deny the necessity of special territorial economic regimes. These are Austria, Denmark, Mexico, and Slovakia. In Russia the majority of special economic zones are functioning under the Act no. 116-FZ/2005, On Special Economic Zones in the Russian Federation.

The above-mentioned law provides that there are 4 types of special economic zones:

- Industrial production special economic zones;
- Technology development special economic zones;
- Tourism and recreation special economic zones;
- Port special economic zones.

However, there are 3 special economic zones that are created and functioning according to other federal laws:

- The special economic zone in Magadan Oblast (Act no. 104-FZ/1999);
- The special economic zone in Kaliningrad Oblast (Act no. 16-FZ/2006);
- The free economic zone in the Republic of Crimea and the federal city of Sebastopol (Act no. 377-FZ/2014).

Article 5.1 of the Act no. 116-FZ/2005 provides that special economic zone resident taxation shall be carried out according to the Russian Federation legislation on taxes and fees. The Russian Tax Code presupposes a special tax regime for the Skolkovo Innovation Center and for the participants of regional innovative projects. Thus, personal and corporate in special regime territories is carried out primarily according to the provisions of the Tax Code.

A regional investment project allows 0% corporate income tax rate for Russian entities with regard to the part that is payable to the federal budget. The sub-federal governments of the Russian Federation have the right to cut the income tax rate for the participants of regional innovative projects to 10 or even 0% with regard to the part that is payable to the regional budget (Tax Code of the Russian Federation, Art. 284.3, 284.3-1).

The tax regime in the special economic zone depends on its type. For example, port special economic zones have been exempted from the value-added tax (VAT) with regard to the port activities in which the residents of the zone are involved (Tax Code of the Russian Federation, Art. 149.3 (27)). Under Article 284 of the Russian Tax Code, the tax rate of tax payable to the budgets of the constituent entities of the Russian Federation may be reduced for organizations, which are operating in a special economic zone, according to the laws of the constituent entities of the Russian Federation. In this respect, that tax rate may not be lower than 13.5%.

In the special economic zone in Kaliningrad Oblast, by virtue of Article 288.1 of the Tax Code, for organizations, which are included in the unified register of residents, the profit tax shall be levied at the rate of 0% for six calendar years from the day on which their investment projects were started. After six years are over, the profit tax shall be 10%. Under Article 385.1, the property created or acquired in connection with the implementation of an investment project shall be taxed at the rate of 0%. During the period from the seventh to the twelfth calendar year inclusively the property tax shall be 50%.

The residents of the Lipetsk Industrial Special Economic Zone currently enjoy the following advantages:

- The profit tax is 2% for the first 5 years of a business operation, from the sixth to the tenth year it is 7%, after 10 years it is 15.5%;
- The tax on the property belonging to organizations and the vehicle tax are 0% for the first 10 years;
- The land tax is 0% for the first 5 years;
- The organizations registered as residents have been exempted from import duties.

The tax regime of the participants of the Skolkovo Innovation Center projects allows them to enjoy special schemes for VAT (Tax Code of the Russian Federation, Art. 145.1),

profit tax (Art. 246.1, 273, 274, 284, and 289), national duties (Art. 333.35), the tax on the property belonging to organizations (Art. 381), land tax (Art. 395), insurance payments (Art. 427), and customs charges (On the Skolkovo Innovation Center, Art. 11).

The obligatory payments that are covered by a special tax regime go to the budgets of different levels. The profit tax rates for organizations and the land tax rates may be fixed by the constituent entities and municipalities of the Russian Federation. Besides, the tax regime of the Skolkovo Innovation Center in some points is similar to an investment tax credit. The tax privileges aim at the innovative project implementation.

The Russian Tax Code (Article 65, paragraph 5) stipulates that granting an investment tax credit is impossible without the resolution of the authorized financial bodies of regional and municipal levels.

If a project participant (organization) has been exempted from the profit tax payment by the federal bodies, a constituent entity or municipality of the Russian Federation can in no way influence the tax on its profits, property or land.

Thus, the tax regime of the Skolkovo Innovation Center excludes regional and municipal bodies from the tax regulation of all project participants.

Article 176.1, paragraph 2(3) of the Tax Code provides that a resident of a priority social and economic development area has the right to file for VAT refund in case it has a guarantee from the management company.

Articles 284 (1.8) and 284.4 of the Tax Code stipulate that the profit tax rate for organizations, which are residents of priority social and economic development areas, shall be 0% with regard to the part payable to the federal budget, and it shall be not more than 5% with regard to the part that goes to regional budgets during the first five fiscal periods. During the next five fiscal periods, it shall be not more than 10%.

The free economic zone in the Republic of Crimea and the federal city of Sebastopol is created under the Act no. 377-FZ/2015 for the period from 01.01.2015 to 31.12.2039. The residents of the economic zone in the Republic of Crimea and the federal city of Sebastopol currently enjoy the following advantages:

- The profit tax (federal budget rate) is 0% for the first 10 years of a business operation, subnational budget rate is 2 % for the first 3 years of a business operation from the fourth to the eighth year it is 6%, after 9 years it is 13.5%;
- The tax on the property is 0% for the first 10 years;
- The land tax is 0% for the first 3 years.

The technology development special economic zone 'Tolyatti' is created under the Resolution of the Government of the Russian Federation no. 621 of August 12, 2010.

There are the following tax incentives:

- The profit tax is 5% for the first 2 years of a business operation, 9 % for the period from 2021 to 2022, 12 % for the period from 2023 to 2024, 15.5 % for the period from 2025;
- The tax on the property is 0% for the first 10 years;
- The land tax is 0% for the first 5 years;
- The vehicle tax is 0% for the first 5 years.

The issue of Special Economic Zones in Russia was explored in detail in the article “The Special Economic Zones in Russia and foreign countries: budget risks and tax expenditures” by A. Reut, A. Paul, N. Soloveva (Reut, Paul, Soloveva, 2017: 434).

After analyzing all these legal provisions we have come to the following conclusions.

First, the constituent entities of the Russian Federation have the right to establish reduced profit tax rates for the residents of the territories with special tax regimes, but only with regard to the part that is payable to regional budgets (Russian Tax Code, Art. 284).

Second, some taxable activities and assets are not taxed if a business is functioning in a territory with a special tax regime. For example, there is no VAT tax on works and services provided by the residents of port special economic zones. The residents of technology development special economic zones as well as tourism and recreation special economic zones do not pay the profit tax for organizations with regard to the part that goes to the federal budget. The tax on the property belonging to organizations can also be eliminated (Tax Code, Art. 381).

Third, the common legal basis for tax privileges provided by Russian tax laws does not mean that there is any unified legal mechanism of granting tax privileges. Everything depends on the type of a territory with a special tax regime. It can be a special economic zone, a regional investment project, or a priority social and economic development area. Basically, granting tax privileges comes from the federal legislators’ will. The constituent entities of the Russian Federation can grant profit tax privileges only with regard to the part that is payable to their budgets as well as with regard to regional taxes. It is necessary to note that according to the budget legislation, the profit tax for organizations is not the only federal tax, which goes to the budgets of different levels. For example, under Articles 61 and 61.1-61.5 of the Budget Code of the Russian Federation, the personal income tax revenue shall be distributed among the municipal budgets. However, municipalities have no powers to grant personal income tax privileges. Nevertheless, some territories with special tax regimes are mostly linked not to a constituent entity but to a municipality.

## **2.2 Preferential tax regimes on subnational levels and harmful tax competition**

The issues of Russian territories with special economic regimes are covered by the activities of the Organization for Economic Co-operation and Development (OECD). Among other problems, the OECD is dealing with harmful tax competition. There are four basic and eight additional criteria of harmful tax competition distinguished in the OECD harmful tax competition reports:

1. No or low effective income tax rates related to international capital flows;
2. Ring-fencing of regimes;
3. Lack of transparency;
4. Lack of effective information exchange.

The additional criteria are as follows:

1. An artificial definition of the tax base;
2. Failure to adhere to international transfer pricing principles;
3. Foreign source income is exempted from residence country tax;
4. Negotiable tax rate or tax base;
5. Existence of secrecy provisions;
6. Access to a wide network of tax treaties;
7. Regimes which are promoted as tax minimization vehicles;
8. The regime encourages purely tax-driven operations or arrangements.

As for a country's territories with special tax regimes, the OECD has come to the following conclusions

First, tax exemptions and preferences are important elements of the tax regulation. Using these elements, the government can influence the ongoing processes in the economy either by stimulating or by oppressing them.

Second, national governments are responsible for the existence of preferential regimes on subnational levels. It is important to find out if there are (or are not) substantial differences between a national and subnational regimes.

Third, it is necessary to fix a tax rate for a regional level as well as to find out if its reduction can result in a low effective tax rate, taking into consideration a national tax rate as well.

Preferential regimes on subnational levels will not lead to harmful tax competition if:

1. They are created in the less developed territories, in comparison to other regions of the country;
2. They provoke new jobs and investments;
3. The residents of such territories demonstrate a serious growth of investments, assets and jobs;
4. National governments effectively control the activities in such territories.

### 3 Conclusion

We believe that the State's tax sovereignty implementation with regard to preferential tax regimes should be based not only on the national constitutional principles but also on the practices that OECD has recommended. The tax authority of the constituent entities (subnational governments) with regard to the establishment of special tax regimes in corresponding territories is not only the logical consequence of the State's tax sovereignty (national government) but also the thing that should not contradict the practices recommended by the OECD.

### References

- Baladina, A.: Анализ теоретических аспектов налоговых льгот и налоговых преференций (Analysis of theoretic aspects of tax exemptions and tax preferences), Вестник Томского государственного университета (Tomsk State University Journal) no. 4 (2011).
- Barulin, S.: НАЛОГОВЫЕ ЛЬГОТЫ КАК ЭЛЕМЕНТ НАЛОГООБЛОЖЕНИЯ И ИНСТРУМЕНТ НАЛОГОВОЙ ПОЛИТИКИ (Tax exemptions as an element of tax system and an instrument of tax policy), Финансы (Finance) no. 2 (2010).
- Raritska, V.: Tax Sovereignty as a Fundamental Characteristic of Tax Law System, in: Radvan, M. (ed.) System of Financial Law : System of Tax Law : Conference Proceedings, 1st ed. Brno : Masaryk University, Faculty of Law, 2015.
- Reut, A., Paul, A., Soloveva, N.: The Special Economic Zones in Russia and foreign countries: budget risks and tax expenditure, in: RADVAN, M (eds.): The financial law towards challenges of the XXI century : Conference proceedings. 1st editions, Brno : Masaryk University, 2017.
- Sadchikov, M.: Понятие налогового суверенитета (The concept of tax sovereignty), Налоги (Taxes) no. 1 (2016).



## **Legal Acts**

OECD (2017), Harmful Tax Practices-2017 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5. [http:// www.oecd.org/about/publishing/corrigendum-harmful-tax-practices-2017-progress-report.pdf](http://www.oecd.org/about/publishing/corrigendum-harmful-tax-practices-2017-progress-report.pdf)

Act no. 377-FZ/2014, On the free economic zone in the Republic of Crimea and the federal city of Sevastopol, as amended.

Act no. 244-FZ/2010, On the Skolkovo Innovation Center, as amended.

Act no. 16-FZ/2006, On the special economic zone in Kaliningrad Region, as amended.

Act no. 116-FZ/2005, On Special Economic Zones in the Russian Federation, as amended.

Act no. 104-FZ/1999, On the special economic zone in Magadan Region, as amended.

Resolution of the Government of the Russian Federation no. 621 of August 12, 2010.

---

## PART 2. CONTEMPORARY ISSUES OF FISCAL RULE-MAKING IN THE COUNTRIES OF CENTRAL AND EASTERN EUROPE

---

### TAX ANNULMENT IN THE CONCEPT OF FISCAL RULE MAKING – COMPARATIVE ANALYSIS<sup>1</sup>

*Piotr Bulawa*<sup>2</sup>

#### **Abstract**

In contrast to a tax imposition act of parliament it is not a necessary condition to annul a tax in the democratic states of law. The comparison of legal systems of the Czech Republic, Poland and England shows very different approaches to a tax annulment in each country. In the Czech Republic the tax annulment has not been allowed since 2011 when a new Czech Tax Ordinance was introduced. There is one exception – the decree of Minister of Finance but in fact it is not used nowadays. In Poland a tax may be annulled under article 22 of the Polish Tax Ordinance by the Minister of Finance and under article 67a of the Polish Tax Ordinance by tax authorities. Tax annulment is allowed only if it is substantiated by important interest of a taxpayer or public interest. In England the tax annulments called extra-statutory concession are broadly used by tax authorities without any particular legal basis. Contemporary regulation of the tax annulment is a subject of legal criticism in the Czech Republic and England.

#### **Key words**

Tax annulment, extra-statutory concession, tax imposition, cancellation of tax liability.

**JEL Classification:** H20

## **1 Introduction**

It is common in democratic states of law that a tax may be imposed on a taxpayer only by the act of parliament. On the other hand, it is not obvious if the cancellation of an already implied tax also requires the act of parliament, or the act of tax authorities is enough. The aim of the article is to clarify the abovementioned doubt and it is achieved

---

<sup>1</sup> The article was prepared in the frame of the project Annulment of tax obligations – comparative study. The project is realised at the Faculty of Law and Administration, Silesia University in Katowice, Poland. I am the manager and sole performer of the project, its research supervisor is dr hab. Marek Zdebel. The project is financed by the National Science Centre (Poland) under decision no. 2016/23/N/HS5/00157

<sup>2</sup> Piotr Bulawa is PhD-candidate at Department of Financial Law, Faculty of Law and Administration, Silesia University in Katowice, Poland. He is advocate in Poland and Czech Republic. The author specializes in tax law, esp. comparative and international tax law. Contact email: piotr@bulawa.com.pl

by the comparison of the legal systems of the Czech Republic, Poland and England regarding the tax annulment. All of the compared states present a different approach to this issue, so it allows to challenge a contemporary view about it. The article includes some information about the source of law to allow to understand easier the position of the tax annulment in state's legal system.

In the article the tax annulment should be understood as an operative rule, not as a specific institution of national tax law. It is required because the article contains comparative elements between Poland, the Czech Republic and England. Essentially, the operative rule is a case when countries develop tax mechanisms that turn out to have the same or a similar effect (Garbarino, 2009: 688), which is the case with tax annulment. Therefore, the tax annulment (pol. *umorzenie zobowiązania podatkowego*, cz. *prominutí daně*, eng. extra-statutory concession) should be understood as a tool to redeem a tax or not collect a tax even though it must be collected under the act of parliament.

## 2.1 The Czech Republic

Czech law seems to be the closest to the idea that only parliament may levy a tax and annul it. According to article 11 point 5 of Resolution of the Presidium of the Czech National Council no. 2/1993 Sb. (Collection of Law), the Charter of Fundamental Rights and Freedoms “taxes and fees shall be levied only on the basis of law”. The Charter is a part of Czech constitutional law. There is no similar stipulation at the constitutional level regarding the tax annulment, but there is an adequate regulation in the Act no. 280/2009 Sb. (Collection of Law), Tax Ordinance, as amended (the Czech Tax Ordinance) introduced in 2011. According to articles 259 – 260 of the Czech Tax Ordinance, tax annulment is possible only if it was provided by another statute or under a decree of Minister of Finance directed to a specific group of taxpayers. In practice, there is no statute now where the tax annulment is stipulated, so it is dead letter.

It should be mentioned that the institution of the tax annulment was introduced into the Czech Tax Ordinance in 2015, but it concerns only late payment interests, not taxes. Moreover, the introduced annulment is restricted by further necessary conditions under § 259b and 259c of the Czech Tax Ordinance. Especially, instalments may be annulled only if the tax has been paid fully. Further, the annulment of late payment interests is regulated in internal administration guide no. GŘ-D-21 (Guide of the General Tax Administration regarding annulment of late payment interest, no. 4260/15/7100-40123).

The tax annulment based on the decree of Minister of Finance shall apply to all taxpayers who are connected with the cause of tax annulment. Therefore, it is called a group decision on the tax annulment. However, the possibility to annul a tax under the decree of Minister of Finance is limited by its subject. The Minister of Finance may annul a tax only if application of tax law leads to inequalities or in case of extraordinary events, especially natural disasters like floods. During 2010-2013 the Minister of Finance

published 10 decrees about the tax annulment. He has not published the decrees since 2014, so it is definitely a rarely used institution.

In Czech legal doctrine, there is a visible dispute over the range of the tax annulment. J. Kratochvíl postulates unambiguously to reintroduce the possibility to annul taxes. He says that the possibility to annul late payment interests is not enough to effectively react to unfairness and disproportionate severity (cz. *tvrdost*) of taxation in specific cases. The legislator cannot predict all cases. The possibility to annul a tax in individual cases should make tax authorities' work easier and increase taxpayers' trust in tax system. On the other hand, the author underlines that the reintroduction of the tax annulment is not only a question of legislative technique but it depends on political will (Kratochvíl, 2014: 3).

There are also different opinions expressed. V. Boněk articulated his critical view about the possibility to annul taxes in 2008 before the new Czech Tax Ordinance was introduced. As far as he was concerned, problems regarding vague legal provisions should be removed through an amendment of law or through jurisprudence, not with the help of institution of tax annulment. The tax annulment in specific cases increases decidedly the cost of tax administration and it is corruption-prone. In case of using the tax annulment it should be limited by countable measures like social minimum or insolvency (Boněk, 2008: 18).

The opinion of V. Boněk confers the position of the new Czech Tax Ordinance's authors. According to justification to a draft of the Czech Tax Ordinance the aim of liquidation of possibility to annul a tax was: reduction of corruption risk, avoiding inequality and non-transparency, reduction of workload in tax administration regarding tax annulment proceedings, motivation of taxpayers to pay taxes correctly and on time, elimination of a possible conflict between EU state aid law and the tax annulment (Justification of draft of Tax Ordinance, Parliament form no. 252/0, point 11.28.1).

It may be shortly summed up that the tax annulment may not be provided by tax authorities in the Czech Republic and any tax annulment requires the act of parliament. It may be annulled by a decree of Minister of Finance, because it is an institution which is almost not used, and it is hard to recognize this decree as the real institution of the tax annulment. Justification to a draft of the Czech Tax Ordinance shows that there is now political will to allow tax authorities to annul taxes.

## 2.2 Poland

Taxes may be levied on a taxpayer only in the form of an act of parliament, which is literally stipulated in article 217 of the Polish Constitution. On the other hand, taxes may be annulled under article 67a of the Act of August 29, 1997 – Tax Ordinance, OJ L 2017, item 201 (Tax Ordinance). According to this article of the Polish Tax Ordinance, a tax may be annulled by tax authority if it is substantiated by important interest of a taxpayer or public interest. The tax authority's decision is directed to a specific person.

The decision has a substantive effect, i.e. a tax extinguishes, however, the tax may be altered in the future (Dzwonkowski, 2017: 464, 466).

Additionally, a tax may be also annulled by a decree of Minister of Finance. In accordance with article 22 § 1 point 1 of the Polish Tax Ordinance, the Minister of Finance may unilaterally annul a tax if it is substantiated by important interest of a taxpayer or public interest (singular tax annulment). The decree has proceedings effect, i.e. it suspends immutable enforcement of future tax. The decree should define: the type of tax, period wherein a tax shall be annulled and a taxpayer group who the tax annulment concerns. Therefore, the decree cannot be directed to a specific person, but to a group of people. In practice the Minister of Finance issues decrees regularly regarding the tax annulment. The Minister of Finance issued 13 decrees in 2014 and 2 decrees in 2016. The decrees concern many issues from lotteries to the realization of offset agreements.

The key point of the tax annulment in Poland is a definition of important interest of a taxpayer and definition of public interest. It is required to fulfil one of the abovementioned conditions to annul a tax. However, the definitions are very broad comprehensive clauses which require using extrajudicial concepts (Dzwonkowski, 2017: 461-462). The meaning of the definitions is under strong influence of concept of fairness (Zdebel, 2013: 494-495). In practice, it is difficult to define important interest of a taxpayer or public interest, because administrative courts define them repeatedly *ad casum*. According to H. Dzwonkowski, there is no settled case law about the meaning of those institutions. Moreover, there are signs that administrative courts try to avoid settling cases about tax annulment (Dzwonkowski, 2017: 462).

Fulfilment of prerequisite of public interest or important interest of a taxpayer do not prejudice the tax annulment, because the possible tax annulment depends on discretionary power of the tax authority. The Tax authority may annul a tax, however, it does not have to be carried out. It is up to the tax authority to annul a tax if prerequisites are fulfilled (Bartosiewicz, Kubacki, 2007: 46). Of course, the discretionary power of the tax authority is not unlimited. If the decisions of tax authorities are clearly irrational or contrary to basic constitutional principles, they shall be cancelled by administrative courts, which was confirmed in judgment of the Polish Supreme Administrative Court of March 2, 2016, no. II FSK 2474/15, LEX no. 2021630.

Polish institution of tax annulment partially represents the idea that only parliament may levy taxes and annul them. Tax authorities including the Minister of Finance are allowed to annul a tax but they can do it only if it is substantiated by important interest of a taxpayer or by public interest. The abovementioned discretionary power of the tax authority to annul a tax does not change it because it is only the right to deny the tax annulment. On the other hand, the definition of important interest of a taxpayer and public interest is very broad comprehensive clauses, therefore tax authorities have significant power to cancel already implied taxes without any further activity of parliament. It is worth noting that there is no significant debate in Polish legal doctrine about an amendment of the tax annulment regulation in tax law.

## 2.3 England

The power to levy taxes is manifestation of the sovereignty of Parliament (Tiley, 2008: 29). According to the Act of English Parliament of 1688, no. 2, the Bill of Rights 1688 no charge on a taxpayer including taxes shall be levied by pretence of prerogative without the consent of Parliament. Therefore, it is justified to say that England has a long tradition to levy taxes only based on the acts of parliament. However, it does not mean that the tax annulment requires the act of parliament.

Because England represents a legal system with significant distinctive features it is useful to present some facts about the source of law to identify relation between the act of parliament and the tax annulment in English law system. First, England as a part of Great Britain does not have any written constitution and there is no hierarchy of sources of law. Only the acts of parliament have priority over other acts of law (Feldman, Birks, 2004: 44-45). Of significant importance for administration including tax administration are acts filed by a member of government on the basis of the acts of parliament which are called jointly statutory instruments. The acts of parliament may not indicate how administration issues shall be regulated in statutory instruments. It is enough, if statutory instruments follow the aim of acts of parliament (Turpin, 2002: 411).

In reality, it is very common to exercise public administration including tax administration on the basis of discretionary power or without any grounds in the acts of parliament. As a result, there are administrative practices which are called tertiary rules and they are not even called a law. Administrative practises are designed to realise polices of government (Turpin, 2002: 426). Moreover, the government and its agencies often introduce non-statutory administrative rules to avoid appealing to formalised legislative procedures before parliament. These non-statutory rules are very effective, but they do not require control of the parliament and they are not even published (Turpin, 2002: 430). The abovementioned non-statutory rules are used as concessions to annul taxes.

English law does not formally regulate the institution of tax annulment. In reality English tax authorities very often take the tax annulment into consideration. The first tax annulment supported by evidence was provided in 1793 (Daly, 2017: 1). Because there is no specific statute which regulates tax annulments, they are called jointly as extra-statutory concessions (Lymer, Oats, 2017: 20). Nowadays extra-statutory concessions are issued by tax authorities – High Majesty’s Revenue and Customs (HMRC), which shall care and manage taxes (Tallon, Young, Elliot, Dave, 1985: 6b). Moreover, extra-statutory concessions have been confirmed by Chancellor of Exchequer – British Minister of Finance (Tallon, Young, Elliot, Dave, 1985: 14).

Theoretically, article 1 point 1 of Tax Management Act 1970 is a legal basis for extra-statutory concessions. According to this article, income tax, corporation tax and capital gains tax shall be under care and management of HMRC and that’s why HMRC may be also automatically entitled to annul taxes (Halsbury’s Laws of England, 2011: 1046).

However, it should be presumed that there is no particular legal basis for extra-statutory concessions as their names indicate and they are just the result of administrative practice (Oxford dictionary of accounting, 2016: 188). S. Cripps – the Chancellor of Exchequer stated in 1947 that the extra-statutory concessions do not have any particular legal basis. In his opinion, extra-statutory concessions do not need any legal basis or an act of parliament. They are issues just on the basis of his power, i.e. power of the Chancellor of Exchequer (Williams, 1979: 140). The abovementioned opinion was also confirmed by article 160 of the Finance Act 2008. Pursuant to this article, extra-statutory concessions are any reductions in liability to a tax or duty or other concessions relating to a tax or duty made by the Commissioners for HMRC which are not or may not be entitled in accordance with the law.

Concessions have common usage, but their issue is caused by specific circumstances in a particular case. The majority of concessions are issued with the aim of solving the following problems:

- 1) minor or transitory anomalies,
- 2) cases of hardship at the margin where a statutory remedy would be difficult to devise,
- 3) abuse of power and administrative common sense (Heaton, 2008: G2,1).

However, it is said in legal doctrine that the abovementioned examples are traditionally indicated by HMRC, but it is an incomplete list. Extra-statutory concessions may be in fact used with the aim of solving any practical problem connected with tax administration.

There are two lists of extra-statutory concessions nowadays. One concerns income taxes and is published under the title Extra-statutory concessions. The other concerns VAT tax and is published under the title VAT Notice 48. Both are published on the HMRC's web pages (David, 2016: 48). On April 6, 2017 the first list included 312 positions and VAT-48 list included 42 positions.<sup>3</sup> However, it is worth noting that the lists do not include all extra-statutory concessions. There are cases where HMRC publishes cancellation of extra-statutory concession which has never been published (Daly, 2017: 16).

Extra-statutory concessions are described in legal doctrine as curiosity. The act of tax annulment is not a law but it has priority over law. It can be legally challenged only by judicial review. The concessions were also criticised by the Tax Law Simplification Committee (David, 2016: 48). A radical opinion about extra-statutory concessions was expressed by D. Williams, professor of Cambridge University: *“most of extra-statutory concessions are illegal. That they exist at all in either overt or covert form is a matter of concern. That they not only exist, but grow regularly, in open contradiction to the rule of law, cannot but reflect on the quality of the executive that creates them and the polity that tolerates them”* (Williams, 1979: 144).

---

<sup>3</sup> Webpage of the British Administration, [www.gov.uk](http://www.gov.uk)

There are of course opposite opinions. Lord K. Diplock many times expressed an opinion that the concessions are a sign of administrative pragmatism. The legal basis for issuing concessions is HMRC's obligation to care and manage taxes (Daly, 2017: 12). Moreover, it is many times underlined that the Parliament does not have time to take a stand on all concessions and problematic of concessions does not fit legislative proceedings, because they concern just minor issues (Daly, 2017: 13-14). It is worth noting that in some opinions of HMRC annual budget debates are full of unseemly haste, inexpert debate and lack of proper examination, therefore, it is impossible to correctly fulfil a budget without extra-statutory concessions (Tallon, Young, Elliott, Dave, 1985: 9).

The English case represents a situation when the right to annual a tax does not require an act of law. The idea that only parliament may levy tax and annul it is overcome. English tax authorities have a right to cancel any already implied tax without any additional conditions. On the other hand, a tax may have been levied only with the consent of parliament since 1688. The construction of extra-statutory concessions is criticized by part of legal doctrine, but it is tenacious institution of English law and it can be assumed it would not be changed. English legal system as it was mentioned above has significant distinctive features but it is out of doubt that England (Great Britain) is a democratic state of law.

### **3 Conclusion**

The tax annulment does not require an act of parliament. The comparison of three European states shows there is no simple correlation between imposition of a tax and the tax annulment regarding participation of parliament. All of the states represent significant different points of view, where the common aspects are limited to obligation of imposition of a tax by the act of parliament. In the Czech Republic there is no tax annulment, so a tax may be annulled only by a new act of parliament. However, the restriction looks more like a part of tax policy than the implementation of an idea that only parliament may levy a tax and annul it. On the opposite side of the analysis there is England. The tax annulment depends in reality only on HMRC's decision, so in England the tax annulment is also more a part of tax policy than the issue of legislation.

When compared to England and the Czech Republic, Polish regulations of the tax annulment look moderate. They combine flexibility required by tax policy and the requirement of parliament participation in the tax annulment. However, understanding of public interest and important interest of a taxpayer in article 22 and article 67a of the Polish Tax Ordinance, as well as discretionary power of tax authority regarding tax annulment make parliament participation therein formal.

The comparison of law is a legal eye-opener (Husa, 2015: 59). So, it is worth to underline two issues which were mentioned above and are important for any tax system. First, according to the part of Czech legal doctrine, the possibility to annul taxes increases



risk of corruption, creates inequality and non-transparency, causes workload in tax administration, decreases motivation of taxpayers to pay taxes correctly and on time. Second, according to part of English legal doctrine, tax annulment is a sign of administrative pragmatism which allows effective care and management of taxes. Both points of view should be taken into consideration in the framework of any reform of the tax annulment in the future.

## References

- Bartosiewicz, A., Kubacki, R.: Ulgi płatnicze w świetle wartości konstytucyjnych. Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 16 stycznia 2007 r., sygn. akt I FSK 477/06 (Payment allowance in light of constitution values. Gloss to judgement of the Supreme Administrative Court of January 16, 2007, no. I FSK 477/06), *Monitor Podatkowy* (Tax Chronicle) no. 12 (2007).
- Boněk, V.: Ještě jednou k promitnutí daně a jejího příslušenství (Once word more about annulment of tax and its accessory), *Daňový expert* (Tax expert) no. 5 (2008).
- Daly, S.: The life and times of ESCs: defence?, *Studies in the History of Tax Law*: vol. 8, 2017.
- David, W.: *Principles of Tax Law*, London: Thomson Reuters, 2016.
- Dzwonkowski, H.: *Ordynacja podatkowa. Komentarz* (Tax Ordinance. Commentary), Warszawa: Wydawnictwo C.H. Beck, 2017.
- Garbarino, C.: An Evolutionary Approach to Comparative Taxation: Methods and Agenda for Research, *The American Journal of Comparative Law*, vol. 57, no. 3 (2009).
- Husa, J.: *A New Introduction to Comparative Law*, Oxford: Hart Publishing, 2015.
- Feldman, D.: P. Birks, *English Public Law*, Oxford: Oxford University Press, 2004.
- Halsbury's Laws of England. Capital Gains Tax, Lexis Nexis UK 2011, vol. 6.
- Heaton, D. (ed.): *Simon's Taxes*, Lexis Nexis UK 2008, computer-based legal research Lexis@Library.
- Kratochvíl, J.: Je potřebný a možný návrat individuálního prominutí do daňového řádu (Is come back of individual tax annulment required and possible), *Daňe a právo v praxi* (Taxes and law in practice) no. 4 (2014).
- Lymer, A., Oats, L.: *Taxation. Policy and Practice*, Birmingham: Fiscal Publications, 2017.
- Oxford dictionary of accounting*, Oxford: Oxford University Press, 2016.

Tallon, D., Young, I., Elliott, P., Dave, D.: *Inland Revenue Practices and Concessions. Volume 1*, Longman, 1985.

Tiley, J.: *Revenue Law*, Portland: Hart Publishing, 2008.

Turpin, C.: *British Government and the Constitution. Text, Cases and Materials*, London: Lexis Nexis, 2002.

Williams, D.: *Extra statutory concessions*, *British Tax Review*, 1979.

Zdebel, M.: *Warunki stosowania w Polsce umorzeń płatności należności budżetowych (Application conditions for annulment of budgetary receivables in Poland)* in: I. Mirek, T. Nowak, *Prawo finansowe po transformacji ustrojowej: międzynarodowe i europejskie prawo podatkowe: Zjazd Katedr Prawa Finansowego i Podatkowego: Łódź, 5-6 czerwca 2012 r. – Łódź (Financial Law after political transformation: International and European Tax Law: the Convention of Tax and Financial Law Chambers: Lodz, 5-6 June 2012)*, Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2013.

---

# WRITTEN EXPLANATIONS OF THE TAX LAW: FISCAL LAW-MAKING, INTERPRETATION OR LAW ENFORCEMENT?

*Igor Demytyev*<sup>1</sup>

## **Abstract**

The article is devoted to the theoretical description of the interpretation of the norms of the tax law and the definition of the legal status of written explanations of the tax legislation, their place in the mechanism of tax legal regulation. The purpose of the article is to confirm or refute the following hypothesis: written explanations of the tax legislation – an act of official interpretation of the norms of the tax law and mandatory for subjects of tax law enforcement. Methods: the methodological basis of the study was a set of methods of scientific knowledge. General scientific (dialectics, analysis and synthesis, abstraction and concretization) and private scientific methods of research (formal-legal, comparative-legal, technical-legal) were used. To obtain new knowledge, the author also used the systemic and instrumental approach, empirical methods of description, comparison; methods of analogy, abstraction, structural-functional method.

## **Key words**

Written explanations, interpretation of tax law, tax law enforcement, law procedure.

**JEL Classification:** K340

## **1 Introduction**

Tax and legal science faces the task of theoretical understanding of the interpretation of tax and legal norms. Interpretation is an important component of tax law enforcement, since there is no and there can be no enforcement without interpretation (Monaenko, 2013: 193). Due to interpretation, the law enforcement entity (first of all, the tax authority) establishes the true meaning and content of the tax and legal norm.

The need for interpretation of legal norms arises before the law enforcement objectively. The reasons for this are the general nature of the legal rule, the use of terms not established by law, errors and ambiguities in the text of the law (Vengerov, 1999: 450-452).

---

<sup>1</sup> Ph.D. in Law, Associate Professor, Department of Civil procedural law, Central Branch of the Russian State University of justice (Russia, Voronezh). The author specializes in tax law. He is the author of 3 books and more than 40 reviewed articles in prestigious journals. He is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe.

ORCID: 0000-0001-7364-8770. ResearcherID: E-3913-2018. Contact e-mail: i.v.demytyev@yandex.ru

These shortcomings are also inherent in tax legislation. Part One of the Tax Code of the Russian Federation contains gaps in the regulation of tax relations. The technology of the presentation of the norms of the tax law in the Tax Code of the Russian Federation is incomplete. Part Two of the Tax Code of the Russian Federation is a step backwards. This is the result of the fact that lawyers were practically not involved in its development. This is evidenced by the style, language, terms and legal illiteracy of the statement of norms (Mihailova, 2004: 6). More than 10 years have passed since the approval of this idea, but the legal technique of the tax law is still far from perfect. The tax legislation objectively requires interpretation. The reason is the use of institutions, concepts and terms of civil law in the tax law. Such terms should be understood in the meaning and sense defined by the norms of civil law, unless otherwise stipulated by the Tax Code of the Russian Federation (Tax Code, Art. 11).

Russian tax law contains several rules governing the interpretation of its provisions. For example, this is paragraph 7 of Art. 3 of the Tax Code of the Russian Federation, according to which all irremovable doubts, contradictions and ambiguities in acts of legislation on taxes and fees are interpreted in favor of the taxpayer. Article 34.2 of the RF Tax Code defines the powers of the Ministry of Finance of Russia and of the financial bodies of the subjects of the Federation and municipal entities on a written explanation of the tax legislation. Some problems of interpreting tax and legal norms were covered in the periodical press, but they did not receive a theoretical generalization (Zaripov, 2015: 51-55; Pilipenko, 2012: 25-29; Mironova, 2009: 155-156; Nikitina, 2008; Cerenov, 2007).

It seems that the need for a theoretical and methodological study of the interpretation of the norms of tax law has matured. A practical consequence of this should be the development by the legislator and the inclusion in the RF Tax Code of norms defining the types of official interpretation of tax legislation, the form of acts of interpretation and their legal consequences, the procedure for their adoption and publication, as well as challenging stakeholders.

In the Russian legal science there is a theory of interpretation of law (Vas`kovskiy, 1997; Voplenko, 1976; Pigolkin, 1962). A number of studies are devoted to the interpretation of civil laws (Pigolkin, 1998; Petrushev, 2003), criminal legislation, constitutional legislation (Barinov, Ovchinnikov, 2004; Taeva, 2006; Habrieva, 1998; Gadzhiev, 2000; Jebzeev, 1998; Kolokolov, 2009). A lot of authors devoted their works to the study of judicial interpretation of the norms of law (Tarasova, 2002; Homyakov, 2011: 62-65). The problems of interpreting the norms of tax law are in the focus of attention of foreign legal science (Monaenko, 2013; Kucharczyk, Rogowska – Rajda, 2013; Pachecka, 2012; MacCORMICK, 1993; Qiu, 2014; Dworkin, 1982; Lee, 1999).

In the present work we will focus on the issues of determining subjects of interpretation of the norms of tax law, types of acts of interpretation of tax norms and their legal force.

## 2 Interpretation in the mechanism of tax law regulation

In legal theory, interpretation is defined as a component of law enforcement, a kind of law regulation (Malahov, 2012: 276). The process of application of the norms of law consists of successive stages (stages), which reflect the sequence of mental operations of the law enforcer. The process of applying the rules of law is a logical sequence. First, it involves understanding the concrete factual circumstances of the case, the substance of the matter. At this stage, the proof of the legally significant circumstances of the case is relevant. The second stage is legal due diligence. At this stage, the actual and legal circumstances acquire a legal assessment. To do this, the law-enforcer seeks a legal rule that should regulate the situation in question. The third stage is the preparation and decision-making to set, change, make concrete abolishing the rights and obligations of the participants of legal conflicts (Rassolov, Bastrykin, Ivanov, 2014: 278).

At the second stage of law enforcement, the law-enforcer interprets the law. Interpretation is carried out not only at the stage of application of the norms of the tax law, but also at the stage of tax rulemaking. Normative interpretation of tax norms is connected with tax norm-setting, the existence of which will be proved below. The theoretical and methodological basis for understanding the interpretation of the norms of tax law is the construction of a mechanism for tax and legal regulation. The mechanism of legal regulation is a system of legal means which provides an effective legal influence on public relations. The concept of the mechanism of legal regulation allows us to bring together phenomena of legal reality – norms, legal relations, legal acts, etc. These legal phenomena are built in a system-dynamic form, they show their specific functions. Their relationship with each other and interaction become obvious (Alekseev, 2009: 267). The mechanism of legal regulation includes the following elements: “rules of law – legal relations – acts of the implementation of rights and obligations.” Between them there can be acts of the application of law. They bring the mechanism of legal regulation into motion in cases where it is impossible without the authoritative organizing activity of authorized entities.

The mechanism of tax and legal regulation allows to transform normative tax and legal regulation into individual tax and legal regulation, norms of tax law into individual prescriptions contained in individual tax and legal acts. The regulatory legal regulation of tax relations includes tax norm-setting, which results in normative-legal acts. Normative interpretation of tax norms is connected with tax norm-setting. Its result is acts of normative interpretation of tax legislation. Individual legal regulation of tax relations is carried out during the course of tax enforcement. Individual tax and legal acts are means of individual regulation of tax relations. In such acts an enforcement decision is made by the tax authority. In the course of tax enforcement, a casual interpretation of tax rules is carried out. Acts of casual interpretation of tax and legal norms can be objectified in a separate document (an interpretative act), or be part of an individual legal act (law enforcement decision). Casual interpretation as part of the law enforcement decision is contained in the reasoning of the act. It reflects the reasoning of the law enforcer, the

analysis of tax law norms. In the process of such an interpretative interpretation, a legal interpretation of the legal norms can be implemented (Zaloilo, 2010: 107, 110).

Interpretation of legal norms is the establishment of the content of normative legal acts aimed at disclosing the norm-setting agent expressed in them (Pigolkin, 1988: 66). Interpretation is, on the one hand, an internal cognitive process of clarifying the meaning of legal norms. On the other hand, interpretation is the result of the process of cognition, i.e. its external expression. It consists of clarifying the content and meaning of the rules of law (Pigolkin, 1962; Cherdancev, 1979). Interpretation plays a special role in the fiscal law-making process. It is used to eliminate ambiguities and possible errors. Law has the property of system. Legal norms interact with each other, therefore the created tax norm should be logically incorporated into the existing system of law. Interpretation reveals the meaning of existing norms and allows to identify gaps in legal regulation. It contributes to the creation of better legal regulations. Besides, interpretation is an important element in the implementation of the tax law in general and tax law enforcement in particular. It is a prerequisite for the correct and uniform application of the interpreted legal norms. Thus, interpretation penetrates all stages of legal regulation and is a condition for their implementation (Zaloilo, 2010: 106).

### **3 Interpretation and tax law-making: correlation problems**

In the tax and legal science, the problem of determining the place of acts of a written explanation of the tax legislation in the mechanism of tax regulation requires solution. This problem is revealed by judicial practice, in particular, in the Decree of the Constitutional Court of the Russian Federation no. 6-P of March 31, 2015, Rulings no. 632-O-O of October 2, 2007; no. 442-O of October 20, 2005; no. 319-O of November 5, 2002.

It seems that the main theoretical reason for this problem is “the lack of necessary clarity on the issue of the correlation and criteria for delineating rulemaking and the official interpretation (explanation) of legal norms” (Obrazhiev, 2010: 99). The main approach is that no new legal norms should be created in the course of interpretation (Pigolkin, 1998: 69; Cherdancev, 1979: 29). But there is also a broad understanding of the interpretation of the rules of law that allows the subject of interpretation to change the content of the legal norm without changing the text of the law (Gavrilov, 2000: 5-6; Manukjan, 2006: 17, 20, 110-118).

In the legal science, the term “normative interpretation” is used. This is interpretation, “the results of which extend to an indefinite range of persons and cases, i.e. an interpretation that, like the norm of law, has a general character (general action) (Lazarev, 1972: 97). Thus, the synthesis of the concepts “interpretation of law” and “rule-making” occurs. This blurs the boundaries between the official interpretation of legal norms and lawmaking. A consequence of this was the discussion, not concluded by a generally accepted decision, about judicial acts as sources of law. It seems that there are criteria for distinguishing

between normative interpretation and norm-setting. However, the boundaries between them are often conditional and vague. The basis for distinguishing between normative acts and acts of normative interpretation should be their content, or rather the sign of normative novelty.

Interpretation of the legal norm requires clarification, disclosure of its meaning laid down by the legislator (normative body). The result of the interpretation is new knowledge about the rule of law, which logically follows from the interpreted norm (Cherdantsev, 1972: 42-43). If the interpretation does not allow to give an unambiguous and the only possible answer about the meaning of the legal norm, then the possibilities of interpretation should be considered exhausted. Thus, explanations of the law are derived from existing legal norms through grammatical, systematic, logical and other means of interpretation. Clarifications of tax norms deepen knowledge about them, but do not create new regulatory requirements, do not introduce normative novelty into the interpreted tax legal norms. Thus, the limit of interpretation is the boundary between the logical deduction of knowledge about the norm of law from the norm itself and the creation of new regulatory prescriptions. The creation of new regulatory prescriptions should be understood as law-making activity, and not interpretation (Obrazhiev, 2010: 100-101). “Interpretation, based on the provisions of applicable laws, can get positive value. But for this it must be enshrined in the norms of law” (Nedilko, 2011: 31).

As an example of going beyond the adequate interpretation of tax norms, one can cite the letter of the Ministry of Finance of Russia of 18.10.2012 no. 03-01-18/8-145. It formulates a new norm, which does not follow from the meaning of the interpreted provisions of Section V.1 of the Tax Code of the Russian Federation (control over transfer prices in transactions). The letter concludes that the possibility of territorial tax authorities in the course of desk and field tax audits to reveal the facts of price manipulation in transactions is not related to controlled ones. The tax authorities have the right to use the methods of transfer price control established by Chapter 14.3 of the RF Tax Code. However, such conclusions of the Ministry of Finance of Russia do not have an obvious logical connection with the interpreted provisions of the RF Tax Code and therefore constitute a new legal norm.

#### **4 Written explanations of tax legislation: problems of law enforcement**

The principle of interpretation of all the unavoidable contradictions, doubts and ambiguities of tax legislation in favor of the taxpayer, fixed by paragraph 7 of Article 3 of the RF Tax Code, is formulated incorrectly. Interpretation of the law is aimed at eliminating contradictions and ambiguities. Therefore, if it is impossible to eliminate them by interpretation, then the interpretation is powerless. Such a norm is defective and must be removed or amended by the lawmaking body. This principle should be more correctly called the principle of application in the taxpayer's favor of a norm of tax legislation containing unavoidable contradictions, doubts and ambiguities.

It is necessary to clearly distinguish the powers of the Ministry of Finance of Russia (financial bodies) and the Federal Tax Service of Russia to clarify tax legislation. It is necessary to include in the RF Tax Code the powers of the Federal Tax Service of Russia to clarify the tax legislation. Then paragraph 6.3 of the Regulation on the Federal Tax Service of Russia will receive a legislative basis. The law should define and distinguish the competence of the Ministry of Finance of Russia and the Federal Tax Service of Russia in interpreting tax legislation.

It is important to unify the names of acts of a written explanation of the tax legislation. Most often, the Ministry of Finance of Russia and the Federal Tax Service of Russia call them letters. Resolution of the Government of the Russian Federation no. 1009 of August 13, 1997 (which approved the Rules for the Preparation of Normative Legal Acts of Federal Executive Authorities and Their State Registration) determines the types of regulatory acts of federal executive bodies: decrees, orders, rules, instructions and regulations. But the legislator does not disclose the specifics of the indicated types of acts. In which cases when regulating managerial relations, are the instructions adopted as rules or regulations? (Starilov, Davydov, 2011: 130). The form and types of acts of interpretation of law are not defined normatively. It is necessary to issue a law on normative legal acts and acts of interpretation. To date, there are three draft laws on regulatory legal acts of the Russian Federation.

In 1996, deputies of the State Duma drafted the RF Law “On Regulatory Legal Acts of the Russian Federation” (no. 96700088-2), submitted to the State Duma, but it was never adopted. The Institute of Legislation and Comparative Law at the Government of the Russian Federation (ILCL) in 2012 developed a draft law “On Regulatory Legal Acts in the Russian Federation” (Proekt federalnogo zakona, 2013). This is the second draft law on normative acts. It contains a chapter on the official interpretation of normative acts. The official interpretation of normative legal acts is generally binding, its legal force corresponds to the interpreted act. The third draft of the Federal Law “On Regulatory Legal Acts in the Russian Federation” was prepared by the Ministry of Justice of Russia in 2014, but was not submitted to the State Duma of the Federal Assembly of the Russian Federation.

Unfortunately, in Russia, not a single draft law has ever been adopted. Although, for example, the Republic of Belarus has the Law of the Republic of Belarus of 10.01.2000 “On Regulatory Legal Acts of the Republic of Belarus”. All bills contain a section on the interpretation of regulatory legal acts. But this does not exclude a special legal regulation of the interpretation of the norms of tax law.

The official interpretation of the tax legislation can be considered from the general philosophical categories of form and content. Clarification of the meaning of the tax norm is content, and explanation is a form of interpretation. Therefore, it is correct to refer to the act of a written interpretation of tax legislation as an “explanation”, and not a letter. The internal form of explanation is its structure, and the external form



can only be written. The act of normative interpretation should contain introductory, descriptive-motivational and resolute parts. The act of normative interpretation becomes an integral part of the interpreted tax and legal norm and is applied in unity with it.

Therefore, the principle of mandatory acts of an official written explanation of the tax legislation should be consolidated. An officially interpreted tax and legal norm can operate and be applied only in unity with an act of official interpretation. Acts of a written explanation of the tax legislation should be officially published on the website of the Ministry of Finance of Russia and the Federal Tax Service of Russia. Non-published acts should not be binding.

I believe that the Tax Code of the Russian Federation should provide for the reverse action of acts of a written explanation of the tax legislation. According to paragraph 5 of Art. 58 of the draft law “On Normative Legal Acts” of the Ministry of Justice of Russia, the interpretation acts are retroactive and effective from the moment of coming into force of the act to be interpreted. A similar norm is also contained in the above-mentioned draft law ILCL (paragraph 5 of Article 77). This rule should be consolidated in the Tax Code, because judicial practice is not uniform. For example, the explanation of the Ministry of Finance of Russia exempts taxpayers from liability only if it is received before the commission of a tax offense (Federal Arbitration Court of the Moscow District: KA-A40/8197-08/2008, Federal Arbitration Court of the West Siberian: F04-1836/2007 (32977-A27-42), F04-3146/2007 (35046-A70-29), but there is also an opposite practice: Federal Arbitration Court of the North Caucasus District: A53-12417/2008 -C5-14/2009.

According to Art. 217.1 of the Code of Administrative Procedure of the Russian Federation, cases on challenging acts containing explanations of legislation and possessing regulatory features are under the jurisdiction of the Supreme Court of the Russian Federation. Such cases are examined according to the rules of challenging normative legal acts, but with some procedural features.

The contestation of a written explanation of the tax legislation is possible if three conditions are met:

- 1) the act violates the rights and legitimate interests of the taxpayer;
- 2) the act has normative properties;
- 3) the content of the act does not correspond to the actual meaning of the clarified normative provisions.

The burden of proving the compliance of the content of the act with the meaning of the rules of law is assigned to the Ministry of Finance of Russia and the Federal Tax Service of Russia. The act of normative interpretation has the right to be challenged by the persons against whom this act is applied.

From January 1, 2015, tax control in the form of tax monitoring is applied in Russia. The analysis of Art. 105.30 of the Tax Code of the Russian Federation and the Requirements for drawing up a motivated opinion of the tax authority leads to the following conclusion. A motivated opinion is an act of interpretation of tax rules and facts of economic activity of a taxpayer organization and is not a law enforceable act. It does not imply the possibility of enforcement. If the taxpayer does not agree with the reasoned opinion, then a mutually agreeing procedure is initiated in the Federal Tax Service of Russia.

A literal reading of Art. 105.31 of the Tax Code of the Russian Federation leads to the conclusion that there is no possibility of judicial challenge to a motivated opinion. Since a taxpayer cannot fulfill a motivated opinion, it is not a non-normative legal act. Consequently, a motivated opinion cannot be challenged in court. A motivated opinion is also not an act of normative interpretation, so the Supreme Court of the Russian Federation is not authorized to consider its compliance with the law. It turns out that the notification of the Federal Tax Service of Russia on the basis of a mutually agreeing procedure is final and is not subject to judicial challenge. It is unlikely that this state of affairs is consistent with the constitutional right to judicial protection.

## 5 Conclusion

It is necessary to develop and include in the RF Tax Code a normative construction of interpretation of tax norms.

It seems that due to the lack of normative powers of the Federal Tax Service of Russia, only the Ministry of Finance of Russia, the financial bodies of the constituent entities of the Russian Federation and municipal entities have the right to issue written explanations addressed to an indefinite range of taxpayers (normative interpretation). The Federal Tax Service of Russia should be empowered to clarify the application of tax legislation at the request of a particular taxpayer (casual interpretation). At the same time, the interpretation position expressed in the written explanation of the Ministry of Finance should have greater legal force than the interpretative provision contained in the letters of the Federal Tax Service of Russia.

The delineation of written explanations of tax legislation and informing taxpayers should be carried out according to the degree of intellectual and logical processing of normative material. Informing should be limited to literal reproduction of the text of the norms of tax legislation without formulating conclusions and advice of the tax authority. If the text of the letter of the Federal Tax Service of Russia contains a logical reasoning and formulates a legal advice, then this should be understood not as informing, but as a written explanation of the tax legislation (interpretation of the tax law).

Written explanations of the tax legislation are acts of official interpretation of tax laws and therefore must be mandatory for taxpayers, provided there is an effective legal mechanism for challenging the interpretations contained in them.

Since the interpretation position is valid and applied in conjunction with the interpreted norm of the tax law, it must have the retroactive effect. The reverse effect of a written explanation of the tax legislation is not allowed only in the event of deterioration in the legal status of the taxpayer.

The procedure for issuing and publishing written explanations of the tax legislation should be regulated normatively in the Tax Code of the Russian Federation or in the administrative regulations. The most acceptable name for acts of interpretation of tax rules is “explanation”, and not “letter”. All regulatory explanations of the tax legislation should be published on the official website of the Ministry of Finance and the Federal Tax Service of Russia.

An obligatory element of the structure of explanation of the tax legislation should be a descriptive-reasoning part containing logical reasoning of the interpreting subject, the presence of which will allow the court in case of challenge to check the correctness of the interpretation of tax norms.

## References

- Alekseev, S.: *Общая теория права: учебник* (General theory of law: a textbook), 2nd ed., М.: Проспект (Moscow: Prospekt), 2009.
- Varinov, Je., Ovchinnikov, A.: *Толкование права в деятельности Конституционного Суда РФ: учеб. пособие* (Interpretation of law in the activities of the Constitutional Court of the Russian Federation: a textbook), Ростов-на-Дону (Rostov-on-Don), 2004.
- Serenov, B.: *Налоговые индульгенции Минфина России* (Tax indulgences of the Ministry of Finance of Russia), *Ваш налоговый адвокат* (Your tax attorney) no. 11 (2007).
- Cherdantsev, A.: *Толкование советского права (теория и практика)* (Interpretation of Soviet law (theory and practice), М.: Юридическая литература (Moscow: Legal literature), 1979.
- Cherdantsev, A.: *Вопросы толкования советского права* (Questions of interpretation of Soviet law), Свердловск: Изд-во Ленинградского ун-та (Sverdlovsk: Leningrad University Publ.), 1972.
- Dworkin, R.: *Law as Interpretation*. *Critical Inquiry*, 9(1) (1982). <https://doi.org/10.1086/448194>
- Gadzhiev, N.: *Пределы толкования норм Конституции Конституционным Судом* (Limits of interpretation of the Constitution by the Constitutional Court), *Право и политика* (Law and Policy) no. 12 (2000).

- Gavrilov, D.: *Правоприменительное толкование (Enforcement interpretation)*, Saratov, 2000.
- Habrieva, T.: *Толкование Конституции Российской Федерации: теория и практика (Interpretation of the Constitution of the Russian Federation: theory and practice)*, М. (Moscow), 1998.
- Номуаков, S.: *Роль постановлений Пленума Верховного Суда РФ в осуществлении правосудия (The Role of Decisions of the Plenum of the Supreme Court of the Russian Federation in the Implementation of Justice)*, *Российская юстиция (Russian Justice)* no. 6 (2011).
- Jebezev, B.: *Толкование Конституции Конституционным Судом РФ: теоретические и практические проблемы (Interpretation of the Constitution by the Constitutional Court of the Russian Federation: theoretical and practical problems)*, *Государство и право (State and Law.)* no. 5 (1998).
- Kolokolov, Ja.: *Конституционный Суд РФ: аутентическое толкование решений как форма правотворчества (The Constitutional Court of the Russian Federation: Authentic interpretation of decisions as a form of law-making)*, *Российский судья (Russian judge)* no. 12 (2009).
- Kucharczyk, R., Rogowska – Rajda, B.: *The Importance of the State Tax Information System for the System of Interpretation and Application of Tax Law in Poland*, [In:] Kostyukov A.N. (ed.): *Problems of Tax Enforcement in the Countries of Central and Eastern Europe: Proceedings of the International Scientific Conference*, Omsk, September 23-24, 2013, Omsk: Publisher of Omsk State University, 2013.
- Lazarev, V.: *Применение советского права (Application of Soviet law)*, Казань: Изд-во Казан. ун-та (Kazan: Kazan' University Publ.), 1972.
- Lee, N.: *A purposive approach to the interpretation of tax statutes?* *Statute Law Review*, 20(2) (1999). <https://doi.org/10.1093/slr/20.2.124>
- MacCORMICK, N.: *Argumentation and Interpretation in Law*. *Ratio Juris*, 6(1) (1993). <https://doi.org/10.1111/j.1467-9337.1993.tb00135.x>
- Malahov, V., Ivanov, A., Rassolov, M.: *Актуальные проблемы теории государства и права: учеб. пособие для студентов вузов (Actual problems of the state and law: a textbook for students)*, М.: ЮНИТИ-ДАНА (Moscow: JuNITI-DANA), 2012.
- Manukjan, A.: *Толкование норм права: виды, система, пределы действия (Interpretation of legal norms: types, systems, limits of action)*, дис. ... канд. юрид. наук (the dissertation of the candidate of jurisprudence), СПб (SPb.), 2006.
- Martínez, J.: *Valor normativo de las interpretaciones oficiales de la Administración Tributaria Colombiana*. *Jurídicas CUC*, 12(1) (2016). <http://dx.doi.org/10.17981/juridcuc.12.1.2016.8>

- Mihaylova, O., Pepeļajev, S. (ed.): Толкование норм налогового законодательства: учеб. пособие (Interpretation of norms of the tax legislation: the manual), М.: Статут (Moscow: Statut), 2004.
- Mironova, S.: Обжалование актов финансовых органов (Appealing of Financial Bodies Acts), in: Pepeļajev, S. (eds.): Налоговое право в решениях Конституционного Суда РФ 2007 года: по материалам V Междунар. науч.-практ. конф. 11-12 апреля 2008 г. (The Tax Law in the Decisions of the Constitutional Court of the Russian Federation in 2007: on the materials of V Intern. scientific-practical. Conf. 11-12 April 2008), М.: Волтерс Клувер (Moscow: Volters Kluver), 2009.
- Monaenko, A.: Tax explanations and consultations as a special form of tax enforcement under current Ukrainian legislation, in: Kostyukov A.N. (ed.): Problems of tax enforcement in Central and Eastern Europe: materials of an international scientific conference. Omsk, September 23-24, 2013, Omsk: Publisher of Omsk State University, 2013.
- Nedil'ko, Ju.: Толкование правовых норм и его значение (Interpretation of legal norms and its meaning), История государства и права (History of state and law) no. 1 (2011).
- Nikitina, S.: Статус разъяснений Минфина России по вопросам применения налогового законодательства (Status of clarifications of the Ministry of Finance of Russia regarding the application of tax legislation), Налоговые споры: теория и практика (Tax disputes: theory and practice) no. 1 (2008).
- Obrazhiev, K.: Судебное толкование и судебное нормотворчество: проблемы соотношения (Judicial interpretation and judicial rule-making: correlation problems), Журнал российского права (Journal of Russian Law) no. 3 (2010).
- Pachecka, J.: Interpretacje indywidualne jako narzedzie wplywajace na atrakcyjnos system podatkowego, in: T. Famulska, A. Walasik (Eds.): Finanse w niestabilnum otoczeniu – dylematy I wyzwania. Finanse publiczne, Zeszyty Naukowe Wydzialowe no. 108, Uniwersytet Ekonomiczny w Katowicach, Katowice 2012.
- Patterson, D.: Interpretation in Law. San Diego Law Review, 42 (2005). <https://doi.org/10.1525/sp.2007.54.1.23>.
- Petrushev, V.: Проблемы толкования права в Российской Федерации (Problems of interpretation of law in the Russian Federation), М.: РПА МЮ РФ (Moscow: RPA MJu RF), 2003.
- Pigolkin, A.: Толкование норм права и правотворчество: проблемы соотношения (Interpretation of the law and the problem of correlation), in: A.S. Pigolkin (ed.), Закон: создание и толкование (Law: creation and interpretation), Moscow, 1998.
- Pigolkin, A.: Толкование нормативных актов в СССР (Interpretation of normative acts in the USSR), М.: Госюриздат. (Moscow: State publishing house of legal literature), 1962.

- Pilipenko, A.: Теоретико-прикладные аспекты понимания правовой природы письменных разъяснений налогового законодательства (Theoretical and legal aspects of understanding the legal nature of written explanations of tax legislation), *Налоги (Taxes)* no. 5 (2012).
- Qiu, D.: Interpretation of tax laws in China: Moving towards the rule of law? *Hong Kong Law Journal* no. 44 (2014).
- Rassolov, M., et al.: Актуальные проблемы теории государства и права: учеб. пособие (Legal problems of the state and law: textbook), М.: ЮНИТИ-ДАНА (Moscow: JuNITI-DANA), 2014. <http://www.iprbookshop.ru/18188>.
- Starilov, Ju., Davydov, K.: Административная реформа в Российской Федерации на современном этапе: основные достижения, проблемы и перспективы (Administrative reform in the Russian Federation at the present stage: main achievements, problems and prospects), *Правовая наука и реформа юридического образования (Legal science and legal education reform)* no. 1 (2011).
- Taeva, N.: Толкование конституционно-правовых норм в РФ (Interpretation of constitutional legal norms in the Russian Federation), М.: ТК Велби, Изд-во Проспект (Moscow: TK Velbi, Prospekt Publ.), 2006.
- Tarasova, V., Vajtin, M. (eds.): Акты судебного толкования правовых норм: юридическая природа и классификация (Acts of judicial interpretation of legal norms: legal nature and classification), Саратов: Изд-во Саратов. гос. акад. права (Saratov: Saratov State Academy of Law Publ.), 2002.
- Vaskovskij, G.: Руководство к толкованию и применению законов (Guide to the interpretation and application of laws), М. (Moscow), 1997.
- Vengerov, A.: Теория государства и права: учеб. для юрид. вузов (Theory of state and law: textbook), М.: Юриспруденция (Moscow: Jurisprudence), 1999.
- Vorpenko, N.: Официальное толкование норм права (Official interpretation of the law), М.: Юридическая литература (Moscow: Legal literature), 1976.
- Zaloilo, M.: Конкретизация и толкование юридических норм: проблемы соотношения и взаимодействия (Specification and interpretation of legal norms: problems of correlation and interaction), *Журнал российского права (Journal of Russian Law)* no. 5 (2010).
- Zaripov, V.: Обжалование разъяснений финансовых и налоговых органов: вопросы подведомственности и подсудности (Appealing explanations of financial tax authorities: issues of jurisdiction and jurisdiction), *Налоговед (The tax man)* no. 1 (2015).

## Legal Acts

Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended.

Act no. 117-FZ/2000, The Tax Code of the Russian Federation, part 2, as amended.

Act no. 21-FZ/2015, The Code of Administrative Proceedings of the Russian Federation, as amended.

Act 2000, Law of the Republic of Belarus “On Regulatory Legal Acts of the Republic of Belarus”. <http://etalonline.by>

Act no. MMV-7-15/184@/2015, Order of the Federal Tax Service of Russia on the approval of forms of documents used in the conduct of tax monitoring, and the requirement for them. [www.consultant.ru](http://www.consultant.ru)

Constitutional Court of the Russian Federation: 6-P/2015.

Constitutional Court of the Russian Federation: 632-O-O/2007.

Constitutional Court of the Russian Federation: 442-O/2005.

Constitutional Court of the Russian Federation: 319-O/2002.

Draft of Law “On Regulatory Legal Acts of the Russian Federation” (no. 96700088-2). [http://asozd.duma.gov.ru/main.nsf/\(Spravka\)?OpenAgent&RN=96700088-2](http://asozd.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=96700088-2)

Draft of Law “On regulatory legal acts in the Russian Federation” (initiative bill), Moscow: (prepared by Institute of Legislation and Comparative Law at the Government of the Russian Federation), 2013. [www.consultant.ru](http://www.consultant.ru)

Draft law “On Regulatory Legal Acts in the Russian Federation” (prepared by the Ministry of Justice of Russia), 2014. [www.consultant.ru](http://www.consultant.ru)

Federal Arbitration Court of the Moscow District: KA-A40/8197-08/2008.

Federal Arbitration Court of the West-Siberia District: F04-1836/2007(32977-A27-42).

Federal Arbitration Court of the West-Siberia District: F04-3146/2007(35046-A70-29).

Federal Arbitration Court of the North-Caucasian District: A53-12417/2008-S5-14/2009.

---

# THE PREVENTIVE MEASURES OF COERCION IN RUSSIAN TAX LEGISLATION AND LAWMAKING

*Ekaterina Efremova*<sup>1</sup>

## **Abstract:**

The purpose of this article is to determine the necessity to develop preventive tax enforcement measures, lacking in the contemporary Russian tax legislation. The views presented in the scientific literature on administrative, financial and tax law related to the issue have been analyzed, the hypothesis of an erroneous attribution of organisational preventive measures, as well as the ones which are the part of tax surveillance, to tax enforcement measures and the lack of tax coercion preventive measures at the moment has been expressed. Basing on the systematic and analytical approaches, the author has formulated proposals to supplement the existing tax legislation with the norms foreseeing that tax authorities will enact preventive tax enforcement measures in the form of issuing an order to the taxpayer to refuse to commit or continue a tax offense.

## **Key words**

Tax coercion, preventive measures of coercion, commission for the tax base legalisation.

**JEL classification:** K 34

## **1 Introduction**

The article sets the objective to identify preventive measures within the frame of tax coercion by analyzing the existing views in the scientific literature relating to such measures. The theoretical foundation of the research comprises the publications by Sattarova, N.: *Coercion in financial law*, 2006; Kinsburskaya, V.: *Responsibility for the violation of fiscal legislation*, 2013; Razgildyaeva, M.: *Legal persuasion and coercion: theoretical grounds (exemplified by financial legislation)*”, 2012. The paper develops a hypothesis about the absence of direct norms covering preventive coercive measures in the current Tax Code of the Russian Federation.

---

<sup>1</sup> Associate professor of the Commercial, Entrepreneurial and Financial law department, Law Institute of Siberian Federal University, candidate of law. Ph.D. candidate of St.Petersburg State University, the chair of state law. The author of two textbooks on tax and financial law, as well as eleven articles published in peer-reviewed journals. Area of expertise – coercion in tax law. E-mail: Efremova1977@list.ru



## **2 Preventive Measures of Coercion in the System of Enforcement**

### **2.1 The Concept of Preventive Measures**

The concept of preventive measures within the frame of legal coercion has been first explained in the works on administrative law but still remains arguable. Among the grounds for applying administrative preventive measures specialists name the threat of committing an offense, undesirable phenomena which may cause harm to an individual, society or state (epidemic, natural disasters, production accidents, fires).

In the view of some authors (Kurakin, Kostennikov, Myishlyaev, 2015: 913-920) preventive measures are operational in nature. The aim of their application is the identification and elimination of breaches of law, prevention of the threat of ensuing of possible harmful, dangerous and, not unusually, heavy consequences (e.g. the imposition of quarantine), prevention of offenses (checking of documents, search), minimization of the harm that may result from unlawful actions.

However, it is worth saying that not all the specialists agree with the coercive nature of such measures. P.I. Kononov, for example, brands preventive measures as legal restrictions (Kononov, 1998: 27-28). A.V. Malko does not distinguish measures of prevention as a separate form of state coercion (Malko, 1999: 197). M.S. Studenikina noted that “only administrative penalties and preventive measures whose application is justified by the presence of an offence can be considered measures of administrative coercion while numerous measures of administrative-preventive character should not be included into the general classification of administrative coercion measures” (Studenikina, 1968). M. B. Razgulyaeva states that “despite a long-standing period of administrative preventive measures existing in the system of legal coercion, they have not been given a refutable rationale for belonging to the institute of legal coercion”. The author also considers that the institute of administrative-preventive measure is artificially involved in the structure of legal coercion (Razgulyaeva, 2012: 179).

### **2.2 Discussion on Preventive Measures of Coercion in Tax Law**

Various views regarding preventive measures of coercion are expressed within the branches of financial and tax law. Yu. Yu. Kolesnichenko thinks that “state (tax) authorities undertake certain activities aimed at the prevention of wrongs in this sphere (provide written explanations regarding the application of the tax and levy legislation, communicate the relevant information to the taxpayers at their requests). However, such measures are not coercive and are not connected with a concrete offense, so it would hardly be reasonable to treat them as measures of administrative coercion” (Kolesnichenko, 2002). M. B. Razgulyaeva expresses an opinion that the reason for legal coercion is committing an offense, i.e. an action or an omission resulting from the failure to fulfill a legal obligation by the subject of the legal relations and a form of which an omission is considered to be (Razgulyaeva, 2012: 186).

N. A. Sattarova, conversely, considers that the current legislation (article 7 of the “Tax Authorities Act” of the Tax Code of the Russian Federation) within the frame of tax relations allows to identify measures having precautionary effect on the taxpayers. Such measures may also include “the inspection of monetary instruments, accounting records, reports on the payments to the revenue, certificates, estimates by tax authorities” (Sattarova, 2006: 211).

V. A. Kinsburskaya has concluded that within the system of tax coercion there are some preventive enforcement measures “aimed not only at the prevention of violations of tax and levy legislation, but also at establishing conditions that will allow tax bodies to exercise their supervising functions effectively and easily” (Kinsburskaya, 2013). To such measures the author refers the following: “interrogation of witnesses, examination of premises and areas, inventory of property, discovery of documents and things, seizure of documents and things; obliging a taxable person to remedy the identified violations of the tax and levy legislation and control of compliance with the requirement” (Kinsburskaya, 2013).

Assessing the said measures, D. U. Charukhin also notes that, on the one hand, “they bear preventive load encouraging a taxpayer, under the threat of constant control by the tax authorities, to follow tax laws, calculate the taxes and other payments properly and pay them fully and duly to the relevant state budget. On the other hand, such measures are used by the tax authorities as “the instruments of supervisory functions” helping to identify tax violations and crimes” (Charukhin, 2005: 107).

The preventive measures which are actually provided by the current tax legislation are a part of fiscal control and there are no sufficient grounds to agree on their belonging to the institute of coercion.

Undoubtedly, from the perspective of government management and social benefit preventive measures are the most preferable since both for the state and society, as well as for the coerced entity, it is better to prevent an offense. However, in the current tax legislation there are still no legal mechanisms to prevent concrete individuals from breaching their tax liabilities. The actions of tax authorities set out in the tax legislation and used by some authors as examples of preventive measures in tax law, such as inspection of premises, examination of documents, etc. identify, as a rule, already committed wrongful acts and, thus, cannot impede the commission of a crime.

### **3 The Perspective of Preventive Measures of Coercion in Tax Law**

#### **3.1 Commissions on Tax Base Legalisation – a Special Form of Relationships Between a Taxpayer and a Tax Body**

Along with the absence of direct norms providing for coercive measures of prevention in the current legislation, a specific form of relationships between a taxpayer and a tax body has been applied within the scope of work of commissions on tax base legalisation,

performing under authority of the letter from Russia Federal Tax Service no. AC-4-2/12722 of March 21, 2013.<sup>2</sup>

The modus operandi of the commissions stipulates that in accordance with the analysis of the tax base and tax payment data (VAT, profit tax, enterprises property tax, land tax, taxes paid within the frame of special tax regimes, personal income tax) taxpayers might be issued with a letter of information.

The letter displayed actual violations, discrepancies and other issues identified during the preparation for the commission meeting to which the taxpayer was also invited. The taxpayer was at the same time advised to clarify all the tax liabilities in accordance with article 81 of the Tax Code of the Russian Federation.

Following the revision the commission made recommendations with a due date to eliminate all the violations committed at the stage of tax base formation.

Failing to appear at the commission without a reasonable excuse, the taxpayers faced penalties imposed in accordance with article 19.4 of the Russian Federation Administrative Offenses Code.

The results of the commission's work aimed at the legalisation of the tax base have received mixed reviews. Following the data published at the website of the Federal Tax Service of Russia it can be seen that, for example, in Krasnoyarsk, Leningrad and Tver regions in 2014 – 2015 certain advances in tax revenues were detected which were partially provided by the improved performance of the commission on tax base legalisations. In Kostroma region about 25% of loss-making organizations stopped claiming damages in the subsequent reporting periods having reduced 100 mln roubles deficit and recorded a profit of 160 mln roubles. In Krasnoyarsk region over a nine-month period 4020,7 thousand roubles deficit has been reduced, 8,35 thousand roubles of uniform tax on imputed income and 51,4 thousand roubles of the tax imposed upon those taxpayers who chose income as the object of taxation, were paid into the budget ([https://www.nalog.ru/rn77/news/activities\\_fts/5282972/](https://www.nalog.ru/rn77/news/activities_fts/5282972/)).

Some practising lawyers criticize the work of the commissions. A. V. Bryizgalin, for example, supposes that “it is a violation of law to summon taxpayers to such commissions as, practically, tax authorities “bother” the taxpayer whenever they want either because they have some “suspicions” or being under the threat of being held accountable and imposed a fine in accordance with article 19.4 of the Russian Federation Administrative Offenses Code” (<http://www.nalog-briz.ru/2013/05/27032013-03-9172013.html#more>).

D.V. Sokolov believes that “special tax commissions, despite all the declared good reasons, actually promote business tax terrorism. It is the author's opinion that in the modern world where tax code and administrative provisions for the public authorities exist, there

---

<sup>2</sup> Since March 21, 2017 commissions on tax base legalisation deal with the issues of proper tax base formation for calculating personal income tax and insurance premium (The letter of FTS of July 25, 2017 no. ED-4-15/14490@ “About the work of the commission on tax base and insurance premium base legalisation”)

is no necessity in commissions, dedicated presences or extraordinary meetings whatever goals they pursue or whatever disciplinary methods they use (Sokolov, 2017: 43-51).

### **3.2 The order to the taxpayer to specify tax liabilities independently as a measure of preventive tax coercion**

The critical remarks against the work of the commissions on the tax base legalisation stated above are well justified. The interference of the tax authorities with the issues of tax base formation and the determination of certain taxpayers liabilities is actually possible only in cases and forms directly envisaged by law. At the same time, the working experience of the commission on tax base legalisation can be used in the development of legal regulation of the relations between tax bodies and taxpayers in order to prevent tax offenses.

The following reasons can be brought in justification of this opinion:

1. As it is known, “tax law is virtually the only branch in the Russian legal system where the majority of offences and abuses of rights is committed negligently, i.e. because of ignorance and misunderstanding of tax provisions, inability to interpret and apply them properly” (Bolotov, Ivanchenko, 2013: 312-314).

In this regard deterring faithful taxpayers from pertaining violations and giving them a real possibility to remedy existing mistakes cannot be considered as an abuse of their rights and interests.

2. In recent years the work of tax authorities has been widely supplemented with informational resources containing detailed information about taxpayers’ transactions connected with tax base formation. This results in the appearance of a previously missing possibility to prevent tax wrongs or to curtail them at an early stage when it is easy to restore the balance of public and private interests. In the perspective, taking into consideration the experience of European countries<sup>3</sup>, a move towards full electronic administration in the sphere of taxes and levies is deemed.
3. Should tax authorities get any information in relation to certain taxpayers committing actions or omissions that might result in tax offenses, the state is obliged to provide the implementation of the relevant measures to prevent such illegal acts as well as to benefit both social interests and taxpayers’ concerns.
4. According to the general theory of law, the reasons for applying measures of legal coercion can be offenses or other legal anomalies<sup>4</sup> which might also include

<sup>3</sup> Krzysztof Teszner E-tax administration in the contemporary Polish system of financial law, <https://www.law.muni.cz/sborniky/system-of-financial-law/system-ot-tax-law.pdf>

<sup>4</sup> Anomaly (anomalia – greek.) – a deviation from the norm, from common law, irregularity. Legal anomaly is a deviation from legal order arising out of both guilty and innocent behaviour. In the scientific circulation this term has been introduced by V.D. Ardashkin.

the stage of preparation for a tax offense. The Tax Code does not consider a corresponding behaviour for a tax body in such a situation. Formally, a tax body is only entitled to use the information it has about the signs of a tax offense commission when conducting monitoring activities. It appears that in order to meet the objectives of moving towards a new “partner” model of fiscal management in the Russian Federation, it is worth adopting provisions regulating grounds and procedures of the interaction between tax bodies and taxpayers in the situation when the balance of interests can be kept without any control activities or tax sanctions.

#### 4 Conclusion

1. The hypothesis about the erroneous attribution of preventive measures, as well as the ones which are a part of tax surveillance, to tax enforcement measures and the lack of tax coercion preventive measures in the Russian legislation has been confirmed.
2. Basing on the research, the author confirms the necessity to establish a version of preventive measures of coercion in tax legislation. It is advised to consider the working experience of the commission on tax base legalisation which, among other forms of work, offers to send proposals to a taxpayer to specify the tax base and tax liabilities independently.
3. The author recommends supplementing article 31 of the Tax Code of the Russian Federation (the rights of the tax bodies) with the following competencies: “When identifying facts that might result in tax offenses, a tax body sends to the taxpayer a motivated order (warning) to check the identified facts, specify tax base and identify tax liabilities by themselves.” Application of such a norm to a particular taxpayer can be considered as a preventive measure of tax coercion.

#### References

- Bolotova, A., Ivanchenko, L.: Повышение уровня налоговой культуры как основа предупреждения налоговой преступности (The improvement of the tax culture level as the foundation of the tax crime prevention), *Актуальные проблемы авиации и космонавтики* (Actual issues of aviation and cosmonautics) no. 2(9) (2013).
- Kinsburgskaya, V.: Ответственность за нарушение законодательства о налогах и сборах (Financial responsibility for violation of legislation on taxes and fees), М.: Юстицинформ (Moscow: Yustitsinform Publ.), 2013.

- Kolesnichenko, U.: Меры административного принуждения за нарушение законодательства о налогах и сборах – классификация и условия применения (Measures of administrative coercion for violation of tax and levy legislation – classification and conditions of use), Журнал российского права (Journal of Russian Law) no. 7 (2002).
- Копонов, Р.: Законодательство об административном принуждении: проблемы кодификации (Legislation about administrative coercion: problems of codification), Журнал российского права (Journal of Russian Law) no. 8 (1998).
- Krzysztof Teszner: E-tax administration in the contemporary Polish system of financial law, Brno: System of financial law System of tax law Conference proceedings, 2015. <https://www.law.muni.cz/sborniky/system-of-financial-law/system-ot-tax-law.pdf>
- Kurakin, A., Kostennikov, M., Myishlyayev, N.: К вопросу о классификации административно-профилактических мер (Revisiting the classification of administrative preventive measures), Административное и муниципальное право (Administrative and municipal law) no. 9 (2015).
- Malko, A.: Теория государства и права в вопросах и ответах (Theory of state and law in questions and answers), 3d ed., М.: Юрист (Moscow: Jurist), 1999.
- Razgulyaeva, M., Khimicheva, N. (eds.): Правовое убеждение и принуждение: теоретические основы (на примере финансового законодательства) (Legal persuasion and coercion: theoretical base (exemplified by fiscal legislation)), М.: Юрлитинформ (Moscow: Yurlitinform Publ.), 2012.
- Sattarova, N., Kucherov, I. (eds.): Принуждение в финансовом праве (Coercion in financial law), М.: Юрлитинформ (Moscow: Yurlitinform Publ.), 2006.
- Sokolov, D.: Исторический и правовой генезис межведомственных налоговых комиссий (Historical and legal genesis of the inter-departmental tax commissions), Налоговед (Nalogoved) no. 17 (2017).
- Studenikina, M.: Соотношение административного принуждения и административной ответственности (The correlation of administrative coercion and administrative liability), Советское государство и право (Soviet State and Law) no. 10 (1968).

---

# LAWMAKING IN THE FIELD OF TAX CONSOLIDATION: IS IT THE MANIFESTATION OF TAX SOVEREIGNTY OR A THREAT TO NATIONAL FISCAL SECURITY?

*Irina Glazunova<sup>1</sup>, Kirill Maslov<sup>2</sup>*

## **Abstract**

This contribution deals with the issues of tax consolidation in context of tax sovereignty and fiscal security theory. The main aim of the contribution is to confirm or disprove the hypothesis that inclusion of tax consolidation rules in the national legislation, being the sign of tax sovereignty, may threaten the national fiscal security. The methodology of the study includes general scientific methods (analysis, synthesis, induction, deduction, comparison, description) as well as particular legal academic methods (interpretation of legal acts, formal legal method).

The main results of the research are as follows. The emergence of the institution of tax consolidation is a natural consequence of the development of the world economy. Most developed countries in the world actively include elements of consolidation into taxation systems, successfully providing a balance between the positive and negative consequences of its implementation. The practice of applying the institution of consolidated groups of taxpayers confirms the existence of a significant number of advantages and disadvantages of tax consolidation in Russia.

The authors conclude that the inclusion of irrational tax consolidation rules in national legislation may threaten the national fiscal security when it is not supported by the results of economic analysis and doesn't comply with legal technique. The rules of tax consolidation cease to be a manifestation of tax sovereignty and become a threat to national fiscal security when they are accompanied by the right of the constituent entities (or other territorial units) to differentiate the tax rate for the participants of consolidated groups of taxpayers, and the falling incomes of the constituent entities with a low level of budgetary capacity not compensated by inter-budgetary transfers.

## **Key words**

Tax consolidation; consolidated group of taxpayers; fiscal security; tax sovereignty; threats; corporate profit tax; VAT.

## **JEL Classification:** K340

<sup>1</sup> Associate professor for Financial Law, Department of Constitutional and Municipal Law, Faculty of Law, Dostoevsky Omsk State University, Russian Federation. The author specializes in tax law and budget law. She is the author of 5 books and more than 50 reviewed articles in Russian legal journals. She is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. Contact e-mail: irine.glazunovoi@yandex.ru.

<sup>2</sup> Associate professor for Financial Law, Department of Constitutional and Municipal Law, Faculty of Law, Dostoevsky Omsk State University, Russian Federation. The author specializes in tax law and tax administration. He is the author of 5 books and more than 40 reviewed articles in Russian legal journals. Contact e-mail: maslov.omsu@gmail.com.

## 1 Introduction

The main aim of the contribution is to confirm or disprove the hypothesis that inclusion of tax consolidation rules in the national legislation, being the sign of tax sovereignty, may threaten the national fiscal security.

The main research question is when and why the rules of tax consolidation cease to be a manifestation of tax sovereignty and become a threat to national fiscal security.

The answer to this question will be given using general scientific methods (analysis, synthesis, induction, deduction, comparison, description) as well as particular legal academic methods (interpretation of legal acts, formal legal method).

The legal issues of tax consolidation were in the focus of researches of: A. Ting (*The Taxation of Corporate Groups Under Consolidation: An International Comparison*. Cambridge, 2013), W. Schön, U. Schreiber, C. Spengel (*A Common Consolidated Corporate Tax Base for Europe*. Berlin, 2008); M. Gammie (*Achieving a Common Consolidated Corporate Tax Base in the EU*. Brussels, 2005); D. Friedel (*Intercompany dividends matter more than you might think*, in: *Corporate Taxation*, 2007: 3–10.), A. Takasaki (*Consolidated tax return system*, in: *Shin Nihon Ernst and Young Sney Newsletter*, 2002: 5–6); A. Edstorm (*The new Danish tax regime – Attitudes and opinions of different Swedish interested parties*, in: *Accounting and Finance*, 1999, 2016).

The issues of tax sovereignty were researched by: S. Douma (*Optimization of Tax Sovereignty and Free Movement*, Amsterdam, 2011), S. Jansen (*Fiscal Sovereignty of the Member States in an Internal Market: Past and Future*, Amsterdam, 2011), I. Kucherov (*Components of Financial Security and Its Legal Provision*, Moscow, 2017), A. Pogorletskiy (*Principles of International Taxation and International Tax Planning*, Saint-Petersburg, 2005), S. Ovsyannikov (*Constitutional and Legal Basis of Tax Relations*, Saint-Petersburg, 2001).

The problems of tax consolidation in the context of the theory of tax sovereignty have not been sufficiently researched by lawyers.

The development of the world economic system stimulates the emergence of new forms of management characterized by the enlargement of national and international business, the unification of production, financial and legal resources of individual enterprises into a single system in order to optimize their functioning and reduce the risks arising within the framework of entrepreneurial activity. Concerns and holdings are becoming increasingly widespread, and economic integration is proceeding along the path of preserving legal independence for individual participants, with almost complete establishment of their interdependence in the economic sphere.

These trends are reflected in the development of tax systems of various states. It is expressed, among other things, in the formation of institutions of consolidated groups



of taxpayers, in particular for profit tax purposes. Tax consolidation allows to optimize the tax burden on participants in large business structures and simplify tax administration.

Reforms carried out in this area deserve close attention and require an assessment of their effectiveness.

## **2 Formation of the Institute of Consolidated Groups of Taxpayers in World and Russian Practice**

The concept of a “consolidated taxpayer” originated in the early 20th century in Austria (Chaykovskaya, 2010: 56). In this case, the reason for combining the tax base of individual entities was the need to optimize tax procedures. Legislative execution of tax consolidation in Austria took place much later and was carried out on the basis of judicial practice.

The purpose of combining the tax base of a number of companies in the US and Spain was the opposition to the fragmentation of business and the stabilization of tax revenue to the state budget (Bannova, 2011: 39). The Institute of Consolidated Groups of Taxpayers (hereinafter referred to as CGT) in these states had a more formal legal character.

Special rules for taxation of group “Organschaft” companies were introduced in 1920 in Germany that gave rise to the establishment of full-fledged legal mode of consolidate taxation. This mode was enshrined in France in the 1980s, in Australia and Japan – in 2002 (Ikonnikova, 2009: 5).

Nowadays the tax consolidation institute is present in the taxation systems of most countries of the European Union, where the basis of consolidated taxation was the Council Directive of 23.07.1990 “On the general taxation system applied to the parent and subsidiaries in the case of their location in different EU Member States “ and the 7th Directive of the Council of the EU of 13.07.1983, which regulates the procedure for reporting by interdependent enterprises.

In March, 2011 the European Commission launched a proposal for a Common Consolidated Corporate Tax Base and after long discussions in October, 2016 the Commission proposed to re-launch CCCTB. This taxation system will be mandatory for large multinational companies with global revenues exceeding EUR 750 million. This proposal is also being discussed a lot in European scientific contributions (Gajewski, 2017: 371-372; Kappel, 2017: 394-401).

The idea of introducing the legal institute of the CGT in Russia was first discussed comprehensively in the drafting of the Tax Code of the Russian Federation, but was rejected because of insufficient level of development and lack of experience and resources for Russian tax authorities that allow tax interaction with major subjects of tax legal relations. The immediate impact of the CGT Institute in Russia is related to the

enactment of Act no. 321-FZ/2011 On Amending Part One and Two of the Tax Code of the Russian Federation in Connection with the Creation of a Consolidated Group of Taxpayers. So, from January 1, 2012, Part 1 of the Tax Code of the Russian Federation has been expanded with Chapter 3.1 devoted to the procedure of the establishment and basics of the operation of CGTs.

The main reason for the establishment of tax consolidation in 2011-2012 was the dynamic growth of the Russian economy and the associated education and activities of integrated business groups. Like all taxpayers, having interests opposite to the state's tax policy, large holdings have great resources for countering it. Using the imperfection of the Russian legislation, large taxpayers organized the transfer of the profit center to jurisdictions with reduced taxation, which was facilitated by the Art. 284 of the RF Tax Code providing the possibility of the constituent entities of the Russian Federation to reduce the rate of income tax in the part coming to the regional budget. The result was the emergence of unscrupulous tax competition between subjects of the Russian Federation, manifested in the struggle for profit centers of large taxpayers in exchange for various benefits, as well as an unjust disproportion in the amount of tax revenues of the budgets of the subjects of the Russian Federation.

The years of 2000-2010 were characterized by a sharp increase in the number of large corporations and holdings in Russia (Evnevich, 2013: 198). The preventive, suppressive and punitive potentials of the tax legislation in the specified conditions proved ineffective, and it became necessary to find and legislate more flexible ways of influencing the state on the activities of large taxpayers, which consist in creating for the latter conditions reducing interest in tax manipulation.

The introduction of the CGT institute in Russia is also caused by the need to shift the bulk of taxation to regions where the concentration of production capacities reaches a maximum, to transition to international financial reporting standards, to reduce the tax burden on large business, and to improve tax control over transfer pricing.

### **3 The Essence of the Institution of Consolidated Groups of Taxpayers**

There is no unity of opinions in the scientific community on the issue of the number of existing models of consolidated taxation (Bannova, 2011: 39; Shamonin, 2015: 195; Ermakova, 2015: 94). In our opinion, the most justified way is the identification of four basic models of tax consolidation.

The first of these involves attributing all losses and profits to the parent company, when the rest of the corporation is treated as its internal units. The given model has developed in Germany, and also in Austria where the participant of group of tax bearers before the introduction into it is obliged to reduce the profit on the losses received by it for acquisition of the right to read to itself losses of group (Gerdes, 2008: 71).

The second model developed in the UK and Singapore, where the group's exemption system is used, which allows to transfer losses of one member of the taxpayer group to another.

The third, most common model involves a separate calculation of the profits of each group member, followed by the consolidation of the amounts received at the level of groups of companies, after which the parent company calculates and pays the tax on behalf of the entire group.

Finally, the last, fourth, model was established in Holland. Participants in the consolidated group can account for their own losses and profits after using the group's losses.

The model of consolidation of taxpayers in Russia combines the signs of the third and fourth models.

The concept of "tax consolidation" in the established world practice, as a rule, implies "... a regime established in the legislation on taxes and fees in a number of countries where a group of companies or other enterprises (trusts or partnerships) with absolute or preferential participation of some in others is perceived as one economic unit for taxation purposes" (Smirnov, 2010: 34). Such an understanding of tax consolidation was established in the US and France. At the same time, the CGT should be distinguished from a holding or corporation that can act as elements of the CGT, but must be identified with it (Bannova, Grinkevich, 2013: 91).

According to the RF Tax Code, the consolidated group of taxpayers in Russia is a voluntary association of taxpayers of corporate income tax on the basis of an agreement on the establishment of a consolidated group of taxpayers with a view to calculating and paying corporate profit tax, taking into account the aggregate financial result of economic activities of these taxpayers.

It is noteworthy that the CGT in Russia is a non-legal entity and is formed by legal entities on a voluntary basis. The legal basis for consolidation is the agreement on the creation of the CGT, while the purpose of the association is the acquisition of a special regime for calculating and paying corporate income tax. The scientific literature also indicates that the purpose of formation of the group is to reduce the tax burden, which not only allows businesses to minimize their costs, but also has a stimulating effect to the implementation of investment projects, which are at the initial stage and may be a loss (Ryumina, 2013: 145).

The legislation on taxes and duties of the Russian Federation establishes the requirements for organizations that are members of the CGT (Article 25.2 of the RF Tax Code). Thus, not every legal entity may become a party to the agreement on the establishment of a consolidated group of taxpayers and, respectively, participant of the group (Efimova, 2016: 17).

#### **4 Tax Consolidation Rules as a Manifestation of Tax Sovereignty**

Being a kind of state sovereignty, tax sovereignty has all of the attributes applied to the field of taxation. Such attributes, as explained by the Constitutional Court of the Russian Federation, include “the supremacy, independence and autonomy of the state power, the fullness of the legislative, executive and judicial power in its territory and independence in international communication” (Constitutional Court: 10-P/2000).

In the context of tax sovereignty, supremacy refers to the ability of public authorities to impose and collect (including through the use of legal coercion) taxes and duties on the entire territory of the country in respect of any economically related collectives and individuals, regardless of their will. The right of the state to determine independently the indicators of assessment of the taxpayer’s financial and economic activities necessary for tax purposes is an integral element of state sovereignty (Constitutional Court: 1047-O-O/2009).

The discretion of the legislative authorities to establish the elements of taxation is implemented *inter alia* through the legislative expression of the possible consolidation of taxpayers, the tax base and tax reporting. That is, the legislative expression of the rules of tax consolidation is a direct manifestation of the tax sovereignty of the state.

#### **5 Positive and Negative Aspects of the Application of Legislation on Consolidated Groups of Taxpayers**

The significance of tax sovereignty lies in the fact that its existence allows the state to carry out an independent tax policy that allows it to meet its own needs of the population living in the territory of the state. It should be noted that the unrestricted exercise of tax sovereignty may itself pose a threat to the national fiscal security in the case of decisions taken by public authorities, when such decisions do not meet the goals of the economic development of the state.

Tax sovereignty may be restricted (but only by national courts) to the extent that legislative decisions in the tax area begin to pose a threat to the national fiscal security. Thus, according to Art. 2 (4) of the General Part of the Tax Code of the Republic of Belarus it is forbidden to establish taxes, duties and privileges for their payment which cause damage to the national security of the Republic of Belarus, its territorial integrity, political and economic stability (Pilipenko, 2006: 21-30).

Numerous works of Russian and foreign researchers have been devoted to the study of questions of efficiency and economic feasibility of the creation of CGT. At the same time, the majority of foreign authors note the positive influence of the Institute on the economic activities of the group members, the increase in the indices of this activity of the organizations included in the group in comparison with the situation that existed

before the creation of the CGT (Friedel, 2007: 3-10; Takasaki, 2002: 5-6; Yujiro, 2005: 23-29; Edstorm, 1999: 3).

## 5.1 Positive Aspects

The practice of applying the institution of consolidated taxation on corporate profit tax from 2012 to 2017 allows us to judge the advantages and disadvantages of legal regulation of the establishment and activities of CGT in Russia.

The main advantages for participants of CGT are in the order of determining the tax base for calculating the corporate income tax. The participants of the CGT are also interested in the potential reduction of tax risks when making transactions within the group; there is no need to prove compliance with market prices of transactions made by organizations between themselves within the group.

The interest of the state in the development of tax consolidation is equally important. It leads to a decrease in the opportunities for large taxpayers to use schemes to evade taxes on profits using transfer pricing. “The use of prices that do not correspond to the market level in transactions between participants of one CGT does not in fact create a threat of budget losses due to income tax and distortions in the distribution of the tax base between regions, since undervaluation of income (overstatement of costs) by one party to the transaction entails a simultaneous understatement of costs (income) from the other party to the transaction in a similar amount taken into account when calculating a single tax base” (Babenko, 2015: 5).

The proportion of profit attributable to each participant of the CGT and its separate subdivision is calculated as the average arithmetic value of the specific weight of the average number of employees (labor costs) and the specific weight of the residual value of the depreciable property of that participant or a separate subdivision, respectively, in the average number of employees (costs of payment labor) and the residual value of depreciable property in general according to CGT (Tax Code of the Russian Federation, Art. 288), whereby “... payment of the regional part of the income tax to the budgets of the regions in which the income was actually received, and not in the budget of the region in which the registered umbrella organization vertically integrated group of companies” (Shamonin, 2015: 193), as a result of which prerequisites are created for establishing the financial independence of the subjects of the Russian Federation and reducing the dependence of regional budgets on transfers from the federal budget.

The overall procedures of tax administration are realized in respect of the CGT participants. It entails reduction of costs of tax authorities related to collection of corporate profit tax from CGT as well as costs of implementation of tax control.

An opinion is expressed that the consolidation institute stimulates the development of integrated structures, which results in the unification of the tax system, and the

development of competitiveness of interconnected producers in the domestic and international markets (Ryumina, 2013: 141).

The inconvenience of the members of CGT may be related to the potential likelihood of transferring responsibility to them for non-payment of income tax, fines, and penalties if the responsible member of CGT does not fulfill the obligation to make appropriate payments to the budget. In addition, there is the possibility of suspending transactions on the accounts of all participants CGT to ensure execution of the judgment for the recovery of arrears. Bank accounts of all of the participants of CGT may be blocked at the same time, if the decision is made to suspend operations for failure of submitting corporate profit tax report.

In addition, there is actually no ability to use the tax consolidation of the accounting for losses on business start (Vikulov, 2009: 24; Vitvitskaya, 2015: 23; Babenko, 2014: 138). The newly established company, as a rule, suffers losses in the first few years after its creation. However, under the provisions of the Tax Code, taxpayers who had losses before the entry into CGT actually lose their right to use them until they quit their membership.

Some researchers noted that a significant shortcoming of the CGT institute is imposing of almost all tax obligations on the responsible member of CGT (Bannova, 2013: 117). But such opinion is doubtful: the responsible member is usually the most powerful member of the CTG in legal and economic sense.

After the inclusion of CGT institute in the Russian legislation it was noted that the consolidated budget of the Russian Federation lost more than 3 billion roubles of corporate profits tax during three quarters of 2012. According to the deputy head of the Russian Federal Tax Service D. Egorov, it is a little sum for the state, but 40 regions felt positive budget results from the introduction of CGT, and only 10 – 15 RF constituent entities lost part of the budget revenues.

According to the calculations of the Ministry of Finance of Russia, more than 50 regions gained benefits from the introduction of the mechanism of the consolidated group of taxpayers, and more than half of the losses were suffered by Moscow and Khanty-Mansiysk Autonomous District (Babenko, 2014: 136). It is difficult to agree with the principled criticism of the CGT institute by the RF Accounts Chamber. According to the auditors, in 2016 CGT members paid to the consolidated budget half as much profit tax (296 billion roubles) as the same companies listed in 2011; the budget deficit has increased in four regions of the Russian Federation (Republic of Karelia, St. Petersburg, Belgorod region, Kemerovo region) in comparison with 2011 (Yashunskiy, 2018). However, it is obvious that crisis phenomena in recent years in the economy, inevitably leading to a decrease in the tax base, impact on such a significant reduction in tax revenues. The following conclusion of auditors is more significant: corporate profit tax revenues from CGT participants have reduced in half of the regions and have increased in the other

half of the regions over 5 years of functioning of the CGT institute. Moreover, the reduction, as we found out, concerned regions with the highest level of fiscal capacity, donor regions.

Therefore CGT institute essentially solves the most important problem of redistribution of profit share from the regions where the main holding companies are located to the regions where the production facilities of the holdings are actually located.

Meanwhile, since 2014 Russia has established a moratorium on the creation of new CGT and on the inclusion of new participants in the existing CGTs (an exception was made for PJSC Gazprom in 2017).

## 5.2 Negative Aspects

The inconsistency of the effect of CGT on the structure of the regional budgets causes the biggest number of fears. “The aim of fiscal consolidation is the redistribution of income from profit tax at the very region where the profit is created, rather than the region where the parent company is located” (Shuvalova, Yurchenkova, 2014: 372). However, the CGT institute simultaneously leads to the erosion of the share of the tax base of a number of budgets. It results in reduced accuracy of forecasting the volume of income from corporate profit tax. There is no unified approach to the calculation of lost income from profit tax for CGT organizations at the federal and regional level, there is no prediction mechanism of CGT activities results in the coming period in the context of the territories, as well as methods for determining compensation of shortfall in regional budget revenues (Alkaeva, 2016: 122).

The outflow of a significant amount of revenues occurring in the context of the redistribution of tax revenues from the CGT becomes a significant problem for a number of regions. The creation of the CGT, among other things, implies an initial significant reduction in the amount of income tax payable to the respective budgets due to the special procedure for their calculation. Reducing the tax burden on large businesses in the future should contribute to its dynamic development, which means the economic growth, and the profits of organizations will increase as a result, tax payments to regional budgets will also increase. Such mechanisms are effective in a situation when the state can afford long-term legal solutions in a stable economic environment; however, modern Russian realities exclude such situation.

It is necessary to amend the legislation in order to eliminate the above-mentioned contradictions and to ensure a balance between the benefits for taxpayers and the interests of national fiscal security in the process of tax consolidation.

Firstly, it is compensation of revenues lost due to the consolidation in regions with low level of fiscal capacity by the means of inter-budgetary transfers. There are few such regions. Fiscal capacity per capita is higher than the national average in the regions with a

major share of the shortfall in income due to tax consolidation (Moscow, Saint-Petersburg, Krasnoyarsk region, Tyumen region, Khanty-Mansiisk Autonomous District).

Secondly, it is necessary to restrict the rights of RF constituent entities on the reduction of the regional share of the tax rate on the corporate profit tax in relation to the CGT. Reduction of corporate profit tax revenues from CGT is inextricably linked with the application of reduced tax rates established by the laws of the Russian Federation by the participants of CGT. The reduced rate is valid in 27 regions. Due to the use of such benefits by participants of the six CGT corporate profit tax to the budgets of the constituent entities of the Russian Federation over 9 months of 2015 decreased by 25.8 billion roubles (Konovalova, 2016), and all the constituent entities of the Federation received 40 billion roubles less for 2015 and 5.6 billion roubles less for 2016 (Yashunskiy, 2018).

Constitutionalists distinguish the unity of state power as an important feature of sovereignty (Kazannik, Kostiukov, 2016: 7). Unity in the field of taxation means systemic integrity in the forecasting and implementation of tax policy throughout the country. Therefore, we evaluate extremely negatively (from the point of view of maintaining tax sovereignty) the existing rules of consolidation that allow to differentiate the regional tax rate on profits of organizations. Such rules lead to internal migration of the responsible members of the CGT and to the uneven collection of their taxes in the budgets of the RF constituent entities.

## **6 Does the extension of tax consolidation on VAT threaten the national fiscal security?**

International experience shows the effectiveness of the introduction of tax consolidation to calculate and pay not only income tax but also value added tax. We may name the following positive effects of such consolidation: a decrease of formal fragmentation of the business, an increase of the collection of VAT due to the foreclosure on the assets of all members of the group, and reducing the cases of deduction of “incoming” VAT without corresponding payment of “outgoing”, and as a consequence reducing the costs of tax administration (Savseris-Rublskiy, 2010: 43). The consolidation of VAT has a positive impact on the tax security of taxpayers, who can reduce transaction costs for the submission of tax reports, control the accounting of subsidiaries by the parent company, eliminate the cost of paying VAT on intra-group transactions, costs for submission of documents on such transactions to the tax authorities, reduce cash gaps due to the exclusion of VAT refund by one members of group in case when other members pay it (Bannova, Grinkevich, 2013: 91).

At the same time the introduction of tax consolidation, taking into account the procedure of calculation and collection of VAT, will not entail redistribution of tax funds between the budgets of the constituent entities of the Russian Federation, as well as reducing tax revenues of the consolidated budget of the Russian Federation.



Such manifestation of tax sovereignty of the state as fixing of voluntary tax consolidation for the purpose of calculation and payment of the VAT meets interests of the national fiscal security.

## 7 Conclusion

Consolidation of the institution of consolidated groups of taxpayers in tax legislation is a manifestation of the tax sovereignty of the state, a reflection of such attribute of sovereign state power as its supremacy within the country. The institute of CGT essentially solves the most important problem of redistribution of a share of profit from regions where the head holding companies are located to the regions where the production facilities of the holdings are actually located.

The aims of the research were achieved. It is proved that the inclusion of irrational tax consolidation rules in national legislation may threaten the national fiscal security when it is not supported by the results of economic analysis and does not comply with legal technique. The rules of tax consolidation cease to be a manifestation of tax sovereignty and become a threat to national fiscal security when they are accompanied by the right of the constituent entities (or other territorial units) to differentiate the tax rate for the participants of consolidated groups of taxpayers, and the falling incomes of the constituent entities with a low level of budgetary capacity not compensated by inter-budgetary transfers.

## References

- Алкаева, В.: Анализ опыта внедрения системы консолидированного налогообложения за рубежом (The analysis of the experience of implementing the system of consolidated taxation abroad), Вестник университета (Bulletin of the University) no. 7-8 (2016).
- Babenko, D.: Введение института консолидированных групп налогоплательщиков в России: предварительные итоги (Introduction of the institute of consolidated groups of taxpayers in Russia: preliminary results), Финансовый журнал (Financial Journal) no. 2 (2014).
- Babenko, D.: Развитие налогообложения консолидированных групп налогоплательщиков в России (The development of taxation of consolidated taxpayer groups in Russia), Cand. Diss. Moscow, 2015. <http://economy-lib.com/razvitiie-nalogooblozheniya-konsolidirovannyh-grupp-nalogoplatelshchikov-v-rossii>.
- Ваннова, К.: Методика управления рисками системного взаимодействия участников консолидированной группы налогоплательщиков (The method of

- risk management of system interaction of participants of the consolidated group of taxpayers), Вестник Томского государственного университета. Экономика (Bulletin of Tomsk State University. Economy) no. 4 (2013).
- Vannova, K.: Проблемы налогообложения консолидированных групп за рубежом и в России (Problems of taxation of consolidated groups abroad and in Russia), Проблемы учета и финансов (Accounting and finance problems) no. 3 (2011).
- Vannova, K., Grinkevich, L.: Систематизация особенностей объединения в форме консолидированной группы налогоплательщиков (Systematization of features of combining to form a consolidated group of taxpayers), Вестник Волжского университета им. В.Н. Татищева (Bulletin of Volzhsky University named after V.N. Tatishchev) no. 4 (2013).
- Chaykovskaya, L., Gubanova, A.: Создание консолидированного налогоплательщика: последствия и преимущества (Creating a consolidated taxpayer: implications and benefits), Финансовый вестник: финансы, налоги, страхование, бухгалтерский учет (Financial newsletter: finance, taxes, insurance, accounting) no. 6 (2010).
- Edstorm, A.: The new Danish tax regime – Attitudes and opinions of different Swedish interested parties, Accounting and Finance, no. 2016 (1999). <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.10.8096>
- Efimova, N.: Договор о создании консолидированной группы налогоплательщиков с участием банков: особенности субъектного состава (The agreement on the establishment of a consolidated group of taxpayers with the participation of banks: the features of the subject composition, Банковское право (Banking Law) no. 2 (2016).
- Ermakova, E.: Институт консолидированного налогообложения: проблемы согласования интересов налогоплательщиков и бюджетных возможностей (Institute for Consolidated Taxation: Problems of Harmonization of Taxpayers' Interests and Budget Potentials), Экономика. Налоги. Право (Economy. Taxes. Right) no. 3 (2014).
- Eynevich, M., Yaburova, D.: Консолидированная группа налогоплательщиков – шаг к формализации холдингов (Consolidated group of taxpayers – a step towards the formalization of holdings), Проблемы современной экономики (Problems of modern economy) no. 3 (2013).
- Friedel, D.: Intercompany dividends matter more than you might think, Corporate Taxation no. 34 (2007).
- Gajewski, D.: Tax Law Management of Tax Risk Incurred by International Holding Companies, in: Radvan M., Gliniecka J., Sowinski T., Mrkyvka P. The Financial Law

- Towards Challenges of the XXI Century (Conference Proceedings). *Iuridica Editio Scientia*, vol. 570. Brno: Masaryk University, 2017.
- Gerdes, I.: Austrian Group Taxation – three years on, in: *Group Tax Planning. Tax Planning International: Special Report*. Arlington: BNA International, 2008.
- Ikonnikova, O.: Понятие консолидированного налогоплательщика в современном налоговом праве (The concept of a consolidated taxpayer in modern tax law), *Реформы и право (Reforms and law)* no. 4 (2009).
- Kappel, J.: Re-launched CCTB in the Czech Context: a Few Introductory Remarks, in: Radvan M., Gliniecka J., Sowinski T., Mrkyvka P. *The Financial Law Towards Challenges of the XXI Century (Conference Proceedings)*. *Iuridica Editio Scientia*, vol. 570. Brno: Masaryk University, 2017.
- Kazannik, A., Kostyukov, A. (eds.): Конституционное право: Университетский курс (Constitutional law: University course: textbook), vol. 2, М.: Проспект (Moscow: Prospect Publ.), 2016.
- Konovalova, T.: Итоги функционирования консолидированных групп налогоплательщиков в 2012-2015 года на примере Республики Марий Эл (Results of functioning of consolidated groups of taxpayers in 2012-2015 by the example of the Republic of Mari El), *Инновационное развитие экономики (Innovational Development of Economics)* no. 2 (2016).
- Pilipenko, A.: Economic and legal principles of tax system formation (Экономико-правовые начала формирования налоговой системы), *Финансовое право (Financial Law)* no. 10 (2006).
- Ryumina, Y., Vannova, K.: Причины и последствия консолидации налогоплательщиков (Causes and effects of consolidation of taxpayers), *Вестник Томского государственного университета. Экономика (Bulletin of Tomsk State University. Economy)* no. 22 (2013).
- Savseris, S., Rubalskiy, R.: Ускоренный порядок возмещения НДС – ускоренные проблемы (Accelerated VAT refund procedure means accelerated problems), *Налоговед (Nalogoved)* no. 3 (2010).
- Shamonin, N.: Современное состояние института консолидированного налогоплательщика: основные принципы и методология отражения в бухгалтерском учете налога на прибыль (Current state of an institute of consolidated taxpayer: basic principles and methodology of accounting for income taxes), *Вестник Самарского государственного университета (Bulletin of the Samara State University)* no. 2 (2015).
- Shuvalova, E., Yurchenkova, N.: Особенности налогового контроля по консолидированной группе налогоплательщиков (Features of tax control of

- the consolidated group of taxpayers), *Статистика и экономика (Statistics and economics)* no. 6 (2014).
- Smirnov, D.: Актуальные проблемы налогообложения консолидированных групп за рубежом и в России (Relevant problems of taxation of consolidated groups abroad and in Russia), *Международный бухгалтерский учет (International Accounting)* no. 5 (2010).
- Takasaki, A.: Consolidated tax return system, *Shin Nihon Ernst and Young Sney Newsletter* no. 4 (2002).
- Vikulov, K.: Правила налоговой консолидации в России: преимущества и недостатки (Rules of tax consolidation in Russia: advantages and disadvantages), *Налоговая политика и практика (Tax policy and practice)* no. 1 (2009).
- Vitvitskaya, T.: Преимущества и недостатки введения института консолидированных групп налогоплательщиков (The advantages and disadvantages of introducing the institution of consolidated groups of taxpayers). *Социально-экономический и гуманитарный журнал Красноярского ГАУ (The socio-economic and humanitarian journal of Krasnoyarsk SAU)* no. 2 (2015).
- Yashunskiy, G.: Счетная палата раскритиковала механизм консолидированной группы налогоплательщиков (The Accounts Chamber criticized the mechanism of the consolidated group of taxpayers), *Ведомости (Vedomosti)* no. 11.01 (2018). <https://www.vedomosti.ru/economics/articles/2018/01/11/747545-schetnaya-palata-raskritikovala-mehanizm-konsolidirovannih-nalogoplatelshikov>
- Yujiro, O.: Study based on a consolidated tax system adoption survey of companies listed on the Tokyo Stock Exchange, *Kansai University Review of Business and Commerce* no. 7 (2005).

## Legal Acts

Constitutional Court of the Russian Federation: 1047-O-O/2009.

Constitutional Court of the Russian Federation: 10-P/2000.

---

# FISCAL RULE-MAKING IN RUSSIAN INSTITUTES' OF HIGHER EDUCATION PROPERTY TAXATION: ECONOMIC ANALYSIS OF THE EFFECTS OF AMENDMENTS

*Artem Krivosheev<sup>1</sup>, Natal'ya Spiridonova<sup>2</sup>*

## Abstract

The paper analyzes the effects of amendments to laws on taxation of institutes' of higher education property. Fiscal law is both a source of amendments to laws and an instrument of influencing legal rules. Changes in property tax calculations this year have led to a substantial increase in the institutes' tax burden, which may result in their loss of paying capacity and opportunity to create the region's and the country's social, cultural, scientific and innovative environment effectively. The purpose of the research is economic analysis of changes in institutes' of higher education property taxation on the basis of the tested calculation methodology using the example of an institution of Voronezh Region. The paper uses a complex approach to substantiate the proposals on specifying the rules of institutes' taxation using the methods of economic analysis. Practical application of the results of the research allows to assess the institutes' tax burden. The implementation of the legislative proposals may lead to its lesser increase.

## Key words

Taxation of the institutes of higher education; property tax; tax relief; economic analysis of tax burden.

**JEL Classification:** H21, H71, I23, P46

## 1 Introduction

Amendments to tax laws result in certain economic effects. Today assessing the effect of amendments to the Tax Code relating to property tax is of growing importance for institutes of higher education. First, it is explained by the fact that 2018 has seen the introduction of new requirements for real property valuation in accounting for public sector organizations. Secondly, federal tax reliefs connected with movable property

---

<sup>1</sup> A postgraduate of the Department of economic analysis and auditing of Voronezh State University. The author specializes on the issues of analyzing financial stability of state-financed educational institutions. The author has published 13 papers in Russian Citation Index Database and 2 papers in the journals approved by the Higher Attestation Commission. Contact e-mail: [krivosheev@vsu.ru](mailto:krivosheev@vsu.ru)

<sup>2</sup> A Master's student of the Department of economic analysis and auditing of Voronezh State University. The author specializes on the issues of taxation of institutes of higher education, economic analysis and internal financial control. A coauthor of 4 papers in the journals approved by the Higher Attestation Commission and 3 papers in Russian Citation Index Database. Contact e-mail: [spiridonova@vsu.ru](mailto:spiridonova@vsu.ru)

acquired after the January 1, 2013 were abolished. Since institutes of higher education pay property tax on a common basis, any amendments to tax rules lead to an increase or decrease in tax burden. It certainly influences an institute's ability to meet its tax liabilities. The need for assessing and analyzing economic effects of amendments to institutes' of higher education property tax emphasizes the relevance and practical application of this research.

## **2 Overview of researches on institutes' of higher education property taxation**

Currently a series of researches by Russian scholars is widely known. They raise issues relating to taxation of non-profit organizations, calculation of property tax and property tax reliefs. Specialists believe that education needs support because educational institutions are socially important; besides, they pay taxes and thus contribute to the federal budget significantly. A. Zolotareva and T. Malinina specify the role of tax reliefs as a factor proving that the state recognizes the importance for society of non-profit organizations' activities (Zolotareva, Malinina, 2015: 23). At the same time the lack of systemic approach to tax reliefs is pointed at. Researchers analyze taxation abroad (Grigorieva, 2017: 46-140, Heifets, 2017: 23-26, Nurmatov, 2017: 107-110, Poplawski, 2017: 333-338), provide legal cases on misapplication of tax reliefs and consider different instruments of tax burden minimization. Some specialists regard property tax as the most important among all taxes relating to property. A. Ilyina and A. Ilyin pay attention to the fact that an introduction of the cadastral value for real property items may cause a ten-times increase in the tax base for property tax (Ilyina, Ilyin, 2015: 238). I. Zinoviev, Yu. Kolesnikov and V. Melnikov state that cadastral valuation cannot be applied for real property management and address the problem that cadastral valuation and the real value of a land plot do not correspond with each other (Zinoviev, Kolesnikov, Melnikov, 2016: 281-282).

An overview of the researches demonstrates that most scholars pay attention to the specifics of taxation of nonprofit organizations. However, there are no papers which would use practical data to conclude that the efficiency of an institute's of higher education activity may change because of an increase in property tax after the enforcement of the new accounting rules and the abolition of federal tax reliefs relating to movable property.

## **3 Analysis of changes in institutes' of higher education property taxation**

Economic analysis of the effects of amendments to tax laws is relevant for institutes of higher education from a practical standpoint because from January 1, 2018 the tax base for property tax increases significantly. This is connected with the following innovations:

- 1) a change in the application procedure of tax relief relating to movable property acquired after January 1, 2013;
- 2) a change in balance sheet valuation of real property in connection with the application of cadastral value.

To assess and analyze the effects of the changes stated above as well as to substantiate some proposals on minimizing tax burden that specify the effective laws a study has been conducted using the example of an institute of higher education of Voronezh Region, Russia.

### **3.1 Economic effects of the abolition of federal tax relief relating to movable property**

In 2015 chapter 30 of the Tax Code of the Russian Federation, part 2, (hereinafter “Tax Code”) was substantially amended, which led to a reduction in tax burden of economic entities. One of the innovations was the introduction of a tax relief relating to movable property acquired after January 1, 2013. Another method of reducing the tax base for property tax was the opportunity to exclude property relating to the first and second depreciation group from taxable items. However, from January 1, 2018 the application procedure for tax relief relating to movable property acquired after January 1, 2013 has changed. As a result of the amendments to Art. 381.1 of the Tax Code, the tax relief ceases to be federal and is to be applied regionally only if there is an appropriate law.

According to Art. 380 of the Tax Code, property tax rate is set by a region and cannot exceed 2.2%, with property tax rate relating to property previously qualifying for tax relief not exceeding 1.1% in 2018. Thus, if a region refuses to use the tax relief, the expenses of economic entities will increase. Currently some Russian regions preserve this tax relief, for example, Lipetsk Region, Ivanovo Region, Smolensk Region, St. Petersburg and the Chechen Republic. Zero per cent tax rate is set in Moscow Region for 2018-2020. Penza Region, Ryazan Region, Tula Region, Tyumen Region and Jewish Autonomous Region decided to reduce property tax rate.

At Voronezh Region Act no. 62-OZ/2003, on Corporate Property Tax, as amended (hereinafter “Corporate Property Tax Act”) is in force. According to the Art.1 of the Corporate Property Tax Act, the tax rate in general is 2.2%. Since Voronezh Regional Duma has not decided to preserve the tax relief or reduce movable property tax rate, property tax rate in 2018 will be set at 1.1% with further increase to 2.2%. The regional law does not provide for tax relief or a reduction of the tax rate for educational institutions as opposed to:

- entities producing agricultural produce (the tax rate of 1.7%);
- medical organizations providing high-tech assistance (the tax rate of 0.4%);

- entities exempted from property tax such as religious organizations, organizations using property for making folk handicrafts items, health spa establishments, public associations for fire prevention, organizations managing and maintaining infrastructure facilities in industrial parks, and organizations involved in financial leasing of aircrafts.

Thus, since Voronezh Regional Duma has not decided to preserve the tax relief, property tax for an institute of higher education will increase from zero to 2.6 million rubles over nine months of the year 2017.

That is why the Council of Rectors of Voronezh Region Institutes of Higher Education initiated a proposal and submitted it to Voronezh Region government. The proposal includes amendments to Art. 2.1 of the Corporate Property Tax Act in relation to tax relief. It provides for tax exemptions for Voronezh Region institutes of higher education relating to movable property recorded as tangible fixed assets from January 1, 2013.

### **3.2 Economic effects of a change in balance sheet valuation of real property in connection with the application of cadastral value**

A change in balance sheet valuation of real property in connection with the application of cadastral value is the result of the enforcement of the Order no. 257n/2016, Federal Accounting Standard for public sector organizations “Tangible Fixed Assets” (hereinafter “Tangible Fixed Assets Standard”). The tax base for property tax (its depreciated value), which under the new accounting procedure in accordance with the standard is equivalent to cadastral value from January 1, 2018, is calculated to compare it with the tax return figures on property tax over a 9-month period as if the Tangible Fixed Assets Standard was in force from January 1, 2017.

To calculate the change in the tax base the following indicators were used:

- cadastral value of property items according to the Federal Service for State Registration, Cadaster and Cartography;
- depreciation of property items calculated according to the Tangible Fixed Assets Standard;
- tax base according to the tax return as of October 1, 2017.

One should take into account some specifics of the methodology of analysis of economic effects of a change in balance sheet valuation of real property. For example, according to para. 58 of the Tangible Fixed Assets Standard, when the standard is applied for the first time public (municipal) property items meeting the requirements for tangible fixed assets items are recorded on balance sheet accounts at their cadastral value, which is considered to be their balance sheet value.



Cadastral value of an institute's of higher education property as of January 1, 2017 consists of the value of property items according to the Federal Service for State Registration, Cadaster and Cartography and the balance sheet value of the items whose cadastral value has not been calculated yet. Under para. 59 of the Tangible Fixed Assets Standard, if cadastral value of a property item is not available as of the date of the first application of the Standard, the organization records this item at its balance sheet value until the cadastral value of the item is calculated.

According to the Art. 375 of the Tax Code, in calculating the tax base as the yearly average taxable property value such property is recorded at its depreciated value set in accordance with the organization's accounting policy. So the tax base also includes depreciation amount. That is why in assessing depreciation, the provisions of para. 39 (3) of the Tangible Fixed Assets Standard should be considered. They state that tangible fixed assets items having the value of up to and including 10,000 rubles are not depreciated except for library collection items. The depreciation amount as of February 1, 2017 should be increased by the value of property whose cadastral value ranges from 10,000 to 100,000 rubles because under para. 39 (5) of the Tangible Fixed Assets Standard such items are depreciated at the rate of 100% of the initial value after they are put into operation. The total depreciation amount for the period from January 1, 2017 to October 1, 2017 is calculated at an average per cent rate to exclude the depreciation amount as of the beginning of 2017. To make the calculations compatible with the tax return figures the tax base for property tax includes depreciation value of the institute's movable property recorded as tangible fixed assets before January 1, 2013.

Thus, the calculations show an increase of 29.5 million rubles in property tax. This increase is substantial for the institute of higher education because the tax burden will increase:

- on property tax of an institute of higher education (excluding the value of the property belonging to the institute's branch) by over 2.5 times;
- on tax on property located in Voronezh Region – by over 2.5 times;
- on tax on property located in Lipetsk Region – by over 30 times.

In connection with the facts stated above a proposal is submitted to Voronezh Region government on the introduction of 50-per cent tax relief on property tax for state educational institutions of Voronezh Region.

Table 1 shows a change in the institute's property tax burden as compared with the tax return figures over nine months of 2017. The change is deemed to be effective from January 1, 2018 and takes into account the proposed tax relief.

Table 1: A change in the institute's property tax burden from January 1, 2018 and with the proposed tax relief

Indicator	Absolute change, mln rubles	
	Without the proposed relief	With the proposed relief
A change in the tax amount after the introduction of balance sheet property valuation at cadastral value	+ 29,5	+ 5,2
A change in the tax amount after the abolition of the federal relief	+ 2,6	0
Total change in the tax amount	+ 32,1	+ 5,2

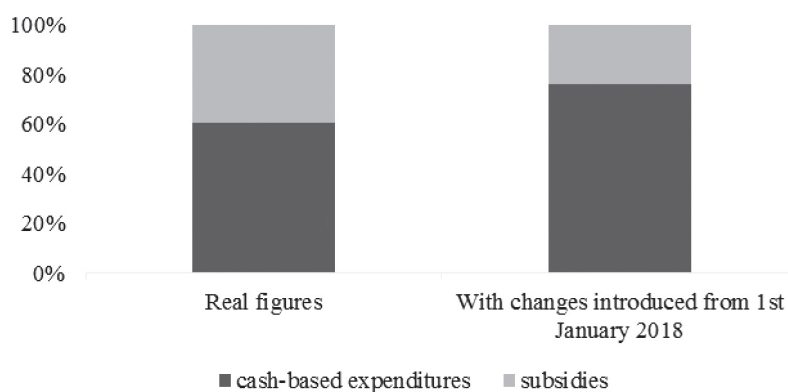
Source: own studies

So, if the tax relief is introduced the tax will increase only by 5.2 million rubles, which is a lesser increase.

However, none of the initiatives has been supported regionally so far because of the lack of the resulting revenues from taxes for the corresponding budgets. The lack of the solution which would satisfy both the local authorities and the educational institutions poses tax and financial risks to the institutes of higher education.

One of the arguments for changing institutes' tax management is that while total subsidies from the Russian Ministry of Education and Science are expected to rise, the year 2017 saw a reduction in subsidies provided to institutes of higher education for maintaining property. Because of these changes the proportion of subsidies in cash-based expenditures on property tax will be reduced, (see: figure 1).

Figure 1: Proportion of the subsidy for maintaining property in cash-based expenditures on property tax over nine months of 2017 and the calculated value with the changes introduced from 1<sup>st</sup> January 2018



Source: own studies

The Ministry of Education and Science shares the institutes' concerns about an increase in tax burden and is planning to subsidize the appropriate expenditures but the institutes have not received the finance yet because the process of gathering the relevant data is still under way.

#### 4 Conclusion

This research substantiates the need for conducting economic analysis of the effects brought about by the amendments of legislation on taxing institutes' of higher education property. The calculations allow to conclude that the institute's tax burden increases substantially. To prevent the negative effects some proposals on tax reliefs for state educational institutions of Voronezh Region were submitted. These proposals are related to paying 50% of property tax and tax exemptions on movable property recorded as tangible fixed assets from January 1, 2013.

The proposals to specify the provisions of regional property tax laws are formulated as proposals of the Council of Rectors of Voronezh Region Institutes of Higher Education and are introduced at the joint meeting of the Council and Voronezh Region Department of Federal Tax Service on December 12, 2017. V. Pereverzeva, the First Deputy Minister of Education and Science, who participated in the meeting by videoconference, contributed significantly to the contents of the proposals on improving the taxation of educational institutions. Their practical application may lead to a lesser increase in educational institutions' tax burden. Local authorities and educational institutions should join their efforts to implement the proposals, especially considering the fact that the amended laws effective from January 1, 2018 might create the conditions resulting in the reduction of the efficiency of the educational institutions which play the key role in social, cultural, scientific and educational system of the region.

#### References

- Grigorieva, L.: *Налогообложение объектов недвижимости в России и за рубежом (Taxation of real property items in Russia and abroad)*, М.: Российская газета (Moscow: Russian Newspaper), 2017.
- Heifets, Ye.: *Современная система земельно-правовых отношений и налогов на недвижимость в Китае (Modern system of land law relations and property taxes in China), Имущественные отношения в Российской Федерации (Property relations in the Russian Federation) no. 5 (2017).*
- Плу́на, А., Плу́н, А.: *Сбалансированное применение нового механизма взимания налога на имущество (Balanced application of the new mechanism of collecting*

property tax), Экономические проблемы регионов и отраслевых комплексов (Economic problems of the regions and industries) no. 2 (2015).

Nurmatov, M.: Плата за землю: сравнительно-правовой анализ законодательства Республики Узбекистан и Российской Федерации (Payment for land: comparative legal analysis of Russian and Uzbek legislation), Журнал зарубежного законодательства и сравнительного правоведения (Journal of foreign legislation and comparative law) no. 3 (2017).

Poplawski, M.: Directions of changes of tax procedures in Poland, The financial law towards challenges of the XXI century no. 580 (2017).

Zinioiev, I., Kolesnikov, Yu., Melnikov, V.: Кадастровая оценка имущества как новый элемент налогообложения (Cadastral valuation of property as a new element in taxation), Финансовое право и управление (Financial law and Management) no. 4 (2016).

Zolotareva, A., Malinina, T.: Подходы к налогообложению некоммерческих организаций (Approaches to taxing nonprofit organizations), Финансы (Finance) no. 9 (2015).

## Legal Acts

Act no. 117-FZ/2000, The Tax Code of the Russian Federation, part 2, as amended.

Act no. 62-OZ/2003, The law of Voronezh Region on Corporate Property Tax, as amended.

Act no. 257n/2016, Ministry of Finance Order, Federal Accounting Standard for public sector organizations “Tangible Fixed Assets”.

---

# FISCAL LAWMAKING MUNICIPALITIES: THE EXPERIENCE OF RUSSIA AND EUROPEAN STATES

*Svetlana Mironova*<sup>1</sup>

## **Abstract**

One of the fundamental principles of the budgetary system of the Russian Federation – the principle of independent budgets – presupposes that in accordance with the legislation of the Russian Federation on taxes and fees, local governments have the right to establish taxes and fees the revenues from which are to be transferred to the corresponding budgets of the budgetary system of the Russian Federation, and other regulatory legal acts (paragraph 4 of Article 31 of the Budget Code of the RF), which determine the fiscal powers of local self-government bodies to fill local budgets. Unlike many European countries, where a wide range of local taxes and fees is presented, and local authorities have sufficient authority to establish and collect them, in Russia the competence of municipal entities in the field of taxation, as well as the introduction of other types of public payments at present is very limited, which is predetermined by the peculiarities of Russian federalism.

## **Key words**

Taxes, fees, self-taxation of citizens, municipalities, law-making, budget, the establishment and introduction of local taxes and fees, elements of taxation.

**JEL Classification:** H71, H72, H77

## **1 Introduction**

European Charter of Local Self-Government sets out the concept of local self-government: “Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population”. This provision is implemented through the establishment of financial foundations of local self-government, including provisions on the right of local governments “to adequate financial resources of their own, of which they may dispose freely within the framework of their powers” and “Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate”.

---

<sup>1</sup> Candidate of juridical sciences, Associate Professor, Department of entrepreneurial and financial law, Volgograd Institute of Management – branch of the RANEP, Gagarina street, 8, Volgograd, 400131, Russia. She is the author of three monographs, a textbook and more than 20 articles in prestigious journals. She specializes in the financial and legal status of municipalities. Contact e-mail: smironova2017@gmail.com

In the Constitutions of states, the right of local self-government bodies to financial independence is assigned. For example, in order to understand basic assumptions that have been adopted during works on the new codification of tax law in the context of local government tax authorities, it should be indicated that pursuant to Art. 167/ 1 of the Constitution of the Republic of Poland, the principle has been expressed therein according to which local government units shall be assured public funds adequate for the performance of the duties assigned to them (Dowgier, 2017: 126).

The local self-government bodies can realize their right to independent financial support, including through law-making functions, by adopting the relevant municipal regulatory and legal acts that affect the formation of local budget revenues, primarily through tax revenues. First of all, this law-making function is given to representative bodies of local self-government, which express the interests of the population, as they are elected last in the elections. Thus, the establishment and introduction of taxes by local governments can be attributed to tax lawmaking.

As Radvan says, “local tax would be a financial levy, determined to the municipal budget that can be influenced (talking about tax base, tax rates or one of the correction elements) by the municipality. It is not crucial whether the taxpayer obtains any consideration from the municipality or if it is a regular or a single levy –local taxes include both taxes *sensu stricto* and fees (charges)” (Radvan, 2017: 341). Tax norm-setting as the process of creating tax norms (by adopting tax laws and subordinate regulatory legal acts by the competent bodies) and simultaneously as one of the main links in the mechanism of legal regulation of tax relations is a certain “prerequisite” for the implementation of tax and legal norms through taxation of the state, and, consequently, first of all, it determines the various problematic issues that arise in this sphere (Alimbekova, 2013).

According to the decision of Constitutional Court of the Russian Federation, the principle *in dubio contra fiscum* is a manifestation of the constitutional principle of lawful establishment of taxes and fees in the tax legislation (Article 57 of the Constitution of the Russian Federation), by virtue of which tax authorities can act in the sphere of taxation only within the limits, in the amount of the tax burden that is established by law, i.e. an act adopted in compliance with democratic procedures (Constitutional Court of the Russian Federation: 430-O-O/2010).

Not only the establishment and introduction of local taxes and fees will affect the filling of the local budget, but also local governments can adopt legal acts with regard to the establishment of separate elements of taxation related to taxes that are within the competence of higher authorities. In addition, at the local level, mandatory payments that are not part of the tax system can be introduced. Municipal legal acts are adopted on the establishment and regulation of other forms of non-tax revenues coming to local budgets.

Thus, it should not only be about tax rule-making, but about fiscal rule-making. A fictitious job is to understand the obligation of a private entity (debtor) arising from the financial obligation to transfer money to public money funds (Vasyanina, 2013). Based on this definition, the fiscal norm-making of municipal entities can be understood in the broadest sense of the word as the process of creating norms by local governments (first of all, by representative bodies of local self-government) by the adoption of normative legal acts in establishing and introducing local taxes and fees, separate elements of taxation on federal and regional taxes, the establishment and introduction of other mandatory payments, and the regulation of other non-tax revenues coming in budget.

In the narrow sense, fiscal lawmaking of municipal entities can be defined as the process of creating tax norms by the representative bodies of local self-government by adopting of normative legal acts on the establishment and introduction of local taxes and fees, as well as the establishment of separate elements of federal and regional taxes.

The problems of distribution of tax revenues between the levels of budgets, the establishment and introduction of local taxes and fees, the empowerment of local self-government bodies with powers to establish taxes and other mandatory payments are the subject of close research by the scientific community as a whole (Ashmyanskaya, 2016; Regional financial law, 2017; Uksusov, 2015; Gandullia, 2012; Rehtsigel, 2008) and on certain key issues (Mironova, 2016, 2017; Zhuravleva, 2013; Shchekin, 2013; Stenkula, 2014), etc. At the same time, despite a number of differences on the issues in question in Russia and some European countries, in many respects the problems are similar, which predetermines the need for the states to exchange the experience, including the expediency of using foreign experience by Russia.

This article is the result of a critical review of fiscal lawmaking of municipalities, both in Russia and abroad. The research was conducted using the traditional theoretical methods, such as specification, synthesis, and modeling, comparative jurisprudence. Empirical methods include the study of the experience of establishing and introducing local taxes and fees in a number of countries, and analysis and systematization of legislative documents with the aim of improving their use in Russian practice.

## **2 Features of fiscal lawfulness of municipalities**

### **2.1 Establishment and introduction of local taxes and fees**

The first issue that should be considered when disclosing fiscal lawmaking is the right of local governments to establish and impose local taxes and fees. Kucherov notes that “the right to establish and introduce taxes and fees is, in fact, an integral part of state sovereignty, which can be designated as sovereignty in the field of taxation (tax sovereignty). This right is derived from the will of the people, which is usually fixed in the establishment of constitutional duties on the need to pay taxes and fees” (Kucherov,

2009). Consequently, tax sovereignty is a part of state sovereignty, which is manifested in the exclusive right of the state to establish and impose taxes and fees (Uksusov, 2015).

In the literature, the powers to establish and to impose taxes are delineated. The authority to establish taxes and fees can be defined as the right to fix types and elements of the legal composition of taxes and fees that can be put into effect on the territory of public entity. The power to enforce is the right to legalize the duties of certain persons to pay the established taxes and fees from a certain date and on a certain territory. Consequently, the right to establish taxes and fees is the potential right to collect taxes and fees, the right to introduce taxes and fees is the realizable right to collect data on mandatory payments (Uksusov, 2015).

Russian judicial practice is based on the premise that “local government bodies are not entitled to impose additional taxes and fees not provided for by federal law. Representative bodies of local self-government have the right to decide on their own whether to introduce local taxes provided for by federal law “(Constitutional Court of the Russian Federation: 22-O/1998). It should be agreed that “Providing limited powers to municipalities to introduce taxes, the state thereby delegates some of its rights” (Uksusov, 2015).

Thus, the state delegates to municipalities a limited right to impose taxes and fees. In Russia, a list of local taxes and fees, as well as the specifics of their establishment and implementation are determined by the Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1. Thus, Art. 12 of the Tax Code stipulates:

- what taxes and fees are recognized as local;
- peculiarities of putting into operation and termination of local taxes and fees on the territory of municipalities;
- peculiarities of establishing and introducing local taxes and fees in certain types of municipal formations (settlements, urban districts with intra-urban division, in cities of federal significance);
- a list of elements of taxation that local authorities can establish;
- a number of elements of taxation under special tax regimes.

In Russia, only two local taxes are established: personal property tax and land tax, and one fee istrade tax. With respect to taxes, local authorities establish only such elements as tax rates, the procedure and terms for payment of taxes, if these elements of taxation are not established by the Tax Code, and can also establish the specifics of determining the tax base, tax incentives, grounds and procedure for their application. The trade fee can be entered only on the territory of cities of federal significance (currently only in Moscow), so local authorities do not have the authority to introduce a trade fee, since this is the authority of the entity of the Russian Federation.



Such insignificant number of local taxes testifies to the lack of independence of municipalities, since revenues from local taxes cannot be considered sufficient to solve all issues of local importance.

Unlike Russian experience, foreign experience shows that states transfer more rights to municipalities in establishing local taxes.

Act no. 166-Z/2002, the Tax Code of Belarus, part 1 includes the following in local taxes and fees:

- tax on the possession of dogs;
- resort fee;
- collection from the procurement.

Act no. 2755-VI/2010, The Tax Code of Ukraine refers to local taxes and fees, established in accordance with the list and within the limits of the limits set by the Code, decisions of rural, township and city councils within their authority, which are mandatory for payment on the territory of the respective territorial communities. The list of local taxes is set in art. 10 of the Code:

- property tax;
- single tax;
- fee for parking spaces for vehicles;
- tourist tax.

In this case, local councils must establish a single tax and property tax (in respect of the transport tax and payment for land). Issues related to the establishment of property tax (with respect to real estate tax other than land) and the establishment of fees for parking spaces for vehicles and tourist fees are decided by local councils within their authority. Thus, the Tax Code of Ukraine determines how mandatory taxes and fees are, and those that are established by the decision of local councils. The establishment of other taxes and fees is not allowed.

The following can be attributed to the taxes of the German lands:

- 1) property tax;
- 2) tax on inheritance;
- 3) tax on motor vehicles;
- 4) transport tax;
- 5) tax on beer;
- 6) income from gambling establishments;
- 7) fishing tax;
- 8) local taxes on consumption and costs (Grigorieva, 2017).

Interest is represented by separate fees charged at the local level in Poland. Among municipality fees, those with the greatest fiscal importance have been chosen for analysis, i.e. the betterment levy and the re-zoning fee; mandatory fees include the liquor license fee, which is collected based on the Act on upbringing in sobriety and counteracting alcoholism; the fee for removing trees and shrubs, which is based on the Nature Conservation Legislation of April 16, 2004; occupancy of the right of way charge, which is based on the Act on Public Roads of March 21, 1985 (Kowalczyk, 2015: 313-314).

Despite the possible introduction of special taxes and duties in certain countries, local taxes related to the levying of property and land remain common to all states. Thus, the list of locally established taxes and fees, as a rule, is slightly different in different countries. At the same time, there are examples where local authorities are given higher-level tax administration. For example, in Albania, in accordance with the 2002 Law on Local Tax on Small Business, this tax is administered by local governments and accounts for about a third of their tax revenues (Ashmyanskaya, 2016).

The Swedish experience is interesting when from 1991 to 2008 in Sweden the real estate tax was levied by state authorities, after which it was transferred to establish local self-government bodies. At the same time, the Government retained the right to determine the tax rate and reduced the amount of transfers to communes in the amount of income received from the collection (Stenkula, 2014).

#### Establishment of separate elements of taxation

In addition to the possibility of introducing taxes and fees not provided for at the national level, an important proxy for the municipalities is also autonomy in setting local taxes and fees, namely the definition of all the necessary elements of taxation. As noted above, local governments in Russia are limited in terms of establishing separate elements of taxation for local taxes.

In Poland the rights of local government units with regard to taxes are in fact limited to establishing their rates (most often within statutory limits) and introducing tax exemptions and reliefs.

Only exceptionally the legislator introduces a possibility of independent decision-making by local government, i.e. whether they intend to collect a certain benefit, as it occurs with regard to local charges for dog registration, city tax, health resort fee and market levy (Dowgier, 2017: 127).

At the same time, it is necessary to identify the problem of using tax benefits for local taxes at the federal level. Since local taxes are fully received by the local budget, it is advisable to abandon the benefits of such taxes established at the federal level. More effective use of tax incentives should be recognized by their establishment directly by local governments, based on the needs of local budgets, as well as the need of citizens of municipalities for the relevant benefits.

In European countries, municipalities have great powers in this matter. For example, Act no. 166-Z/2002, the Tax Code of Belarus, part 1 secured a list of elements that are defined in setting local taxes and fees: Minsk city council of deputies of local councils of deputies of based territorial level in accordance with the Tax Code defines the taxpayers, objects of taxation, tax base, tax rates, tax period, the procedure for calculating, the procedure and terms for payment of local taxes and fees, the time limits for submitting tax declarations (calculations) for local taxes to the tax authorities and frames, as well as tax breaks on local taxes and levies. Thus, the local authorities of the Republic of Belarus are not limited in establishing only certain elements of taxation, as established in Russia.

It should also be noted that it is possible to adopt normative and legal acts of municipalities with regard to the establishment of separate elements for taxes that are not related to local taxes. Thus, Article 12 of the Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1 provides for the possibility of representative bodies of local self-government of certain elements under special tax regimes. In particular, normative legal acts of representative bodies put in place the System of Taxation in the form of a single tax on imputed income for certain types of activities. The establishment of such additional powers should be assessed positively, as they allow to influence the formation of the revenue of local budgets.

## **2.2 The possibility of introducing other mandatory payments**

In recent years, there has been an increase in the number of compulsory payments not included in the Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1. The emergence of new fiscal levies in the financial system of Russia is sometimes due only to the desire of the state to replenish the treasury, which in some cases leads to a situation where the compulsory payments that are compulsory for payment have no economic and legal basis, while meeting the requirements of the law on general conditions of taxation and fees (Vasyanina, 2013). Such payments are also found in other countries (Kuchin, Demeyer, 2016).

According to specialists' estimates, there are more than 50 uncodified public payments in Russia, and the number of them continues to grow ("Tax Reform").

Despite the classification of all non-codified public payments, the level of establishment and levying on federal, regional and local levels ("Tax Reform"), most of them are not regulated at the local level, and as a rule, have federal or regional legal regulation. Accordingly, local governments are virtually excluded from the sphere of lawmaking for such payments. At the same time, it is possible to give some examples when municipal entities participate in the legal regulation of non-tax payments.

Such payments, for example, include fees for providing information on the activities of government agencies and local governments.

In the sphere of urban planning, contributions in cash and in kind are levied on the development of the social and economic infrastructure in favor of local governments and government bodies of cities of federal significance. As D.M. Shchekin, “in the Russian Federation practice has become widespread when local authorities actually require developers to provide them with a share in the constructed premises or monetary compensation ... Such payments are made, as a rule, on the basis of contracts concluded between investors and municipalities, called investment, under the terms of which the investor assumes obligations in the established manner and within the agreed timeframes to implement the project, and also pay the agreed amount (or (Shchekin.) The legal nature of this payment is controversial, but we should agree with Denis Shchekin in that “the fee charged in cash or in kind from developers for publicly-lawful actions for issuing construction permits, approving construction documents, etc. is actually a payment for the performance by public legal entities of their functions in the form of legally significant actions” (Shchekin, 2013).

Of interest is the experience of Germany, which provides for the collection of “infrastructure charges”, which are public legal payments (Kuchin).

In German court practice, the validity of the contract was also recognized, according to which the developer undertook to pay to the local community all the costs that the community had already incurred or incurred in building up (Folgekostenvertrag). Such expenses include the budget expenses for the creation of public infrastructure that allows the developer to operate the building normally, since urban development of the city’s territory is the responsibility of local authorities. Agreements on the alleviation of town-planning restrictions (for example, the norm for the creation of parking spaces) are also recognized as valid for a fee directed at leveling the consequences of such mitigation (for example, the creation of a parking space in another place, but in the same locality). When buying a part of a land plot for public needs, a public legal entity can mitigate the town-planning restrictions with respect to the rest of the plot (Kuchin).

According to D.M. Shchekin, the establishment of the public law nature of such a payment in Russia and its consolidation will not only create more guarantees for payers, but will also benefit municipalities, since they will be able to plan revenues of local budgets, apply effective mechanisms for charging payments, and exercise public control over expenditure of such a payment (Shchekin, 2013).

The experience of Russia and European countries in introducing a resort (tourist) fee is interesting. In Russia, this fee is a mandatory non-tax payment.

Since May 1, 2018, in four Russian regions – in the Republic of Crimea, the Altai Territory, the Krasnodar Territory and the Stavropol Territory, an experiment is underway to develop the resort infrastructure, including the introduction of the resort fee (Act no. 214-FZ/2017, On conducting an experiment on the development of resort infrastructure in the Republic of Crimea, the Altai Territory, the Krasnodar Territory and

the Stavropol Territory). Despite such goals of the experiment as the goal of preserving, restoring and developing resorts, forming a single tourist space, creating favorable conditions for the sustainable development of the tourism industry, i.e. its actual direction for the development of specific territories, the participation of municipalities in the establishment and collection of this fee is minimal. Thus, the experiment is carried out by introducing fees for the use of the resort infrastructure in the municipal entities whose territories are included in the experimental territory for the financial support of the design, construction, reconstruction, maintenance, improvement and repair of the resort infrastructure facilities. The powers of the local self-government bodies provided for by law are reduced to filing an application for the inclusion of a municipal formation in the territory of an experiment, submitting proposals for the formation of a list of works on improvement, and drawing up appropriate reports.

Of particular interest are the powers of local governments to submit proposals for determining the size of the resort fee and (or) to determine other categories of persons exempted from paying a holiday fee. At the moment, there are no such municipal legal acts. Thus, municipalities are limited in their authority to introduce a resort fee, despite the fact that the money received from the resort fee to the Resort Infrastructure Development Fund is sent to the municipalities for the development of resorts: “The budgetary allocations of the Fund are sent in the form of inter-budgetary transfers from the budget of the entity of the Russian Federation to the budgets of municipal entities whose territories are included in the territory of the experiment, with a view to providing financial support for the design, construction, reconstruction, maintenance, improvement and repair of the resort infrastructure facilities on their territories “.

Resort fee is a common fee in European countries. Under different names, such a fee exists in Germany, Italy, France, the Czech Republic and other countries. For example, in Germany, a special law on the rules for the establishment and collection of tax on vacationers was adopted in 1893. Nowadays, this collection can be found in the Federal Republic under a variety of names – Kurtaxe, Ortstaxe, Gästetaxe, Aufenthaltsabgabe, Beherbergungstaxe, Nächtigungstaxe, that is, taxes or fees for the resort, local, guest, stay, accommodation or overnight stay.

In Switzerland, tourist tax (Tourismusabgaben) consists of three parts: the tax on accommodation (Beherbergungsabgabe), the resort fee (Kurtaxe), and the transport fee (Tourismusförderungabgabe).

The amount of tax or levy is set by the local authorities and depends on different conditions: the number of days of residence, the category of the hotel, the category of an individual (as a rule, children are exempted from paying taxes, as well as a number of other preferential categories of citizens).

Thus, it can be concluded that European states give local governments more powers to establish mandatory payments. Such a right allows municipalities to independently

determine the direction of spending of funds coming to the local budget. At the same time, in Russia it is necessary to improve the system of such payments with regard to their regulation by legislation.

For example, on March 27, 2018, the Government of the Russian Federation, following a meeting of March 16, instructed the relevant ministries to draft a law by autumn 2018, which would include quasi-tax payments in the Tax Code. Officials are also instructed to work out changes in federal legislation and provisions concerning liability for non-payment of such fees. The Ministry of Finance and the Ministry of Economic Development will draft and submit to the Government a draft federal law providing for the inclusion in the Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1 of non-tax payments having a quasi-tax character, having worked on amending certain federal laws that established such non-tax payments, and establishing transitional provisions in the responsibility for non-payment (incomplete payment) of payments included in the Tax Code, ensuring a balance of private and public interests. Thus, it is necessary to forecast further work to improve the system of mandatory public payments.

### **2.3 The introduction of citizens' self-taxation**

Unlike other states, Russia uses self-taxation to attract people to participate in the budget process. Act no. 131-FZ/2003, On the general principles of the organization of local government in the Russian Federation defines the means for self-taxation of citizens as one-time payments for solving specific problems of local significance. This definition contains only some signs of the legal nature of the means of self-taxation of citizens.

The means of citizens' self-taxation differ from the tax payments by the special procedure for the introduction and collection of one-time payments, the possibility of replacing the payment of payment by public works, and the lack of a developed mechanism for collecting unpaid self-taxation. At the same time, such signs as compulsory payment, individually gratuitous nature, as well as its direction to finance public needs, allow us to talk about the tax nature of self-financing of citizens (Mironova, 2016).

Self-taxation of citizens is actively used by individual municipalities (Kirov region, Novosibirsk region, Republic of Tatarstan, etc.) in order to replenish local budgets and participate in regional programs to support local initiatives. So, as of January 1, 2018, local referendums on citizens' self-taxation were held more than 2000 times in the municipalities of the Russian Federation (most of the local referendums in recent years have been conducted specifically on the introduction of citizens' self-taxation).

Act no. 131-FZ/2003 in art. 56 uses the concept of “means of self-taxation of citizens, determines the procedure for determining the amount of payments, preferential categories of citizens, as well as the procedure for deciding whether to impose self-taxation – at

a local referendum or a gathering of citizens. This is the limit of the regulation of this income of local budgets by federal legislation. The main regulatory regulation should be carried out at the municipal level.

Based on the analysis of federal legislation and municipal legal acts, as well as judicial practice, we will define the legal nature of the means of self-taxation of citizens, their tax or non-tax character.

From the very concept of the means of self-taxation of citizens, it is possible to single out the sign of the payment discontinuity.

The violation of the principle of the disbursement of payment became the subject of consideration of the complaint in the Constitutional Court of the Russian Federation. In accordance with the Constitutional Court of the Russian Federation, the decision of the local court to recognize the decision of the local referendum on introducing single payments on the territory of the municipal formation in the order of self-taxation of citizens (Constitutional Court of the Russian Federation: 1649-O/2014). As the court pointed out, such payments were not one-time and, in fact, were a tax. In the applicant's opinion, the introduction of payments on the territory of the municipal formation that are subject to self-taxation by citizens every year for several years does not mean that such payments become tax payments.

In 2013, several decisions of local referenda of municipal entities of the Kurgan region were declared invalid by the court, since annual one-off payments were introduced for five years in the self-taxation of citizens.

As noted Kurgan Regional Court, by the decision of the local referendum, payments for self-taxation were recognized as regular and mandatory and for five years they became a permanent source of replenishment of the local budget. In this case, payments of self-taxation of citizens have signs of tax (Kurgan Regional Court: 33-1825/2013). It should be noted that the decision of the local referendum is internally contradictory, since it simultaneously contains an indication of the time and frequency of payments.

The prosecutor of the Mishkinsky district of the Kurgan region made his statement on the recognition of the normative legal act as invalid by the fact that the concept of "one-time payment" implies that with the introduction of self-taxation funds at a local referendum (citizens' meeting), only one payment can be established to resolve a particular local issue, charged with citizens only once, and not on a systematic basis for a certain time.

The court noted that the decision taken at the referendum, payments of self-taxation were given regularity and compulsion, self-taxation of citizens actually became a permanent source of replenishment of the budget of the Shalamovsky village council for five years. Thus, by the decision of the local referendum, self-tax payments of citizens turned out to be taxes.

The disparity of payments assumes a one-time admission, and therefore it is not allowed to use such formulations as “annual single payments” or the establishment of one-off payments for a period of more than one year.

It is obvious that the establishment of means of self-taxation of citizens for a long period is conditioned by the desire to save on holding local referendums, but it contradicts the idea of a single payment, which is not permissible. On the other hand, due to the fact that self-financing means of citizens are one of the links in co-financing projects in the framework of initiative budgeting, one of the principles of which is multiple, the desire of municipalities to establish them for a long period is quite logical. And it is this contradiction that determines the opinion of a number of authors about the attribution of such payments to local taxes. It should be recognized that in the form in which the legislator now funds self-taxation of citizens – just as a one-time payment, its introduction is possible only for a specific period (one fiscal year) and only for specific purposes. The best option in this case is the holding of local referendums on the United Voting Day, held in September (combining them with federal and regional elections), which reduces the financial costs of holding the referendum itself.

From the definition of means of self-taxation of citizens, it follows that these funds are intended to address issues of local importance. The purpose of payment allows some authors to attribute self-taxation to targeted taxes (Karasev, 2004). Practice shows that the funds are spent as a solution to one of the issues of local importance (for example, the improvement of settlements, repair and maintenance of roads), and for specific needs (street lighting, cleaning from snow in winter, repair of a water pipe in Shkolnaya Street village of Petropavlovsk, for the construction of a children’s playground in the village of Adilev, for the repair of a water pipe along Central Street in Sedyash village, etc.).

When referring a question to a referendum, in some cases there is no indication of the purpose of the payment (For example: “Do you agree to introduce self-taxation of citizens in 2014 in the amount of 100 (one hundred) rubles for each adult resident permanently in the Sarashevsky rural settlement?”). Such an approach cannot be considered correct, since citizens do not know at the referendum what the funds will be directed to. This reduces their interest in the outcome of the vote and may affect the results of the referendum. The more specific the appointment will have the means of self-taxation, the more interested will the residents of the municipality be in collecting such funds. As a rule, preliminary work with citizens before the referendum, with an explanation of what exactly collected funds will provide, provides a high percentage of votes given for the introduction of self-taxation (from 80% and higher).

This characteristic of one-time payments can be countered with targeted taxes, since, according to S.G. Pepelyaev, one of the constitutional principles for setting taxes and fees is the principle of limiting their specialization (Pepelyaev, 2015), which led to a reduction in targeted taxes in recent years.



It should be noted that in addition to receiving additional local budget revenues to address local issues, another goal of citizens' self-taxation is to increase civic engagement of the population, involving it in the direct implementation of local self-government. This goal does not directly follow from the definition of means of self-taxation, but it clearly characterizes their essence, since it is possible to attract such funds only in case of activation of the population in the municipality.

The procedure for using one-off payments is closely related to the purpose of payment. The money collected in the order of self-taxation of citizens comes to the local budget and is spent for the solution of specific tasks of local significance provided for by the decision taken at the referendum. A more specific list of such issues can be established by the relevant legal act on the means of self-taxation of citizens taken by a municipal entity.

In cases where this appointment is defined in general (improvement of settlements), the direction of spending money should be determined in the draft local budget (or by making changes to it). Citizens should understand that they cannot impose self-taxation to finance other issues, except those that are issues of local importance. That is why the preliminary work with the population is so important before the referendum is held.

At the same time, the economic validity of means of self-taxation, which is even called one of the principles for the introduction, collection and use of self-taxation of citizens, is of great importance .

Proceeding from the definition of tax as a payment levied for the financial support of the activities of the state and (or) municipal entities, one should speak of the similarity of the public nature of the means of self-taxation of citizens, since such means are also directed to the financial provision of municipalities.

The subject composition of payers of single payments is determined by Act no. 131-FZ/2003.

Municipal legal acts include the following categories into such citizens:

- Adult residents permanently residing on the territory of the municipality;
- Adult residents registered on the territory of the municipality;
- eighteen-year-old citizens living on the territory of the municipality for at least three months a year (the mechanism for determining this period is not established);
- home ownership;
- country estates.

On the one hand, the determination of self-tax payers by the residents of a municipal formation allows to take into account the interests of the local population as much

as possible. On the other hand, the establishment of special requirements for entities paying for self-taxation, for example, the condition of residence for a certain period in a particular settlement, presupposes the need for a legal determination of the procedure for determining such terms.

As Zhuravleva notes, since citizens of the Russian Federation who do not have a permanent place of residence on the territory of a municipal formation do not have the right to participate in the decision-making, but are obliged to pay self-taxation funds, a contradiction arises in the very essence of the legal institution: the requirements of Art. 56 Act no. 131-FZ/2003, including the principle of equality (Zhuravleva, 2012).

The procedure for deciding whether to impose self-tax payments at a local referendum or citizens' gathering presupposes the voluntary expression of the will of citizens.

This provision is combined with one of the basic principles of holding a local referendum – the participation of a citizen of the Russian Federation in a local referendum is recognized as free and voluntary. No one has the right to exert influence on a citizen of the Russian Federation with a view to compelling him to participate or not to participate in a local referendum or to impede his free expression of will.

Voluntary declaration of citizens on the establishment of one-time payments is shown at the stage of preparation for the referendum, since citizens have the right to formulate a question submitted to a referendum, i.e. determine what purposes self-taxation will be spent for, what is the circle of subjects performing payment, and also the amount of payment.

It should be noted that lawmakers have repeatedly tried to change the situation and introduce the establishment of self-taxation facilities for citizens by the representative body of the municipality, a poll of citizens, citizens' meetings, etc. However, all proposed bills were rejected.

Another criterion to highlight the features of self-taxation is the compulsory collection of payment and responsibility for non-payment of one-time payments.

At present, unlike the responsibility for non-payment of taxes and fees, which is provided for by Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, the responsibility for non-payment of self-taxation funds by federal legislation has not been established.

On the one hand, we are talking about self-taxation and the voluntary will of citizens. On the other hand, among citizens of the municipality there are those who were against the introduction of self-taxation. Some citizens simply do not intend to pay anything to the budget. In this regard, the establishment of responsibility for non-payment of a single payment is necessary.

In municipal legal acts, they approach this in different ways, providing for:

- recovery in accordance with the procedure established by federal legislation for collection of unpaid taxes and non-tax payments (for example, in the territory of the rural settlement of Leontief);
- Collection of self-taxation means in accordance with the procedure established by regional legislation (rural settlement of the Abitovsky Village Council Meleuzovsky District of the Republic of Bashkortostan);
- Appeal to the court with a statement of claim (statement of claim) on recovery of unpaid single payments (Uvarovo).

Some municipal entities use the legislation on administrative offenses for non-payment of single-payment payments for failure to comply with the charter of a municipal formation and (or) a legal act adopted at a local referendum (citizens' meeting). For example, in the rural settlements of Augustowka and the Eastern Municipal District of Bolshekhernigovsky of the Samara Region, in violation of the payment deadlines, Art. 10.3 of the Act no. 115-GD/2007, On Administrative Offenses in the Territory of the Samara Region. The article provides for liability in the form of a fine for failure to comply with the charter of a municipal formation and (or) a legal act adopted at a local referendum (citizens' meeting). Violation entails a warning or an administrative penalty on citizens in the amount of 300 rubles up to 2 thousand rubles, for officials – from 500 rubles up to 5 thousand rubles, for legal entities – from 2 thousand rubles up to 10 thousand rubles.

Thus, among the signs that determine the characteristics of self-taxation of citizens should be called the voluntary will of citizens to introduce and use payment through a local referendum or a gathering of citizens; the nature of payment; its purpose; the amount of payment equal for all residents of the municipality.

The means of citizens' self-taxation differ from the tax payments by the special procedure for the introduction and collection of one-time payments, the possibility of replacing the payment of payment by public works, as well as the lack of a developed mechanism for collecting unpaid self-taxation.

At the same time, such signs as compulsory payment, individually gratuitous nature, as well as its direction to finance public needs, allow us to talk about the tax nature of self-taxation of citizens.

Thus, the introduction of self-taxation of citizens can also be attributed to fiscal lawmaking of municipalities. The mechanism of self-taxation was practically not applied several years ago, but with the development of initiative budgeting and programs in support of local initiatives in Russia, as well as in the absence of sufficient financial support for municipalities, self-taxation of citizens is becoming an increasingly active form of citizens' activity of municipalities.

### 3 Conclusion

During the study the author made the following conclusions.

Analysis of foreign legislation and practice shows that European countries are establishing a more flexible tax system in terms of local taxes and fees. In a number of countries, in addition to traditional local taxes related to property, real estate and land, various charges are also provided, due to local specifics and the need to improve the respective territories. Local authorities have more authority to establish and introduce such fees, including the authority to establish separate elements of taxation. On the one hand, Russia already has experience, when it was possible to introduce various local taxes and fees, the number of which was gradually decreasing. On the other hand, the possibility of introducing only two local taxes severely limits the possibilities for fiscal lawmaking of municipalities, which undermines the principle of independence of local self-government, as enshrined in the Constitution of the Russian Federation. For other mandatory public payments that are not part of the Russian tax system, the possibility of issuing municipal legal acts affecting the introduction and collection of such payments is also minimal.

It should be noted that, despite the need to expand the powers in the field of fiscal lawmaking of municipalities, Russian policy is not aimed at such an extension, which is predetermined by the established features of Russian federalism. At the same time, it is necessary to take into account the Russian peculiarities. For example, unlike other states, Russia uses self-taxation to attract the public to participate in the budget process. The means of self-taxation of citizens in Russia are now one of the possible forms of independent replenishment of local budgets by municipalities at the expense of non-tax revenues, which are possible only at the municipal level.

### References

- Alimbekova, A.: *Налоговый нормотворческий процесс как разновидность налоговой деятельности государства (Tax normative process as a kind of tax activity of the state)*, in: *Очерки налогового-правовой науки современности (Essays of the tax-legal science of the present)*, М., Харьков: Право (Moscow-Kharkov: Law), 2013.
- Ashmyanskaya, Y.: *Налоговая децентрализация: в поисках “хорошего местного налога” (Tax decentralization: in search of a “good local tax”)*, *Налоги (Taxes)* no. 3 (2016).
- Demeyer, K.: *Плата за проезд большегрузных автомобилей: опыт Бельгии (Fare for the journey of heavy vehicles: the experience of Belgium)*, *Налоговед (Taxonomy)* no. 7 (2016).

- Dowgier, R.: New Polish Codification of General Tax Law and the Needs of Tax Authorities of Local Government Units, in: Radvan, M., Gliniecka, J., Sowiński, T., Mrkývka, P., (eds.): *The financial law towards challenges of the XXI century. Conference Proceedings*, Masaryk University, Žerotínovonám. 617/9, 601 77 Brno. 1st edition, (2017).
- Gandullia, L.: *The Role of Direct Taxes in Fiscal Decentralization*. University of Genoa. DEP Working Papers Series. 2012. [http://www.academia.edu/10730608/The\\_role\\_of\\_direct\\_taxes\\_in\\_fiscal\\_decentralization](http://www.academia.edu/10730608/The_role_of_direct_taxes_in_fiscal_decentralization)
- Grigorieva, L.: *Налогообложение объектов недвижимости в России и за рубежом (Taxation of real estate in Russia and abroad)*, М.: Издательство Российской газеты (Moscow: Editorial Board of the Rossiiskaya Gazeta), 2017. Issue. 11.
- Karasev, M.: Проблемы правовой квалификации средств самообложения граждан (разовых платежей граждан) с точки зрения законодательства о налогах и сборах (Problems of legal qualification of means of self-taxation of citizens (one-time payments of citizens) from the point of view of legislation on taxes and fees), *Финансовое право (Financial law)* no. 7 (2004).
- Kowalczyk, R.: *Mandatory Character of Selected Local Fees*, in: Radvan, M. (ed.): *System of Tax Law. Conference Proceedings*, Masaryk University, Brno. 1st ed., 2015.
- Kozyrin, A.: *Закон в налоговом праве: принципы законотворческих процедур (Law in tax law: principles of lawmaking procedures)*, *Реформы и право (Reforms and law)* no. 3 (2015).
- Kucherov, I.: *Теория налогов и сборов (Theory of taxes and fees)*, М.: Юринформ (Moscow: YurInform), 2009.
- Kuchin, S.: *Применение договорных форм публичного управления развитием территорий и инфраструктурные сборы в строительном праве Германии (Application of contractual forms of public management with development of territories and infrastructure fees in the German construction law)*. <http://m-logos.ru/img/Tezisy%20Kuchina%20S.A.pdf>
- Lagutin I. (eds.): *Региональное финансовое право (Regional financial law)*, М.: Юстицинформ (Moscow: Yustitsinform), 2017.
- Mironova, S., Zhemchuzhnikov, A.: *Нормативное закрепление принципа участия граждан в финансовой деятельности государства и муниципальных образований (Normative consolidation of the principle of citizen participation in the financial activities of the state and municipalities)*, *Вестник ВА МФД (Bulletin of the Volgograd Academy of the Ministry of Internal Affairs of Russia)* no. 3 (2017).

- Mironova, S.: Средства самообложения граждан в системе формирования доходов местных бюджетов: правовая природа (Means of self-taxation of citizens in the system of formation of income of local budgets: the legal nature and practice of application), Научный вестник Волгоградского филиала РАНХиГС. Серия Юриспруденция. (Scientific Herald of the Branch of RANEPА) no. 7 (2016).
- Mironova, S.: Участие граждан в финансовой деятельности муниципальных образований как принцип финансового права (Participation of citizens in the financial activities of municipalities as a principle of financial law), М.: Юрлитинформ (Moscow: Yurlitinform), 2018.
- Perelyaev S. (eds.): Налоговое право: учебник для вузов (Tax Law: textbook for universities), М.: Альпина Паблишер (Moscow: Alpina Publisher), 2015.
- Radvan, M.: How to Get Taxpayers to Pay Local Charges, in: Radvan, M., Gliniecka, J., Sowiński, T., Mrkúvka, P., (eds.): The financial law towards challenges of the XXI century. Conference Proceedings, Masaryk University, Žerotínovonám. 617/9, 601 77 Brno. 1st ed., 2017.
- Rektsigel, Sh.: Financial relations in the federal state on the example of Germany, in: Финансовая система России (The Financial System of Russia), Красноярск: издательство Сибирского федерального университета (Krasnoyarsk: ИПК SFU), 2008.
- Shchekin, D.: Строительный сбор или к вопросу о компенсациях публичным субъектам при строительстве (Construction fee or on the issue of compensation to public entities in the construction), in: Очерки налогово-правовой науки современности (Essays of the tax-legal science of the present), М., Харьков: Право (Moscow-Kharkov: Law), 2013.
- Stenkula, M.: Taxation of Real Estate in Sweden (1862 – 2013). IFN Working Paper no. 1018, 2014 [Electronic resource]. <http://www.ifn.se/wfiles/wp/wp1018.pdf>
- Tax reform: revision of the “parallel tax system”. М., 2015. <https://zakon.ru/Tools/DownloadFileRecord/22946>
- Uksusov, V.: Компетенция муниципальных образований в сфере налогообложения (Competence of municipalities in the field of taxation), Актуальные проблемы российского права (Actual problems of Russian law) no. 9 (2015).
- Vasyanina, E.: Фискальное право России (Fiscal Law of Russia), М.: Контракт (Moscow: CONTRACT), 2013.
- Zhuravleva, O.: Правовая природа самообложения (The legal nature of self-taxation), Финансовое право (Financial law) no. 10 (2012).

## Legal Acts

European Charter of Local Self-Government. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a088>

Act no. 166-Z/2002, the Tax Code of Belarus, part 2, as amended.

Act no. 2755-VI/2010, The Tax Code of Ukraine, as amended.

Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended.

Act no. 214-FZ/2017, On conducting an experiment on the development of resort infrastructure in the Republic of Crimea, the Altai Territory, the Krasnodar Territory and the Stavropol Territory.

Act no. 131-FZ/2003, On the general principles of the organization of local government in the Russian Federation, as amended.

Act no. 115-GD/2007 On Administrative Offenses in the Territory of the Samara Region, as amended.

Constitutional Court of the Russian Federation: 1649-O/2014.

Constitutional Court of the Russian Federation: 430-O-O/2010.

Constitutional Court of the Russian Federation: 22-O/1998.

Kurgan Regional Court: 33-1825/2013.

---

# QUESTIONS OF THE CENTRAL BANK OF THE RUSSIAN FEDERATION LAWMAKING IN REGARD TO BANKS' LIABILITIES IN THE FRAMEWORK OF THE RUSSIAN TAX LEGISLATION

*Elena Pastushenko<sup>1</sup>, Larisa Zemtsova<sup>2</sup>*

## **Abstract**

The article deals with the questions of normative acts enactment by the Russian Federation Central Bank concerning banks' liabilities as provided by the Russian tax legislation. This analysis is being carried out with the purpose of considering legal basis of the rule-making functions of the Russian Federation Central Bank regarding special (fiscal) questions including novelties of the legal regulation of the rule-making functions of the Russian Federation Central Bank and considering normative acts of the Russian Federation Central Bank enacting of which is provided by the Russian tax legislation as sources of the Russian tax law. The authors draw attention to the existing legal loophole in the legal regulation of the Russian Federation Central Bank normative acts enactment in case if they are coordinated with the federal executive authority which is in charge of control and supervision in the sphere of taxes and charges which is compensated at the modern stage of the legal regulation of the rule-making functions of the Russian Federation Central Bank. The authors note the positive meaning of the mentioned novelty for the quality of carrying out rule-making function of the Russian Federation Central Bank in the cases prescribed by the Russian tax law. General and special grounds of the Russian Federation Central Bank normative acts enactment include the questions of tax-legal regulation powers of the Russian Federation Central Bank to enact normative acts in cases provided by the Russian tax law; requirements to the normative acts of the Russian Federation Central Bank, tendencies of the development of the Russian Federation Central Bank function. The above mentioned allowed the authors to ground the necessity of the interdisciplinary approach (financial law, bank law, tax law) in researching questions of the Russian Federation Central Bank lawmaking in regard to banks' liabilities under the Russian tax legislation. While doing the research the authors applied inductive

---

<sup>1</sup> Doctor of law, professor of the Financial, Bank and Customs department of Federal State Budget Educational Establishment of Higher Education (Saratov State Law Academy), including speciality 12.00.04 – financial law, bank law, tax law, the author of 50 monographs, 50 articles in the reviewed scientific publications. The author specializes in the sphere of financial law in public-legal status of the Central Bank of the Russian Federation as the subject of the financial law, its powers concerning legal acts enactment which includes normative acts as sources of financial law. E-mail: past\_en@mail.ru

<sup>2</sup> Candidate of law, associate professor of the Justice and law-enforcement activities department of Saratov social-economic institute (branch) Federal State Budget Educational Establishment of Higher Education “Russian Economic University named after G.V. Plekhanov”, general jurisdiction court presiding justice (resigned), specialization is in the sphere of legitimacy principle realization in the system of Financial law principles, the author of 1 monograph, 2 joint monographs, more than 20 articles in the reviewed scientific publications. E-mail: Kafedra\_pravocediz@ssta.runnet.ru



methods of knowledge and carried out the analysis with regard to banks' liabilities in the sphere of tax legal relations through the example of the Russian Federation.

### **Key words**

Central Bank of the Russian Federation, normative acts of Bank of Russia, sources of tax law, the order of Bank of Russia, normative acts approval.

**JEL Classifications:** K34, K40

## **1 Introduction**

The objective of this article is the attempt of the authors to propose for consideration the Central Bank of the Russian Federation normative acts enacted on the ground of imperative norm of the Russian tax legislation as the sources of the tax law. The designated position is based upon the theoretical researches in the field of the tax law according to which bylaws of the authorized federal executive bodies refer to the sources of the tax law (Khimicheva, Popov, 2017: 390). As the sources of tax law the open check list of normative legal acts enacted in the order of bylaw rule-making is provided: normative legal acts of the President of the Russian Federation, the Government of the Russian Federation, the Ministry of Finance of the Russian Federation, the former Ministry of the Russian Federation for Taxes and Levies and others (Karasyova, Krokhina, 2001: 187). Among the subjects authorized for bylaw rule-making the Ministry of Finance of the Russian Federation, the Federal Tax Service, law enforcement agencies and investigative authorities are mentioned (Pepelyaev, 2015: 295-297). The role of the Central Bank of the Russian Federation when publishing normative acts on the basis of the Russian tax legislation in regard to the banks as participants of organizational tax relations is emphasized (Abbyasova, 2012: 399), the Central Bank of the Russian Federation is mentioned as the subject acting in the sphere of tax relations (Gritsenko, 2005: 275). Using the example of the Russian Federation the authors are carrying out the analysis of the legal regulation of the Central Bank of the Russian Federation rule-making function as it can be applied to meeting the requirements of the Tax Code of the Russian Federation concerning enactment by the Bank of Russia of normative acts for regulating bank liabilities, connected with monitoring bank control. Basing on the above mentioned scientists and researchers, the authors came to the conclusion that the Central Bank of the Russian Federation normative acts enacted on the basis of the imperative norm of the Russian tax legislation can be characterized as the sources of the tax law. At the end of the introduction the authors draw the conclusion about the specific public-legal status of the Bank of Russia, which enjoys constitutional legal grounds including its rule-making powers in accordance with the Russian tax legislation, and the necessity of the interdisciplinary approach (financial law, bank law, tax law) development in studying the questions of the Central Bank of the Russian Federation lawmaking in regard to bank liabilities in accordance with the Russian tax legislation.

## 2 Basis for Issuing Normative Acts Enacted by the Central Bank of the Russian Federation. General and Specific Questions

General regulations concerning public-legal status of the Central Bank of the Russian Federation including its powers for enacting normative acts for the questions of legally entrenched competence are provided in the Federal Law of the Russian Federation of July 10, 2002 no. 86-FZ, On the Central Bank of the Russian Federation (Bank of Russia) (hereinafter referred as – “Law no. 86-FZ”). Article 7 of the Law no. 86-FZ states that concerning the questions referred to its competence by means of the current federal law and other federal laws, the Bank of Russia issues directions, regulations and instructions in the form of normative acts binding for federal bodies of the state power, bodies of the state power of the Russian Federation subjects and self-governing bodies, all legal bodies and private persons. The Constitutional Court of the Russian Federation has made the conclusion that normative powers of the Bank of Russia presuppose the existence of its exclusive rights and duties concerning establishing obligatory bodies of the state power, all legal bodies and private persons, rules of behavior of the questions referred to its competence and demanding legal regulation (Constitutional Court of the Russian Federation: 268-O/2000). The legal position of the Constitutional Court of the Russian Federation concerning the specifications of the rule-making powers of the Central Bank of the Russian Federation as an element of its specific constitutional legal status was proved in the Constitutional Court of the Russian Federation Ruling of January 15, 2003 no. 45-O, On the refusal to accept for consideration of the Moscow City Arbitration Court on the verification of the validity of the Articles 12 and 30 of the Federal law “On the protection of the business competition in the market of financial services” and in the Constitutional Court of the Russian Federation Ruling of October 26, 2017 no. 2494-O, On the refusal to accept for consideration Andrey Pavlovich Davydov’s complaint about the infringement of his constitutional rights by the part of the first Article 7 of the Federal law “On the Central Bank of the Russian Federation (Bank of Russia)”.

Normative regulations expounded with due account for the interpretations of the Constitutional Court of the Russian Federation indicate two conditions for the enactment of the Central Bank of the Russian Federation act: 1) attribution of the question according to which the normative act should be enacted to the competence of the Central Bank of the Russian Federation; 2) requirement for the corresponding legal regulation on the level of bylaw a normative act. When analyzing the legal technique of the legislator in expounding questions referred to the competence of the Central Bank of the Russian Federation according to which the Central Bank of the Russian Federation normative acts should be enacted the emphasis can be laid upon two approaches: general and specific. The general approach concerning this problem is observed in Article 7 Law no. 86-FZ, in which the rules of the Central Bank of the Russian Federation lawmaking function realization are expounded. The specific approach is observed in other federal laws when the question which needs to be enacted in the normative act of Central Bank of the

Russian Federation is strictly fixed. The fact that Federal Law of July 31, 1998 no. 146 FZ is mentioned in the Tax Code of the Russian Federation of July 31, 1998 no. 146-FZ shows the requirement in enacting normative acts of Bank of Russia concerning certain questions of banks' participation in the tax control (article 86). They should be attached to the specific approach of the Central Bank of the Russian Federation rule-making function realization.

## **2.1 Tax-Legal Regulation of the Central Bank of the Russian Federation Powers for Enacting Normative Acts**

The Tax Code of the Russian Federation (article 86) presupposes two kinds of legal acts of the Central Bank of the Russian Federation in the sphere of banks' liabilities, connected with the implementation of the tax control of the procedural direction. Paragraph 3, part 1.1, article 86 of the Tax Code of the Russian Federation stipulates that the order of the bank report about setting up an account or drawing up a balance sheet, a deposit, about changing of the account, the deposit of an organization, or a sole proprietor, a private person who is not a sole proprietor or about termination of the rights of an organization, a sole proprietor to use corporative electronic means of payment for transferring electronic financial means, about changing of the account of cooperate electronic means of payment in the electronic form is established by the Central Bank of the Russian Federation in consultation and coordination with the federal body of the executive power, authorized agent for the control and supervision in the sphere of taxes and levies. The Regulation of the Bank of Russia of September 7, 2007 no. 311-P, On the order of the electronic bank report to the tax authority about setting up an account or drawing up a balance the sheet, deposit, about changing of account, deposit, and the Regulation of the Bank of Russia of April 28, 2012 no. 377-P, On the order of the bank electronic report to the tax authority about granting the right or termination of rights to use corporative electronic means of payment for transferring electronic financial means, about changing of account of cooperate electronic means of payment, as it is required by the Tax Code of the Russian Federation they must be coordinated with the head of the Federal Tax Service. The texts of the normative acts of the Bank of Russia contain this information published in the form of the Regulation which is in full accordance with Article 7, of the Law no. 86-FZ. It is necessary to pay attention to the fact that according to the preamble of the mentioned regulations the basis of enacting normative acts of the Bank of Russia is the first part of the Tax Code of the Russian Federation and the Law no. 86-FZ.

The other situation is being shaped in relation of the realization of the paragraph 3, part 3, article 6 of the Tax Code of the Russian Federation about the fact that the formats of the bank reports on the electronic information according to the requests of the tax authorities are affirmed by the Central Bank of the Russian Federation with the approval

of the federal authority of the executive power, authorized agent for the control and supervision in the sphere of taxes and levies. Information of Bank of Russia “Description of message formats used in electronic exchange between banks (bank branches), banking units of Bank of Russia and tax authorities (Description of formats “Tax”) (Version dated May 23, 2017)” according to the text of the document cited in accordance with the publication on the site: <http://www.cbr.ru/> as dated September 4, 2017 it is not mentioned about the coordination of this document with the Federal Tax Service. Probably it is possible to explain by the technical character of the mentioned document which can’t be referred according to the form of issue (information) to the normative acts of the Bank of Russia and publication by the Bank of Russia Regulation dated November 6, 2014 no. 440-P, On the order of sending to the bank certain documents of tax authorities and sending by the bank to the tax authority certain documents of the bank in the electronic form in cases as provided for in the legislation of the Russian Federation about taxes and levies, which is mentioned in the preamble of the considered Information of the Bank of Russia as the basis of the publication of the mentioned document with the approval of the Administration of the Federal Tax Service. Such a note exists in the text of the normative act of the Bank of Russia.

The given characteristics of the Bank of Russia normative acts published in accordance with the Tax Code of the Russian Federation allow us to consider them as bylaws sources of the tax law.

### **3 Tendencies of the Rule-Making Function Development of the Central Bank of the Russian Federation**

In the development of the rule-making function of the Central Bank of the Russian Federation it is possible to define the following tendencies of the legal regulation having relations to substantive legal and procedural legal aspects of the normative requirements to the banks according to the Russian legislation.

1. Extension of the grounds for the registration of the normative acts of the Central Bank of the Russian Federation in the Ministry of Justice of the Russian Federation.

If according to Article 6 of the Federal law “On the Central Bank of the Russian Federation (Bank of Russia)” – in the original the Federal law of April 26, 1995 (now it has ceased to be in force) only normative acts of Bank of Russia which are closely connected with the rights, freedoms or duties of citizens subjected to the registration, then in Article 7 of the Law no. 86-FZ quite the other approach was set forth. According to the general rule, normative acts of the Bank of Russia should be registered in the procedure established for the state registration of normative legal acts of the federal authorities of the executive power, except some specific kinds of normative acts of Bank of Russia which need rapid adjustment of the banking regulator or in-house

relations in the Central Bank of the Russian Federation aimed at improvement of the situation. That's why the normative acts of the Central Bank of the Russian Federation mentioned in the current research regulating bank liabilities, connected with exercising control over taxes are registered in the Ministry of Justice of the Russian Federation in accordance with the established procedure. This information is contained in the texts of the normative acts. These acts are the following: Regulation of Bank of Russia of September 7, 2007 no. 311-P, On the order of the electronic bank report to the tax authority about setting up an account or drawing up a balance the sheet, deposit, about changing of account, deposit. Regulation of Bank of Russia of April 28, 2012 no. 377-P, On the order of the bank electronic report to the tax authority about granting the right or termination of rights to use corporative electronic means of payment for transferring electronic financial means, about changing of account of cooperate electronic means of payment, Regulation of Bank of Russia of November 6, 2014 no. 440-P, On the order of sending to the bank certain documents of tax authorities and sending by the bank to the tax authority certain documents of the bank in the electronic form in cases as provided for in the legislation of the Russian Federation about taxes and levies.

2. Increase in the number of the sources of publishing normative acts of the Central Bank of the Russian Federation.

According to Article 6 of the Federal law “On the Central Bank of the Russian Federation (Bank of Russia)”, as worded in the Federal law of April 26, 1995, the normative acts of the Bank of Russia had to be subjected to the official publication in the official edition of Bank of Russia – “Vestnik Banka Rossii”. Since January 10, 2016 the normative acts of the Bank of Russia should be officially published on the official site of the Bank of Russia in the informational-telecommunication net “Internet”. The given novelty was introduced by the Federal law dated December 30, 2015 no. 426-FZ, On introduction of amendments to the Federal law “On the Central Bank of the Russian Federation (Bank of Russia)”. According to the current existing instructions of Article 7 of the Law no. 86-FZ, the first publication of its full text in the official edition of Bank of Russia – “Vestnik Banka Rossii” or its first placement on the official Internet site of Bank of Russia in the informational-telecommunication net “Internet” ([www.cbr.ru](http://www.cbr.ru)) is considered the first official publication of the normative act of the Bank of Russia. It should be taken into consideration when determining the date of normative acts of the Bank of Russia entry into legal force, including acts on regulating banks' liabilities connected with tax monitoring.

3. Renovation of the regulation system of the Central Bank of the Russian Federation on the questions of rules of normative acts preparation of the Bank of Russia.

In connection with the publication of Regulation of Bank of Russia of September 22, 2017 no. 602-P, On the rules of normative acts preparation of Bank of Russia, Regulation of Bank of Russia dated September 15, 1997 no. 519, On the procedure of preparation and entry into legal force of normative acts of the Bank of Russia (as amended and

supplemented) lost its effect. It was rather important for bringing normative regulations of the Bank of Russia into compliance with the requirements of the Law 86-FZ as Regulation of Bank of Russia of September 15, 1997 no. 519, On the procedure of preparation and entry into legal force of normative acts of Bank of Russia, was published in accordance with Article 6 of the Federal law “On the Central Bank of the Russian Federation (Bank of Russia)” as worded in the Federal law dated April 26, 1995 and ignored the changes to legislation reflected in Article 7 of the Law no. 86-FZ.

### **3.1 Filling Gaps of the Legal Regulation of the Central Bank of the Russian Federation Norm-Setting Function**

In the Regulation of the Bank of Russia of September 22, 2017 no. 602-P, On the rules of normative acts preparation of Bank of Russia, there is Chapter 14 devoted to special aspects of preparation and publication by the Bank of Russia of normative legal acts together with Federal bodies of the executive power, other authorities (organizations) as well as in consultation and coordination with the mentioned authorities (organizations). These norms are aimed at meeting the requirements of the Tax Code of the Russian Federation on publication by the Central Bank of the Russian Federation of normative acts on the questions defined in the Tax Code of the Russian Federation in consultation and coordination with the federal authority of the executive power, an authorized agent in charge of control and supervision in the field of taxes and levies. In the former Regulation of the Bank of Russia of September 15, 1997 no. 519, On the procedure of preparation and entry into legal force of normative acts of the Bank of Russia similar norms on publishing normative acts of Bank of Russia in consultation and coordination with the federal authorities of the executive power, other authorities (organizations) were missing. Questions of enacting normative acts by the Bank of Russia together with federal authorities of the executive power (chapter 8) were settled. It is evident that there is some lack of balance in meeting the legislative requirements (including of the Tax legislation) and normative acts of the Bank of Russia which regulate the realization of norm-setting powers. Filling the gaps of the legal regulation is the positive fact from the point of view of the general legal, inter-branch, financial-legal principle of the law-based activity of the Central Bank of the Russian Federation of enacting normative acts which include the questions of bank liabilities, connected with tax control monitoring (article 86 of the Tax Code of the Russian Federation).

## **4 Conclusion**

The analysis of the authority of the Central Bank of the Russian Federation to publish normative acts on the questions within its legislation competence (in the Russian tax legislation as well) allows for the conclusion that it enjoys the special public-legal status

and it is reflected in the legal positions of the Constitutional Court of the Russia Federation. It also indicates the development of the inter-branch approach (financial law, bank law, tax law) in researching questions of the Central Bank of the Russian Federation law-making in relation of bank liabilities in the framework of the Russian tax legislation including issues of considering the Central Bank of the Russian Federation normative acts publication of which is provided by the Russian tax legislation as the sources of the Russian Tax law in terms of regulatory, protective and informational functions of the Bank of Russia normative acts.

## References

- Abbyasova, E.: Электронный обмен неплатежной информацией между банками и налоговыми органами (Electronic exchange of non-payment information between banks and tax authorities), in: Karaseva (Sentsova), M. (ed.): Налоговое и бюджетное право: современные проблемы имущественных отношений: материалы международной научно-практической конференции (Tax and budget law: modern problems of property relations: materials of the international scientific-practical conference), Воронеж, Март 29-31, 2012 (Voronezh, March 29-31, 2012), Воронеж: Издательство Воронежского государственного университета (Voronezh: Publishing house of Voronezh State University), 2012.
- Gritsenko, V.: Теория российского налогового права. Современные проблемы (The theory of Russian tax law. Modern problems), Саратов: Изд-во ГОУ ВПО «Саратовская государственная академия права» (Saratov: Publishing house of the Saratov State Law Academy), 2005.
- Karaseva, M., Krokhtina, J.: Финансовое право (Financial Law), М.: Издательский дом НОРМА (Moscow: Publishing House NORMA), 2001.
- Khimicheva, N., Попов, V.: Финансовое право: учебник (Financial Law: a textbook), 6th ed., М.: Норма (Moscow: Norma), 2017.
- Perelyaev, S. (ed.): Налоговое право: Учебник для вузов (Tax Law: A Textbook for universities), М.: Альпина Паблишер (Moscow: Alpina Pablsher), 2015.

## Legal Acts

Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended.

Act no. 426-FZ/2015, On Amendments to the Federal Law On the Central Bank of the Russian Federation (Bank of Russia). [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_191441/](http://www.consultant.ru/document/cons_doc_LAW_191441/)

- Act no. 86-FZ/2002, On the Central Bank of the Russian Federation (Bank of Russia) (with subsequent amendments). [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_37570/](http://www.consultant.ru/document/cons_doc_LAW_37570/)
- Act no. 65-FZ/1995, On the Central Bank of the Russian Federation (Bank of Russia), as amended.
- Act no. 602-P/2017, Regulation of the Bank of Russia, On the Rules for the Preparation of Bank of Russia Normative Acts. <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=278566&fld=134&dst=1000000001.0&rnd=0.9482168999424225#00789862184730108>
- Act no. 440-P/2014, Regulation of the Bank of Russia, On the procedure for sending separate documents of tax authorities to the bank, as well as sending certain documents of the bank to the tax authority in the electronic form in cases provided for by the legislation of the Russian Federation on taxes and fees. <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=171481&fld=134&dst=1000000001,0&rnd=0.9508089622005016#015293888075542283>
- Act no. 377-P/2012, Regulation of the Bank of Russia, On the procedure for the bank to inform the tax authority in the electronic form on the granting of a right or termination of the right to use corporate electronic means of payment for transfers of electronic funds, change in the details of the corporate electronic means of payment. <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=168430&fld=134&dst=1000000001,0&rnd=0.6517846186654086#08691998296581094>
- Act no. 311-P/2007, Regulation of the Bank of Russia, On the procedure for the bank to electronically report to the tax authority on the opening or closing of the account, deposit (deposit), on changing the details of the account, deposit. <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=163701&fld=134&dst=1000000001,0&rnd=0.37664138963463656#07735853443057061>
- Act no. 519/1997, Regulation of the Bank of Russia, On the Procedure for Preparing and Enforcing Normative Acts of the Bank of Russia (with amendments and additions). <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=202909&fld=134&dst=100001.0&rnd=0.18485013380165816#026802277386069284>
- Information of the Bank of Russia “Description of the formats of messages used for electronic exchange between banks (branches of banks), Bank of Russia subdivisions and tax authorities (Description of formats “Tax”) (Version of May 23, 2017)”. <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=210451&fld=134&dst=1000000001,0&rnd=0.21249881523236258#022517126642142316>
- Constitutional Court of the Russian Federation: 2494-O/2017.
- Constitutional Court of the Russian Federation: 45-O/2003.
- Constitutional Court of the Russian Federation: 268-O/2000.



---

# TAX INTEGRATION IN THE AREA OF DIRECT TAXATION IN THE EUROPEAN UNION<sup>1</sup>

*Karina Ponomareva*<sup>2</sup>

## **Abstract**

The article is devoted to analysis of tax harmonization in the area of direct taxation in the European Union. Issues of positive and negative integration, common market and tax harmonization are analyzed. The author mentions the following benchmarks of the European tax integration: tax harmonization in the area of direct taxation, prohibition of discrimination and unfair competition, leading role of fundamental freedoms in the field of European integration.

The development of the tax law of integration associations is conditioned by the dualism of direct and indirect taxes. It is not only rooted in the tax systems of the Member States, but is also reflected in the constituent treaties. Despite the conventionality, the division of taxes into direct and indirect ones is of fundamental importance: the ratio of direct and indirect taxes is the most important structural indicator of the tax system.

The special role of the European Court of Justice in forming EU tax law is emphasized. The current developments of the EU tax law in connection with realization of OECD BEPS Action Plan are brought into light.

The author concludes that the main reason of the leading role of the negative integration is the requirement for unanimous adoption of decisions on tax issues and the perception by Member States of their tax sovereignty against the backdrop of the “lack of tax authority” of the Union.

## **Key words**

Integration, tax law, European Union, direct taxes, corporate income tax, personal income tax, European Court of Justice, tax sovereignty, harmonization.

**JEL Classification:** K34

## **1 Introduction**

Coordination of various taxes has many facets, from avoiding contradictions within the national tax system to the allocation of taxing rights between sovereign Member States. We have selected a few important starting points of the European tax integration. These

---

<sup>1</sup> The research was performed with financial support of the Russian fund of fundamental research (RFFI), project Nr. 17-03-50091 “Legal framework of direct taxation in integration communities (the experience of the European Union and of the Eurasian Economic Union)”.

<sup>2</sup> Karina Ponomareva, Candidate of Legal Sciences, Assistant Professor, Department of State and Municipal Law, Faculty of Law. Omsk F.M. Dostoevsky State University. Areas of specialization: tax law, budget law, comparative law, 38 articles in VAK journals, 5 monographs, as well as articles in foreign languages, including the article in EC Tax Review. E-mail: karinaponomareva@gmail.com, ResearcherID: N-7562-2016.

© Ponomareva K., 2018.

are tax harmonization in the field of direct taxation, the prohibition of discrimination and restriction of competition, as well as the leading role of fundamental freedoms in European integration.

The development of the tax law of integration associations is conditioned by the dualism of direct and indirect taxes. It is not only rooted in the tax systems of the Member States, but is also reflected in the constituent treaties. Despite the conventionality, the division of taxes into direct and indirect ones is of fundamental importance: the ratio of direct and indirect taxes is the most important structural indicator of the tax system.

Direct taxes are always “tied” to a specific state. On the other hand, integration presupposes the existence of an internal market with open borders, the basis of which is fundamental freedoms which require free movement of goods, works, services and labor. Economic integration has led to the fact that carrying on activities of legal entities and individuals on the territories of two and more States has become commonplace. As a result, in the tax law of each country, there are certain legal relationships where foreign element is involved. Such legal relationships cover all situations that occur on the territory of a particular country when an object of taxation or taxpayer are foreign as well as situations when national legal entities carry on their activities on the territory of other countries (Soloveva, 2015: 122). Meanwhile, national taxation systems require an increase in tax revenues. This moment is a point of tension between the interests of the Member States, which need to increase their income, and the interests of the Union in the creation of the domestic market.

The EU and its Member States became the first and most advanced ones in the integration of tax systems. When creating the European Communities, the harmonization of direct taxes was not seen as their goal. Nevertheless, at a certain stage in the development of the common market, it became clear that harmonization is also required in this sphere. The views of the European Commission and Member States regarding the need for such harmonization were the opposite. As a result, the introduction of common measures for all EU Member States was mainly mediated by means of tax coordination, without creation of acts of secondary EU law.

The sphere of direct taxation, especially the taxation of income, is perceived by the Member States from the standpoint of their sovereignty very sensitively. Along with this, caution is still being observed regarding the economic and political decision on tax competition in this sphere. We believe that in the event of competition between different tax systems, it is necessary to eventually establish the order that would best regulate the most important duties in the domestic market and unnecessarily burden the Member States with harmonization measures.

## **2 Positive and negative integration in the area of direct taxation**

There are two basic directions of tax integration. A great experience in this area is accumulated in the European Union.

1. Negative integration, the most important engines of which in the field of direct taxation are fundamental freedoms. Such integration can be called a “market integration”, or integration through prohibitions. As well-known, negative integration measures at the EU level are aimed at breaking down barriers of cross-border economic relations. Their purpose is mainly to eliminate or to reduce the negative impact of the national legislation of the Member States on their mutual trade. The consequence of negative integration is tax competition between Member States which try to attract taxpayers with favorable tax regimes.

In the mid-1980s, the European Court of Justice (ECJ) began applying the rules governing fundamental freedoms to the tax law of Member States in regulating direct taxation. Since the decision of 1986 in the case of *Avoir Fiscal* (ECR: 273/1986), the Court has begun to recognize the norms of the tax law of the Member States incompatible with fundamental freedoms, promoting negative integration. Disputes in such cases included tax deductions and taxation of non-residents; accounting for losses of subsidiaries and permanent missions; taxation of dividends; CFC rules; loan financing etc.

2. Positive integration, consisting in the approximation of legislation (harmonization of legislative and administrative provisions of Member States through the adoption of acts of secondary EU law).

Positive integration in the field of taxation of income in the EU does not go beyond a set of specific rules, mainly in the field of corporate taxation. This is the Merger Directive (OJ L 310/2009: 34) and the Directive on parent and subsidiary companies (OJ L 225/1990: 10-24), as well as the 1990 Arbitration Convention (OJ L 225/1990: 10-24). In 2003 the EU Council adopted a Directive on interest and royalties (OJ L 157/2003: 49-54) designed to avoid obstacles in the area of cross-border payments of interest and royalties while withholding tax at the source by prohibiting such taxation within the group of companies.

In the field of income taxation, the EU secondary law is mainly directed to the problems of administering savings taxation in transboundary situations.

The Savings Directive 2003/48/EC (OJ L 157/2003: 38–48) required the automatic exchange of information on the accumulation of savings in the form of interest payments between Member States. The directive has been repeatedly amended, and in 2015 it was abolished in connection with the adoption of Directive 2014/107/EU (OJ L 359/2014: 1–29), which provides for mandatory automatic exchange of information between the tax authorities of the EU countries. This is another step in the fight against tax evasion and erosion of the tax base. Now there is only one standard of automatic information exchange in the EU, established by the new edition of Directive 2011/16/EU (OJ L, 2011: 1–12) on administrative cooperation in taxation, in order to avoid situations where parallel application of the two standards is possible. Directive 2014/107/EU gave the tax authorities of the EU Member States almost unlimited opportunities to access

information on the beneficiaries of income from savings and all financial products. According to the Directive, Member States are authorized to require their financial institutions to implement reporting rules and due diligence in accordance with OECD reporting standards. The advanced automatic information exchange based on the Union-level legislative tool was necessary because the EU Member States either concluded or are close to concluding agreements with the United States in accordance with the FATCA (26 USC §§ 1471-1474). This means that now, within the meaning of Article 19 of Directive 2011/16/EU, they should carry out the same close interaction with other Member States. The revision of the provisions of such an important directive indicates the legalization of the automatic exchange of information and the end of banking secrecy for tax purposes in the European Union. Directive 2003/48/EC established the need for automatic exchange of information between Member States in terms of income. The directive required automatic notification of tax authorities if there was a situation where interest is paid to a resident of a state other than that in which the paying agent is located. Thus, the payment of interest was made in one Member State to a resident of another Member State in accordance with the laws of the State in which the person is a tax resident. At the same time, the bank was obliged to automatically disclose information regarding the identification of the beneficiary, his account number, and the amount of money paid. The provisions of the Directive gave rise to numerous assessments of its provisions as undermining the institution of bank secrecy. In recent years, the attention of the European Commission has shifted from harmonization issues to combating tax evasion and abusive tax practices, the main means of combating being transparency.

On June 17, 2015 the Commission presented an Action Plan for Fair and Efficient Corporate Taxation in the EU to fundamentally reform corporate taxation in the EU. The Action Plan sets out a series of initiatives to tackle tax avoidance, secure sustainable revenues and strengthen the Single Market for businesses. Collectively, these measures will significantly improve the corporate tax environment in the EU, making it fairer, more efficient and more growth-friendly.

The Action Plan includes a number of short-, medium- and long-term measures and aims to establish a new approach to corporate taxation in the EU in combating tax evasion, ensuring sustainable income generation and an enabling environment for doing business in the common market.

The main elements of the Action Plan are the restart of the failed idea of the common consolidated corporate tax base; ensuring fair taxation at the place of the creation of income; creating an enabling environment for doing business; increasing transparency and improving cooperation. Different opinions are expressed in the literature about the Action Plan. Thus, W. Schön believes that harmless formulations conceal serious interference in the affairs of the common market: CFC taxation should be toughened, control over transfer prices should be resolved in a contractual way, directives that promote business development are modified, and the notion of permanent representation is expanded. Tax preferences

(for example, patent boxes) should be applied in relation to the decisions of the group that developed the Code of Conduct on Business Taxation. Professor Schön also notes that many of the proposals of the Commission counteract the main trends of the common market; the Commission's argumentation before the Court of Justice in the light of its jurisprudence will only weigh when it proves that the restrictions it proposes concern only "purely artificial constructions" that already do not have their own means of protection on the common market (Schön, 2015: 4). The Commission now faces a dilemma. On the one hand, both the directives and the practice of the EU Court have provided enterprises with enormous opportunities for strategic tax planning within the EU. On the other hand, the free distribution of factors of production in the common market through tax targets is the core of the common market and a healthy competition system. Thus, it is necessary to find a balance between the freedom of entrepreneurship and the requirement of states to pay taxes: the Commission should not let the pendulum swing too much towards encumbrance of European market participants.

### **3 EU tax law and BEPS Action Plan**

On January 28, 2016 the Commission presented its proposal for an Anti-Tax Avoidance Directive as part of the Anti-Tax Avoidance Package (COM (2016) 26 final 2016/0011 (CNS)). On June 20, 2016 the Council adopted the Directive (EU) 2016/1164 (OJ L 193/2016: 1–14) laying down rules against tax avoidance practices that directly affect the functioning of the internal market. The Anti-Tax Avoidance Directive contains legally-binding anti-abuse measures, which all correspond to OECD BEPS Action Plan.

Member States should apply these measures from January 1, 2019. It creates a minimum level of protection against corporate tax avoidance throughout the EU, while ensuring a fairer and more stable environment for businesses. For example, the CFC rules, provisions on hybrid schemes, as well as provisions on exit tax and implementation of the GAAR (General Anti-Avoidance Rule). A single European approach to corporate taxation, according to the Commission's plan, will remove many of the existing obstacles, for example, legal uncertainty, undue costs of compliance with law and distortion of facts that all enterprises face in varying degrees. The Commission calls the first such a common consolidated corporate tax base (CCCTB), but while it is under discussion, there are other measures, for example, instruments for resolving disputes on double taxation and initiatives for cross-border credit loss.

Unlike the OECD BEPS Project, Directive 2016/1164 is a specific legislative measure, whose consequences can go beyond the EU (Navarro, Parada, Schwarz, 2016: 130). It seems possible to conclude that the establishment of a minimum protection of the tax systems of all EU Member States should be left to the discretion of the Member States.

Thus, despite recent trends in combating tax evasion and ensuring fair taxation of profits and revenues, positive integration in the field of taxation of profits and incomes has

shown fragmentary results. The main obstacle to positive integration is the requirement for the unanimous adoption of directives by the Council of the EU, stipulated in Article 115 of the TFEU. In this regard, a large number of proposals of the Harmonization Commission were not successful. Over the past 25 years, the picture of European tax law has changed significantly. While indirect taxes were harmonized by the European Economic Community, “the law of direct taxation” began to develop only after the adoption of three basic directives and the Arbitration Convention in 1990. After a rapid start in the mid-1990s, the EU Court reformed the taxation of cross-border activities and investments through the application of primary law regulating basic economic freedoms. The next trends were joint efforts to combat tax competition, the development of international cooperation in tax matters and combating the tax erosion and profit shifting (BEPS).

## **4 Intermediate results of tax harmonization in the area of direct taxation in the European Union**

### **4.1 Ways of tax coordination**

Tax law scholars use multiple synonymous concepts: tax coordination, tax harmonization, approximation of tax laws, integration in the field of tax law, etc. We consider that the concept of “integration” is a broader concept in comparison with “harmonization and approximation”. As already noted, actions to achieve the internal market objectives are identified in the European science of tax law as positive and negative integration (Kopitz, 2007). The phenomenon of tax coordination is the base of these integration processes.

The concept of tax coordination is typically used in Russian and foreign legal science to refer to the phenomenon of integration which helps to eliminate tax obstacles in the EU internal market and establishes a level playing field for purely domestic situations and cross-border situations. However, some authors do not share this terminological and conceptual equating and maintain a more accurate categorization of integration phenomena in EU tax law. Thus, P. Pistone believes that tax coordination should be seen as one of the possible ways to implement the tax integration into the mechanism of the internal market (Pistone, 2012: 336).

The turning point in the division of these concepts was the 2001 European Commission communication (COM (2001) 582 final), which stressed the need to coordinate corporate taxes. Coordination can take place between subjects (Member States) that operate without a centralized authorized level of government and management and are constantly interacting.

Tax coordination has many facets: from avoiding inconsistencies in the national tax system to the distribution of taxing rights between sovereign states.

There are two possible ways of coordination:

- vertical coordination of tax powers between different levels of government;
- horizontal coordination of tax authorities of different jurisdictions at the same level.

Lack of coordination can lead to excessive tax burden. Thus, inadequate horizontal coordination can lead to distortions, preventing optimal allocation of economic resources and to the reduction of the population's welfare. The lack of vertical coordination can undermine the fiscal autonomy of a certain level of state power.

For the purposes of this study we will understand the horizontal coordination of direct taxation in the EU Member States as the ordering of all measures aimed at ensuring tax neutrality for economic transactions within the internal market (Schön, 2000: 90; Englisch, 2012: 15) by removing the obstacles arising from the parallel existence and interaction of different national tax systems.

Horizontal tax coordination has two directions:

- approximation of material tax law and of the relevant procedural rules of the tax law of the Member States in order to overcome or at least reduce the differences between national tax systems to the extent that these differences lead to distortions of competition or increase the costs of compliance and increase the administrative burden;
- coordination of the requirements of the Member States to the taxpayer in order to avoid double taxation of cross-border trade.

European researchers (Grau, Herrera, 2003: 28-36), the European Commission and the European Court of Justice distinguish tax coordination and tax harmonization through European legislation. Thus, J. Malherbe draws a line between the measures which do not affect the tax sovereignty, and measures which significantly modify the national tax system (Malherbe, 2008: 12). According to this concept, tax coordination is only possible by means of soft law, like recommendations, communications, codes of conduct, etc.

European scholars emphasize differences between the need for the concept of horizontal tax coordination and the removal of barriers to market access, as well as the distortion of competition resulting from discrimination or restrictive measures, which form part of the tax system of the same Member State (Cordewener, 2006: 4; Gammie, 2006). Of course, one cannot dispute the fact that these obstacles should also be regarded as a necessary prerequisite to facilitate access to foreign national markets within the EU and to ensure the fact that competition in the internal market is not distorted. However, scholars agree that a level playing field within the national tax jurisdiction is not a sufficient condition for a competitive environment within the entire European internal market, unless threats of double taxation or market inequalities still exist (Englich, 2008: 244; van Thiel, 2002: 18).

One of the most important principles enshrined by the Treaty on the Functioning of the European Union (hereinafter – TFEU, OJ C115/2008), is the principle of conferral: the Union has only the competences conferred on it by the Treaties (Art. 5 TFEU).

B. Terra and P. Wattel divide powers of the Union into three categories:

- 1) exclusive competences, listed in the Art. 3 TFEU;
- 2) shared competences with “preemption” (both the Union and the Member States are competent, but whenever the Union exercises its competence, the Member States lose their competence in the field where the Union exercised its competence), listed in the Art. 4 TFEU;
- 3) shared competences without “preemption”, meaning that the Union is only competent to support, coordinate or supplement, without superseding the competence of the Member States (listed in the Art. 6 TFEU) (Terra/ Wattel, 2012: 42).

Obviously, direct taxation issues fall into the second category. The long-term aim of harmonizing both direct and indirect taxes is the creation of the internal market. However, it should be emphasized that the internal market in the EU has not been established yet, and Europe still moves in this direction (Kemmeren, 2006: 441–442). The idea of the internal market will be realized only when the tax systems of the Member States are integrated at least sufficiently to eliminate tax obstacles created by rules and practices that create conditions for discrimination, restrictions, state aid and distortion of the internal market. This does not mean that all taxes in Europe should be harmonized, but in any case the European fiscal integration should remain a part of common European policy.

## 4.2 European Court of Justice as a leading actor of negative integration

Harmonization of direct taxation is a politically highly sensitive area. Tax harmonization is brought into life by the decisions of the European Court of Justice. Although the way of harmonization of direct taxes today seems to be difficult to pass, the ECJ has taken the role of the “engine of integration”, promoting the principle of negative integration. As a result, the Court formulates its legal positions at a very high, even abstract level, as they are based not on the norms of EU secondary law, but on the founding treaties (Eden, 2010: 612). The Court of Justice has issued a number of decisions of fundamental importance, according to which Member States are obliged to avoid discriminatory effects on taxpayers within their national tax systems: the taxation of the company or individual who realize their freedom of movement in the internal market should not be in worse conditions in comparison with the taxpayer who remains in the home state.



Considering the interrelated achievements of positive and negative integration, we can identify the following issues regarding the impact of decisions of the Court of Justice on the legal regulation of taxation of profits and incomes in the EU:

- whether the judicial practice promotes at least a de facto harmonization of the tax systems of the Member States;
- whether it contributes to the coordination of the competing tax systems of the Member States;
- whether the judicial practice hardens the “soft law” approach of the Commission to horizontal tax coordination.

The Court does not make decisions regarding the tax liability of individual taxpayers. National courts may apply for ECJ interpretation of law. Subsequently, the Court’s answers to these requests are used by national courts in the resolution of similar disputes. Although Member States have the right to create their own laws governing tax relations, they are obliged to realize this right in accordance with the EU law. The practice of the EU Court has made a great contribution to the filling of the concepts of the general and internal markets with legal content. Principles and goals were developed, thanks to which the concept of “common market” became one of the instruments of EU bodies.

The main legal principle pursued by the ECJ is the realization of the principle of fundamental freedoms. In the practice of the Court, this policy is implemented in the gradual removal of restrictions in the key areas for the creation of the Common Economic Space: free movement of capital, labor, goods and services across the EU, as well as freedom of choice of place of residence and economic activity, as enshrined in the relevant articles of the Treaty About the EU. At the same time, the EU Court must take into account the tax sovereignty of Member States in the field of direct taxation.

The application of the EU’s primary law to the sphere of jurisdiction of the Member States leads to the so-called “indirect collisions” (Kube, Reimer, Spengel, 2016: 254). In all cases, the Court of Justice applies the rules governing the application of fundamental freedoms in two stages: verifying the existence of discrimination and the existence of possible justifications for discrimination. Considering the decisions of the EU Court, it can be said that it began to “stretch” the concept of discrimination in tax law by introducing its own benchmark tests.

The Court of Justice considers hundreds of tax cases. The chief legal principle of the decisions in the area of direct taxation is the principle of realization of fundamental freedoms. At the same time the Court of Justice should take into account the tax sovereignty of Member States in the field of direct taxation.

A. Miller and O. Lynne believe that Member States should check their tax regime for compliance with the TFEU (Miller, Lynne, 2014: 412). Otherwise, sooner or later, they should expect many requests from their own taxpayers, and as a consequence, the need to

bring national acts in the sphere of taxes in accordance with the decision of the European Court of Justice. Each tax case before the European Court of Justice could potentially be the basis for changes in national tax laws of each Member State, and not only of the State that is directly involved in the dispute. Thus, the review of practice of the EU Court of Justice on tax matters showed that the lack of capacity to compensate tax losses in one Member State by the benefits in the other is a key issue for corporate groups operating in several Member States (the case *Marks & Spencer* (ECJ, 2005), *Papillon* (ECJ, 2008), *Philips Electronics* (ECJ, September 6, 2012) and others). Fundamental freedoms empower market participants to carry out economic activity in each Member State or in the State where it is more advantageous from a tax perspective.

However, application of those freedoms to the tax revenues of the Member States is not neutral. If market participants want to use the fundamental freedoms, Member States may try to make it less attractive through discriminatory regulations. In order not to sacrifice the protectionist policy in favor of the common market, it is necessary to establish the limits. The relevant experience of the European Court of Justice supports the balance of national tax sovereignty and the effectiveness of fundamental freedoms.

In accordance with the ECJ practice fundamental freedoms prohibit not only direct discrimination but also all indirect forms of discrimination, for example, the ones arising from nationality. This is especially important for tax and legal regulations: the fundamental principle of tax law is to claim payment of taxes not on the basis of nationality, but due to the fact if the person is a resident or non-resident.

The principle of universality is used for residents and usually covers the taxpayer's income from operations around the world. This principle is based on the idea that a resident of a particular state regularly produces the largest part of his income in this State. The person should also contribute to the related public expenditure in proportion to his ability. All the circumstances of the individual, personal and family matters should also be taken into account. The best way for the state to collect taxes, the state is suitable accommodation of a person, since this is his center of vital interests, as the Court stressed the EU judgment in *Schumacker* case (ECJ, 1995).

In such circumstances the Court declared that there was no objective difference in the situation between the non-resident and the resident which could justify the different tax treatment. The Court explained that in the case of a non-resident who received the major part of his income and almost all his family income in a Member State other than that of his residence, 'discrimination arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment'.

The basis for the exemption can perform effective removal of tax, in particular, the authorities of the tax control. Thus, in *Marks & Spencer* (ECJ, 2005) the Court recognized the European balanced division of taxation powers between the Member

States and prevention of double counting of losses. In this and other decisions the idea of providing more space for the tax sovereignty of Member States is obviously taken as a basis.

The important issue is the balance of interests of EU citizens who realize fundamental freedoms and of the Union which implements the common market mechanisms, on the one hand, and the interests of sovereign states, on the other. Fundamental freedoms and sovereignty of States have equal weight, so the interests of neither the one nor the other will be a priority.

EU tax law does not receive adequate protection because of its systemic inconsistencies and lack of “internal coherence”. Internal system coherence “is expressed in the system configuration of tax law” (Radvan, 2015: 20). Existing taxation rules need to be coherent in the EU. Positive integration requires a unanimous decision of all the Member States, and this mechanism is difficult to implement. So the actions of the European Commission are aimed to maximize the effect of negative integration pursued by the practice of the Court of the EU in cases of direct taxation and creation of acts of “soft” law on these solutions, which “invites” Member States to adapt national legislation to the Commission’s interpretation.

The EU tax policy strategy is explained in the Commission communication entitled “Tax policy in the European Union – Priorities for the years ahead”. Provided that the Member States comply with EU rules, each is free to choose the tax system it considers most appropriate. Within this framework, the main priorities for EU tax policy are:

- the elimination of tax obstacles to cross-border economic activity;
- the fight against harmful tax competition, tax evasion and tax fraud;
- the promotion of greater cooperation between tax administrations in ensuring control and combating fraud. Increased tax policy coordination would ensure that the Member States’ tax policies support wider EU policy objectives, as set out most recently in the Europe 2020 strategy for smart, sustainable and inclusive growth (COM (2011) 260).

### **4.3 The CCCTB Proposal as one of the ways of positive integration**

In terms of corporate taxation policy, the Commission aims to overcome the distortion of the internal market, preventing cross-border economic activity and a decrease in cost of doing business throughout the Union. These operations are conducted in two aspects. In the short term, these are specific measures to overcome the obstacles of cross-border economic activities, such as taxation of cross-border mergers, the impossibility of cross-border accounting for losses of transfer pricing difficulties, leading to double taxation and excessive administrative burden.

In the long term, this is the measure eliminating a whole range of obstacles that limit more serious national tax sovereignty. The most striking example of this is the Commission's proposals on the introduction in the EU of common consolidated tax base on corporate income.

The Common Consolidated Corporate Tax Base (CCCTB) is a single set of rules to calculate companies' taxable profits in the EU. With the CCCTB, cross-border companies will only have to comply with one, single EU system for computing their taxable income, rather than many different national rulebooks. Companies can file one tax return for all of their EU activities, and offset losses in one Member State against profits in another. The consolidated taxable profits will be shared between the Member States in which the group is active, using an apportionment formula. Each Member State will then tax its share of the profits at its own national tax rate.

The primary goal of the CCCTB proposal was to strengthen the Single Market by making it easier and cheaper for companies to operate cross-border in the EU. It would enable them to file a single tax return for all their activities in the EU through one tax authority, rather than having to file a tax return in every country where they operate. The consolidation element in the CCCTB would also allow companies to offset losses in one Member State against profits in another (see section on offset losses).

Moreover, the CCCTB could also be an important instrument to combat tax avoidance. It would eliminate many of the weaknesses in the current corporate tax framework which enable aggressive tax planning and would make corporate taxation in the EU much more transparent.

The CCCTB Proposal will automatically provide the ability to reduce the taxable profits of the amount of loss. Losses within a group of companies will be deducted from the taxable profit and other group companies. According to studies, 81% of companies suffered tax losses in one or several Member States, but 96% of those companies that carry foreign losses were not able to get the full amount of this reduction in profit margin (Lodin, Gammie, 2001: 28). However, some countries (Belgium, Greece, Italy) allow compensation for losses within groups under national law, and they will unlikely participate in CCCTB. The other side of this medal is the issue of the country where profitable divisions of the group are resident. It is believed that once the profits within a group are excluded, their corporate tax base will be reduced.

The Commission has therefore announced in the Action Plan that it will come forward with a new proposal within 18 months to revive the CCCTB. The proposal will be for a mandatory CCCTB, introduced through a step-by-step approach.

Negotiations on the CCCTB proposal, which was put forward by the Commission in 2011, are currently stalled, largely due to its sheer scale. In November 2014, President Juncker announced that the Commission would examine how to re-launch the CCCTB in order to break this deadlock. This idea was well received by Member States, MEPs, businesses and many other groups, as the benefits of the CCCTB are widely recognized.

#### 4.4 Direct taxation and tax sovereignty

Direct taxation is particularly sensitive to Member States in terms of their sovereignty. Along with this, caution is still being exercised regarding the economic and political decision on tax competition in the sphere of direct taxes. In view of the lack of achievements in the area of harmonization of direct taxes, Member States have the right to build their own tax systems in their own interests. However, national measures are not entirely free from the influence of EU law. Much more responsibilities are borne by Member States in the performance of their obligations under EU constituent treaties, to which, in the last instance, the maintenance of the exercise of fundamental freedoms belongs.

Full harmonization could be achieved if all Member States adopted, at the level of the European legislation, the principle of equal treatment of the source of income and the “destination country” or if they harmonized their tax rates and tax bases. However, this is not possible, since the EU Court “cannot simultaneously demand non-discrimination in respect of both countries: the source of income and the” destination country” (Graetz, Warre, 2012: 1122).

The second option is also unattainable neither with the help of positive, nor with the help of negative integration.

An important issue is the balance between the interests of EU citizens and the Union itself in implementing the mechanisms of the common market, on the one hand, and the interests of sovereign states, on the other. The basic freedoms and sovereignty of states are of equal weight, therefore the interests of either side will not be a priority.

The tax sovereignty of states will be less and less subject to protection when it comes to regulation that does not conform to the norms of national law. A contradictory norm or a norm alien to the tax system as a whole is less subject to protection than the norm included in the internal system of law and not contradicting the principles of the operation of fundamental freedoms.

The EU tax law does not receive due protection because of its systemic contradictions and lack of “internal coherence”, or integrity. Existing rules of taxation must be coherent within the EU. Therefore, with the internal contradiction of the rules of primary and secondary EU law governing direct taxation, it must continue to be borne in mind that harmonization establishes uniformity through secondary law and, as a consequence, a compromise between EU Member States. The latter are not ready to limit their tax sovereignty by means of a secondary right, and in case of a conflict between a secondary and a primary right, the latter will have an advantage. It is very difficult for EU Member States to effectively combat tax erosion and profit shifting individually, by simply recognizing a particular state as a source of income. An effective solution to this problem can be taxation of the global profit of a multinational

enterprise in the state of residence of the parent company. Such a system could be based on extraterritorial jurisdiction by analogy with residents – individuals. The necessary measure to achieve this goal should be cooperation between states on tax issues. This cooperation can be based on tax information exchange and reciprocity.

#### **4.5 Exchange of tax information**

The most effective measure of dealing with such a strategy is the exchange of tax information. The Directive 2011/16/EU on administrative cooperation in the area of taxation (has expanded the mandatory automatic exchange of information in accordance with the new OECD standards of automatic exchange of information and has given the tax authorities of the EU Member States almost unlimited opportunities to access information on beneficiaries of income from savings and all financial products.

The main advantage of an automatic exchange is the ability to transmit a large amount of the tax information from the government of a source state to the State of residence of the taxpayer. The costs of obtaining information will be low compared to other means of exchange due to the fact that such information has already been transferred to the tax authorities by financial institutions or other persons responsible for recording payments.

#### **4.6 Current results and perspectives**

According to the results of the study, it can be concluded that the EU constituent treaties have not created a legal regime of harmonization of direct taxes. As can be noted, Member States have unanimously accepted only those proposals of the European Commission that influenced the volume of their incomes positively or those that de facto did not provide harmonization, but only coordinated national rules through the rules of law EU, leaving the national regimes intact (for example, the directive on parent and subsidiary companies or the merger directive that did not affect national standards for groups of companies).

Member States are severely restricted by TFEU, but at the same time it becomes obvious that they need to coordinate rather than harmonize national tax systems. To date, the financial and legal regime of taxation is regulated by the principles of subsidiarity, proportionality and balance of competences.

The ECJ practice showed that the methods of countering unfair practices applied by an EU Member State are permissible, but they should not exceed the limits provided by the EU law. Conversely, if the EU Member State does not effectively counter unfair practices of taxpayers, especially when this practice takes on an international dimension, direct intervention of European law is necessary.

Thus, since positive integration involves unanimous decision-making and this mechanism is difficult to be implemented, the actions of the European Commission are designed to maximize the effect of negative integration, carried out by the ECJ practice and publication of acts of “soft” law which “invite” Member States to adapt national law to the interpretation of the Commission. However, the current state of affairs shows that the combination of soft law, negative integration and positive integration, conducted with the help of acts of “hard law”, failed to achieve the goal (Cerioni, 2015: 15).

In accordance with the TFEU the Commission also checks whether Member States and European enterprises comply with competition rules, the main means of which is the prohibition of state aid (Articles 107-109 TFEU). Today, the Commission is attempting to combat tax planning schemes based on European state aid rules in certain cases, like Apple, Amazon, Fiat Chrysler, Starbucks, McDonald’s. In the Apple case, for example, the Commission found that Ireland granted the company unacceptable tax benefits in violation of EU rules on the prohibition of state aid, which allowed Apple to evade taxation of virtually all profits from the sale of products on the common EU market (Commission decision of August 30, 2016 on state aid SA. 38373 (2014/C) implemented by Ireland to Apple, para. 257).

This approach can be described as “constitutional approach” based on the application of the norms of TFEU, regulating the protection of the common market. There are opinions in the science of the EU tax law that this approach can be promising, but the most natural way to combat tax dumping in the EU can be the introduction of a harmonized corporate tax in the EU. We believe that in the near future this method is unlikely to be implemented in the EU, primarily because of the need for unanimous decision-making. In 2001, the Commission issued the document “Tax Policy in the European Union: Priorities for the Years ahead” (COM (2001) 260), which defined three objectives of the tax policy: systems should be simple and transparent, national tax systems should contribute to the effective functioning of the domestic market, national tax systems should help reduce tax rates and to broaden the tax base. A third goal was largely achieved in recent years, especially in the area of corporate taxation and after EU accession of new Eastern European members.

The last decade has become, according to B. Terra and P. Wattel, “a significant shift from taxation of income to consumption taxation” (Terra/Wattel, 2012: 156). In terms of corporate taxation policy, the Commission aims to overcome the distortion of the internal market, preventing cross-border economic activity, and a decrease in costs of doing business across the Union. These actions are conducted in two aspects: in the short term, these are measures to overcome specific obstacles to cross-border economic activity, for example, taxation of cross-border mergers, the impossibility of cross-border recording of losses, the difficulties of transfer pricing leading to double taxation and excessive administrative burden, in the long term, this is eliminating a whole range of obstacles that severely restrict national tax sovereignty.

In general, the actions of the European Commission and the interim results of EU activities on harmonization of direct taxes can be summarized as follows:

- actions aimed at simplifying and increasing the transparency of national tax regimes, especially for non-residents and citizens,
- the development of national taxation regimes for non-residents,
- the development of national income taxation regimes,
- overcoming the negative effects of tax competition, in particular, loss of tax revenues and tax evasion,
- combating cross-border tax fraud and tax evasion,
- ensuring “good governance” in the area of taxation and facilitating the conclusion of tax agreements both between EU Member States and with third countries,
- taxation of distributed profits of companies,
- simplification of cross-border offsetting of losses,
- elimination of tax obstacles to cross-border payments of dividends, interest and royalties,
- elimination of tax barriers to cross-border mergers,
- development of the EU’s knowledge-based internal market through the establishment of non-discriminatory benefits for research and technology development,
- the creation of a favorable tax regime for small and medium-sized enterprises,
- identification of national tax measures that legitimize state monitoring, monitoring of uniform interpretation and implementation of decisions of the ECJ decisions.

## 5 Conclusion

Thus, we can say that in the field of direct taxation the EU has taken the major steps in the direction of negative integration. The main reason for this requirement is seen in the mechanism of unanimous decisions on taxation and the perception by the Member States of their fiscal sovereignty on the background of the “lack of taxing power” of the Union. Lack of coordination at the legislative level also determines the point character of the ECJ practice. This fact leaves the process of integration in the field of direct taxation dependent on random cases.

In this regard, the most important issue is the problem of income distribution among Member States. The OECD and the European Commission, respectively, in the BEPS



plan and the European Anti-Tax Avoidance Package follow the principle that profits and income should be taxed where they are created. However, in practice, the principle of a country of source of income sometimes has to be sacrificed to tax profits in at least one state. The EU Member States have already divided their tax powers in relations among themselves through DTTs, so this issue has not received much attention from the union legislator. However, the BEPS plan has made adjustments to the situation, and the European legislator has focused on two ways of closing the gaps in the EU tax law:

- 1) establishment of requirements for increasing transparency in the activities of multinational enterprises, for example, by providing reports on the distribution of their profits and taxes paid in interested Member States in accordance with Directive 2011/16 / EC. However, transparency in itself does not create new rights and does not affect the rules of distribution of profits and incomes in the Member States;
- 2) the introduction of anti-declining rules throughout the Union. A number of recommendations in this area and Directive 2016/1164 contain such items as the prevention of double deductions, the establishment of a general rule against tax evasion (GAAR) in national legislation, and encourage Member States to include in new DTTs a new article 5 OECD Model Convention governing the issue of artificial evasion from the status of permanent representation in the framework of the implementation of Action 7 of the BEPS plan.

## References

- Devereux, M., Loretz, S.: What Do We Know about Corporate Tax Competition? National Tax Journal no. 66 (2013).
- Eden, S.: The Obstacles Faced by the European Court of Justice in Removing the “Obstacles” Faced by the Taxpayer: the Difficult Case of Double Taxation, British Tax Review no. 6 (2010).
- Englich, J.: Tax Coordination between Member States in the EU – Role of the ECJ, in: in Lang, M. et aa. (eds.), Horizontal Tax Coordination within the EU and within States, IBFD Publications, 2012.
- Grau, A., Herrera, P.: The link between tax coordination and tax harmonization, EC Tax Review. Volume 12. Issue 1. (2003).
- Kemmeren, E.: Source of Income in Globalizing Economies: Overview of the Issues and a Plea for an Origin-Based Approach, 60 Bull. for Intl. Taxn. no. 11 (2006).
- Kopitz, G. (ed.): Tax Harmonization vs. Tax Coordination in Europe: Different Views, 46 Tax Notes International 2, 2007.
- Lang, M. et al: Horizontal Tax Coordination, IBFD, 2012.

- Lodin, S.-O., Gammie, M.: *Home State Taxation*, IBFD Publications, Amsterdam, 2001.
- Malherbe, J., Malherbe, P., Richelle, I., Traversa, E.: *Direct Taxation in the Case-Law of the European Court of Justice*, Brussels, Larquier, 2008.
- Miller, A., Lynne, O.: *Principles of international taxation*. 4th ed. Bloomsbury Professional 2014.
- Navarro, A., Parada, L., Schwarz, P.: *The Proposal for an EU Anti-avoidance Directive: Some Preliminary Thoughts*, EC Tax Review no. 3 (2016).
- Pistone, P.: *The Requirements of the EU Internal Market: Steering the Development of Direct Taxes towards a Fair Mix of Positive and Negative Integration*, in Lang, M. et al. (eds.), *Horizontal Tax Coordination within the EU and within States*, IBFD Publications, 2012.
- Ponomareva, K.: *Tax Law of the Eurasian Economic Union: Substance and Ways of Using of the European Experience*, EC Tax Review no. 2 (2016).
- Radvan, M.: *System of Tax Law*, in: Radvan, M. (ed.): *System of Financial Law: System of Tax Law : Conference Proceedings*. 1st ed. Brno: Masaryk University, Faculty of Law, 2015.
- Schön, W.: *Tax Competition in Europe – the legal perspective – EC Tax Review*, 2000 (2).
- Soloveva, N.: *International Tax Law in the System of Financial Law*, in: Radvan, M. (ed.): *System of Financial Law: System of Tax Law : Conference Proceedings*. 1st ed. Brno: Masaryk University, Faculty of Law, 2015.
- Terra, B., Wattel P.: *European Tax Law*, 6th ed. 2012.

## **Legal Acts**

- Commission decision of August 30, 2016 on state aid SA. 38373 (2014/C) implemented by Ireland to Apple.
- Council Directive 2016/1164 of July 12, 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.
- Council Directive 2011/96/EU of November 30, 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.
- Council Directive 2011/16/EU of February 15, 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
- Council Directive 2010/24/EU of March 16, 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

Council Directive 2009/133/EC of October 19, 2009 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office, of an SE or SCE, between Member States.

Council Directive 2003/49/EC of June 3, 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

Proposal for a Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market. COM (2016) 26 final 2016/0011 (CNS). <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1454056979779&uri=COM:2016:26:FIN>

ECR: C-270/83/1986.

ECJ: C-279/93/1995.

ECJ: C-446/03/2005.

ECJ: C-418/07/2008.

ECJ: C-18/11/2012.

---

# ON CORRELATION BETWEEN NATIONAL TAX LEGISLATION AND TAX AGREEMENTS OF THE RUSSIAN FEDERATION AND SELECTED COUNTRIES OF CENTRAL AND EASTERN EUROPE

*Vasily Popov<sup>1</sup>, Elena Trishina<sup>2</sup>*

## **Abstract**

The article is devoted to the comparative characteristic of the national legislation of the Russian Federation and certain countries of Central and Eastern Europe, including tax laws, and international tax agreements. The purpose of this article is to determine the features of correlation between the national legislation and international tax agreements. The hypothesis states that in the explored countries of Central and Eastern Europe and the Russian Federation the priority of international agreements over national tax laws is established, but at the same time the provisions emphasizing tax sovereignty of such countries are enshrined in the agreements. The methods used for this research include methods of analysis and synthesis, comparative jurisprudence and generalization.

## **Key words**

Central Europe, Eastern Europe, selected countries, Russian Federation, national tax law, constitutions, international tax agreements, ratio.

**JEL Classification:** K33, K34, K41, K42

## **1 Introduction**

The purpose of this article is to determine the features of correlation between the national legislation and international tax treaties. The hypothesis states that in certain selected countries of Central and Eastern Europe and the Russian Federation the priority of international treaties over national tax laws is established, but at the same time the provisions emphasizing tax sovereignty of such countries are enshrined in agreements. The used methods include: methods of analysis and synthesis, comparative jurisprudence and generalization. A number of works on the research subject were published earlier:

---

<sup>1</sup> Doctor of law, professor, department of financial, banking and customs law, Saratov State Law Academy, Russian Federation. The author specializes in tax law, public and local finances. He is the author and the coauthor of 8 books and more than 40 reviewed articles in prestigious journals. He is a member of International association of the financial law. Contact e-mail: vpopov1970@rambler.ru.

<sup>2</sup> Candidate of law, associate professor, department of civil procedure, Saratov State Law Academy, Russian Federation. The author specializes in legal procedure. She is the author and the coauthor of 8 books and more than 20 reviewed articles in prestigious journals. Contact e-mail: 06yana@bk.ru.

M.N. Kobzar-Frolova “Role and value of international treaties in prevention of a tax tortiousness”, S.A. Bayev “Legal regulations to avoid double taxation in the relations between the Russian Federation and the states of the European Union”, L.V. Polezharova “The main aspects of elimination of the international double taxation”, etc.

## **2 General characteristic of the international tax agreements**

### **2.1 International agreements in the Russian legal system**

Nowadays rules of international law are implemented in the Russian legal system everywhere. As a result of ratification of the most significant international agreements, their regulations became a part of Russian national legislation, including tax laws, proceeding from recognition of international agreements as a source of tax law.

To understand the essence of ratification it is necessary to address the Federal law on international agreements of the Russian Federation. According to this Law, international treaty is an international agreement signed by the Russian Federation with a foreign state (or states), with an international organization or another structure that has the right to sign such agreements, in written form, regulated by international law, enshrined in one document or in several connected documents. At the same time ratification means “a form of expression of consent of the Russian Federation to the obligatory character of the international treaty” and is to some extent identical to the concepts of “signing” and “conclusion” (Act no. 101-FZ/1995, Art. 2).

According to the Constitution of the Russian Federation, “the conventional principles and rules of international law and the international agreements of the Russian Federation are a component of its legal system. If the international treaty of the Russian Federation establishes other rules than those provided by the law, then rules of the international treaty are applied” (The Constitution of the Russian Federation, Art. 15). The priority of international treaties is also enshrined in the Tax Code of the Russian Federation (Act no. 146-FZ/1998, Art. 7). However this rule works if the international treaty is ratified.

In this case, on the basis of the Vienna convention of 1969, in which the principle of “pacta sunt servanda” is enshrined, the agreement for contracting states has to be obligatory and be carried out honestly (The Vienna convention, Art. 26). Also the states are obliged to adhere to the principle of fair accomplishment of such obligations (The Tax law, 2004: 351).

Meanwhile, the Constitutional Court of the Russian Federation in the Resolution of July 14, 2015 no. 21-O drew a conclusion that if government structures authorized to perform international agreements in which the Russian Federation participates have established that the resolution of the European Court of Human Rights (further – ECHR) differs from the Constitution of the Russian Federation, they are entitled to apply to the Constitutional Court of the Russian Federation to determine whether it is possible to

perform the resolution of ECHR. If the Constitutional Court of the Russian Federation decides that the resolution of ECHR in interpretation contradicts the Constitution of the Russian Federation, it is not subject to execution in this part (Constitutional Court of the Russian Federation: 21-O/2015). Thus, execution of international treaties depends on the decision of the Constitutional Court of the Russian Federation.

## 2.2 International tax treaties of the Russian Federation

Among all international treaties, a special role is assigned to the agreements connected with the issues of taxation. In the Russian Federation and in many European countries tax agreements have prevalence over regulations of national tax laws, do not depend on its changes, and thus act as a stable element in the area of taxation (Bayev, 2007: 9).

As it was already mentioned, it is fixed in article 7 of the Tax Code of the Russian Federation that if the international treaty of the Russian Federation established other regulations than this Code and the regulatory legal acts adopted in accordance with it, provisions of international treaties are applied.

M.N. Kobzar-Frolova summarizes: “Presence and operation of international treaties, on the one hand, guarantees taxpayers non-discrimination, allows to avoid double taxation; on the other hand, for the states it provides the possibility of mutual direct consultations, exchange of information, exchange of experience and other contacts for resolving many contentious issues, as well as for monitoring foreign economic activities of its residents. ... The international agreements allow to prevent a large number of torts in the tax sphere by stating the most significant questions in taxation” (Kobzar-Frolova, 2010: 32) and are also a type of public agreements (Tikhomirov, 2008: 289).

The Russian Federation acts as the subject of many international tax agreements from which there can be distinguished agreements:

- on avoidance of double taxation (Perov, 2000: 216-217);
- on the principles of collection of indirect taxes;
- on the taxation of income from international transport;
- on cooperation in preventing violations of tax laws;
- on taxation unification; containing tax regulations principles (for example, on the legal status of diplomatic and consular missions falling under the tax immunity);
- and others.

Thereby, the specified agreements allow not only to provide tax sovereignty of certain participating countries (Raritska, 2015: 345-361), but also unification of tax jurisdictions of different states (Ciak, 2015: 254-257; Kobzar-Frolova, 2010: 33-34).

I.I. Kucherov gives a narrower classification of international treaties, allocating three groups: on avoidance of double taxation; special; on cooperation and mutual assistance on compliance with tax legislation (Kucherov, 2001: 74).

### **3 Features of the correlation of international tax treaties between individual countries of Central and Eastern Europe and the Russian Federation and the national legislation of these states**

#### **3.1 General provisions on the international tax agreements between certain countries of Central and Eastern Europe and the Russian Federation**

The international tax agreements are, as a rule, aimed at regulating direct taxes (on income, on capital, on property). This also applies to tax treaties between the Russian Federation and certain countries of Central and Eastern Europe.

For example, tax agreements are signed between the Russian Federation and such states as the Republic of Poland, Hungary, the Slovak Republic, the Republic of Slovenia, the Republic of Lithuania, the Republic of Latvia, the Republic of Albania, the Republic of Macedonia, the Czech Republic, the Republic of Croatia, the Republic of Bulgaria, etc. They have the form of conventions (in particular, Hungary) or treaties (for example, Croatia).

It should be noted that regulations on the priority of international treaties over national tax laws are also enshrined in the legislation of the mentioned countries. For example, the Law of the Republic of Latvia of February 18, 1995 "About taxes and duties" states that "if the procedure for calculating or paying taxes included in the international treaties approved by the Saeima differs from the one provided by the tax legislation of the Republic of Latvia, then the rules of these international treaties apply" (The law on taxes and fees, Art. 7). In Poland there is no general tax law, but the basic tax provisions are established by the Constitution of the Republic of Poland of April 2, 1997: "Everyone is obliged to bear the public encumbrances and other duties defined in the law, including taxes" and "the international treaty, ratified from the prior consent expressed in the law, takes precedence over the law if this law is not consistent with the treaty" (the Constitution of the Republic of Poland, Art. 84, 91). Similarly, in the Constitution of the Slovak Republic of September 1, 1992 it is said that "international treaties that directly justify the rights or obligations of individuals or legal entities and that have been ratified and promulgated in the manner prescribed by law have priority over the law"; "duties can be assigned: a) by law, either on the basis of law, within its borders and with respect for fundamental rights and freedoms; b) an international treaty, ... which directly justifies the rights and obligations of individuals or legal entities ..."; "taxes and fees are established by the law or on the basis of the law" (the Constitution of the Slovak Republic, Art.

7, 13, 59). Of course, it must be kept in mind that the given examples illustrate ratified international treaties.

A specific place among international treaties is held by agreements on avoidance of double taxation as they allow to secure against the liability to tax twice those taxpayers who, for example, have a nationality of one state, but work on the territory of another. However, such an opportunity appears if the agreement on prevention of double taxation is signed between the two countries. The agreements mentioned above are subject to application on the territory of the Russian Federation, for both taxpayers, and tax and judicial authorities, due to the implementation of the principles of “automatic integration” into the Russian system of law and “self-feasibilities” of the international treaty (Mamedov, 2006: 17-21). Examples of such treaties include agreements with Poland, Slovakia, Latvia, Croatia, Hungary, etc. The subject of such an agreement with Poland, Slovakia, Croatia and Hungary is avoidance of double taxation of income and property, and with Latvia – income and the capital.

It is important to take into consideration that in many countries the application of the provisions of international treaties is associated with obtaining the conclusion of tax authority concerning conditions of the concluded bargain on the basis of agreement regulations. Nevertheless, in Russia, the use of written explanations of financial bodies does not exclude a possibility of additional accrual of taxes if tax authorities take another position (Act of Ministry of Finance of the Russian Federation no. 03-02-07/2-138/2007).

The model conventions developed by the Organization for Economic Cooperation and Development (OECD) and the United Nations (UN) are the main types of bilateral agreements on avoidance of double taxation. Though the Russian Federation is not among members of OECD, when courts consider tax disputes regarding the use of tax benefits on the basis of tax contracts, the financial and tax authorities use the comments on the Model Convention quite widely. This situation testifies to the strengthening of the role of this organization in law enforcement practice in the field of taxation in Russia (Act of Department of tax and customs policy of the Ministry of Finance of the Russian Federation no. 03-08-05/2008). It allows to use a number of the principles of the international tax law: tax non-discrimination; counteractions to offenses at application of tax agreements; granting privileges on taxes to real recipients of income; interactions of tax authorities of contracting states and exchange of the relevant information; differentiations of tax jurisdiction (Bayev, 2007: 17-19), etc.

To date, many countries have taken the negative effects of double taxation on their economies seriously. And one of the ways to eliminate double taxation is the conclusion of the relevant international treaties.

It is known that the states in the taxation systems combine the principles of territoriality (in particular, collection of taxes from income gained only on their own territories,



regardless of the permanent residence of persons receiving them) and residences (taxation on the income of the persons taking permanent residence in these countries including income gained in other countries), which provides protection of their tax laws and interests in relationship with other states (Polezharova, 2010: 48).

As for the principle of residence, this status is established separately with respect to individuals and legal entities (organizations), based on a number of criteria: nationality, permanent residence, place of implementation of activity, location of governing body, etc.). In practice, as a rule, both principles are used.

### **3.2 The specifics of the consolidation of provisions that testify to the tax sovereignty of the contracting states in the international tax treaties between individual countries of Central and Eastern Europe and the Russian Federation**

Addressing specific tax agreements, it is possible to summarize that, for example, in agreements with Poland (The Agreement between the Government of the Russian Federation and the Government of the Republic of Poland about avoidance of double taxation of income and property), Slovakia (The Agreement between the Government of the Russian Federation and the Government of the Slovak Republic about avoidance of double taxation of income and property), Croatia (The Agreement between the Government of the Russian Federation and the Government of the Republic of Croatia about avoidance of double taxation concerning taxes on income and property), Latvia (The Agreement between the Government of the Russian Federation and the Government of the Republic of Latvia about avoidance of double taxation and on prevention of tax avoidance concerning taxes on income and the capital) the governments of these states are described as the subjects that have concluded these international acts, and in the agreement between the Russian Federation and Hungary (The Convention between the Russian Federation and the Hungarian Republic about avoidance of double taxation concerning taxes on income and property) such subjects are the states as public structures.

Each of the agreements fixes the taxes of the state that is a party to the treaty, that is, the international act sends a reference to the national tax legislation with regard to the treatment of the tax system of the contracting state (Jánošíková, 2015: 105-107). This demonstrates respect for the principle of tax sovereignty of an individual state that enters into a tax treaty. At the same time it is mentioned everywhere that that the treaties also apply to any similar taxes that will be levied after the signing of the relevant contract in addition or in place of already fixed taxes, which shows the independence of states for tax lawmaking. The obligation to notify of changes in national legislation is vested in the competent authorities of countries (governments, financial or tax authorities).

Since the contracts use a combination of territoriality and residency, this is necessarily stipulated in the provisions of international acts. In particular, in bilateral agreements with

Latvia and Croatia, the term “resident” is defined, in other treaties under consideration the term “resident” is fixed, which makes it possible to determine the territorial location of a potential taxpayer for levying taxes from it. In the Russian Federation, the concept of a “tax resident” is fixed only in relation to the taxation of individuals by the personal income tax. And this will be an individual who actually resides in the Russian Federation for at least 183 calendar days during the next 12 consecutive months. In the case of legal entities, the notion of a tax resident includes: Russian organizations; foreign organizations recognized as tax residents on the basis of international treaties; foreign organizations the management of which is the Russian Federation.

Among the most common methods for eliminating double taxation, experts note the method of exemption with the use of a territorial approach and exclusion from the tax base of income received in another country; the method of offset using again the territorial approach and including income received in another country in the tax base, but with the subsequent offset of taxes paid in another state on account of the payment to be levied in the host country (Dernberg, 1997: 128-132).

Methods of elimination of double taxation are also widely applied to permanent missions of foreign legal entities. In this regard, these tax treaties fix the concept of permanent representation, in general, and include: the place of management; branch; office; factory; workshop; mine, oil or gas well, quarry or any other place of extraction of natural resources; construction site, assembly or installation facility, or technical supervision activities associated with them, if the duration of the work exceeds 12 months. These provisions are associated with the definition of the tax jurisdiction of the contracting states in terms of the terminology used.

Surely, international treaties on avoidance of double taxation contain the principles concerning cooperation between tax authorities of contracting states. The Convention on the mutual administrative aid on tax cases of 1988 contains regulations on assistance (The Convention about the mutual administrative help with the tax cases). By the general rule, tax authorities of contracting states exchange information which is necessary for ensuring application of provisions of the international treaty and national tax laws of contracting states. Meanwhile, such information is considered as confidential, and its illegal distribution entails responsibility. The corresponding sanctions are defined by the administrative and penal legislation of the state which provided information.

According to the agreements signed by the Russian Federation with Poland, Slovakia, Croatia, Latvia and Hungary, the competent authorities of the states exchange information to fulfill not only the contracts themselves, but also the national tax legislation. Nevertheless, the acquired information is also considered confidential, as well as information obtained according to the national legislation and can be transferred only to persons or bodies (including courts and administrative bodies) engaged in levying taxes in the contracting states, their forcible collection, criminal prosecution for tax offenses or consideration of taxpayers’ appeals concerning taxes. Such provisions are again

linked to the tax sovereignty of the signatory states. In addition to the mentioned above, information can be disclosed in open court sessions or when courts make decisions.

### **3.3 Specifics of the application of international treaties in law-enforcement activities of government and judicial authorities on the territory of the Russian Federation**

International treaties define the principle of possibility of applying the decisions of foreign courts in the Russian Federation, which, particularly, is enshrined in Russian legislation (Act no. 138-FZ/2002, Art. 409; Act no. 95-FZ/2002, Art. 241; Act no. 21-FZ/2015, Art. 350; Act no. 174-FZ/2001, Art. 3, 413) and it is stipulated by the Federal constitutional law on the judicial system of the Russian Federation, on the basis of which “the binding force on the territory of the Russian Federation of judgments of courts of foreign states, international courts and arbitration is determined by international treaties of the Russian Federation” (Act no. 1-FCZ/1996, Art. 6). Thus, the principle of mandatory application of decisions of authorized foreign courts in the law enforcement practice of public authorities and courts on the territory of the Russian Federation is being implemented, while indicating this in ratified international treaties.

As noted by N.I. Marysheva, there is a periodic discussion about the advisability of expanding the range of recognized and executed decisions of foreign courts by allowing reciprocity, even in the absence of an international treaty (Marysheva, 2006: 10). Until recently the most significant legal act for the application of provisions of international treaties by the Russian courts and the principles established in them was the Resolution of the Supreme Court of the Russian Federation “About use by courts of law of the conventional principles and rules of international law and international treaties of the Russian Federation”. According to the Resolution, “it is necessary to understand the fundamental peremptory rules of international law accepted and recognized by the international community of the states in general from which deviation is inadmissible” (Supreme Court of the Russian Federation: 5/2003). The conventional principles include, among others, universal respect of human rights, fair accomplishment of the international obligations. A generally accepted rule is the rule of conduct accepted and recognized by the international community of states as legally binding. It is also specified that “by consideration of civil, criminal or administrative cases by court such international treaty of the Russian Federation which became effective and became obligatory for the Russian Federation and whose provision is directly applied do not demand the publication of interstate acts for their application and are capable to generate the rights and duties for subjects of the national right” (Supreme Court of the Russian Federation: 5/2003). Now these establishments underwent some changes connected with the adoption of the Resolution by the Constitutional Court of the Russian Federation no. 21-O/2015. According to the decision of the court of general jurisdiction, the arbitration tribunal

reviews the case order in accordance with the procedure established by the procedural law in connection with the adoption by the European Court of Human Rights of a decision in which violation of human rights and freedoms in the Russian Federation is found in the application of some law or its separate provisions (Popov, 2012: 47-51), admitting that the possibility of applying the law can be established only after confirmation of its compliance with the Constitution of the Russian Federation, appeals to the Constitutional Court of the Russian Federation to verify the constitutionality of this law. And only the Constitutional Court of the Russian Federation determines the possibility of applying the decisions of the ECHR, based on their compliance with the Constitution of the Russian Federation.

Thus, by analyzing, summarizing and comparing the national tax legislation of the Russian Federation and a number of Central and Eastern European states and international tax treaties concluded between the Russian Federation and these countries, it can be stated that international tax treaties ratified by the contracting states, including avoidance of double taxation, have supremacy over national legislation, including tax legislation. At the same time in general tax laws or codes, or in the constitutions of states, such provisions are fixed as principal provisions. However, there are clarifications of this rule, consisting in the assessment by the bodies determining the constitutionality of laws or its absence, the provisions of international treaties the content of the constitutions of states, for example, the Constitutional Court of the Russian Federation.

#### **4 Conclusion**

As a result of writing the article, the goal of the research was achieved through analysis and generalization of normative and literary sources. A comparative legal characteristic of national legislation, including tax legislation of certain countries of Central and Eastern Europe: Poland, Slovakia, Croatia, Latvia and Hungary, as well as the Russian Federation, and international tax treaties on avoidance of double taxation between these states was conducted. As a result, the hypothesis that the priority of international treaties over national tax laws is fixed in the explored countries, was confirmed. But at the same time it was additionally revealed that in these treaties provisions are fixed that emphasize the tax sovereignty of the contracting states.

#### **References**

Вауев, S.: Правовое регулирование избежания двойного налогообложения в отношениях между Российской Федерацией и государствами Европейского Союза (Legal regulation of avoidance of double taxation in the relations between the Russian Federation and the states of the European Union), М. (Moscow), 2007.

- Ciak, J.: Fiscal Rules in Polish Law and the European Union, in: Mrkývka, P. (ed.): System of Financial Law : General Part : Conference Proceedings, 1st ed. Brno : Masaryk University, Faculty of Law, 2015. <https://www.law.muni.cz/sborniky/system-of-financial-law/general-part.pdf>
- Dernberg, R.: Международное налогообложение: Краткий курс (International taxation: Short course), М.; Будапешт: COZPI (Moscow; Budapest: COZPI), 1997.
- Jánošíková, P.: The Tax System in the Czech Republic and its Transformation in the 20th and 21th Century, in: Radvan, M. (ed.): System of Financial Law : System of Tax Law : Conference Proceedings, 1st ed. Brno : Masaryk University, Faculty of Law, 2015. <https://www.law.muni.cz/sborniky/system-of-financial-law/system-of-tax-law.pdf>
- Kobzar-Frolova, M.: Роль и значение международных договоров в предупреждении налоговой деликтности (A role and value of international treaties in prevention of a tax tortiousness), Финансовое право (Financial law) no. 4 (2010).
- Kucherov, I.: Налоговое право России. Курс лекций (Tax law of Russia. Course of lectures), М.: ЮрИнфоР (Moscow: YurInfoR), 2001.
- Mamedov, A.: Глобализация и финансовое право (Globalization and financial law), Финансовое право (Financial law) no. 8 (2006).
- Marysheva, N.: Вопросы признания и исполнения в России решений иностранных судов (Questions of recognition and execution in Russia of solutions of foreign vessels), Журнал российского права (Magazine of Russian law) no. 8 (2006).
- Perelyaev, S.G. (ed.): Налоговое право: Учебник (The Tax law: the textbook), М.: Юрист (Moscow: Jurist), 2004.
- Perov, A.: Налоги и международные соглашения России (Taxes and international agreements of Russia), М.: Юрист (Moscow: Jurist), 2000.
- Polezharova, L.: Основные аспекты устранения международного двойного налогообложения (Main aspects of elimination of the international double taxation), Финансы (Finance) no. 5 (2010).
- Роров, V.: Правовые позиции Европейского Суда по правам человека по вопросам защиты прав и законных интересов участников отношений в сфере налогообложения (Legal positions of the European Court of Human Rights on protection of the rights and legitimate interests of participants of the relations in the taxation), Правовая политика и правовая жизнь (Legal policy and legal life) no. 1 (2012).
- Raritska, V.: Tax Sovereignty as a Fundamental Characteristic of Tax Law System, in: Radvan, M. (ed.): System of Financial Law : System of Tax Law : Conference

Proceedings, 1st. ed., Brno : Masaryk University, Faculty of Law, 2015. <https://www.law.muni.cz/sborniky/system-of-financial-law/system-of-tax-law.pdf>

Tikhomirov, Yu.: Современное публичное право (Modern public law), М.: Эксмо (Moscow: Eksmo), 2008.

## Legal Acts

The Convention about the mutual administrative help with the tax cases of January 25, 1988.

The Vienna convention on the right of international agreements of May 23, 1969.

The Convention between the Russian Federation and the Hungarian Republic of April 1, 1994, About avoidance of double taxation concerning taxes on income and property.

The Agreement between the Government of the Russian Federation and the Government of the Republic of Latvia of December 20, 2010, About avoidance of double taxation and about prevention of tax avoidance concerning taxes on income and the capital.

The Agreement between the Government of the Russian Federation and the Government of the Republic of Croatia of October 2, 1995, About avoidance of double taxation concerning taxes on income and property.

The Agreement between the Government of the Russian Federation and the Government of the Slovak Republic of June 24, 1994, About avoidance of double taxation of income and property.

The Agreement between the Government of the Russian Federation and the Government of the Republic of Poland of May 22, 1992, About avoidance of double taxation of income and property.

The Constitution of the Republic of Poland of April 2, 1997. [http://www.concourt.am/armenian/legal\\_resources/world\\_constitutions/constit/poland/poland-r.htm](http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/poland/poland-r.htm)

The Constitution of the Slovak Republic of September 1, 1992. <http://worldconstitutions.ru/?p=110>

The law of the Republic of Latvia of February 18, 1995, About taxes and duties, as amended. [http://www.baltikon.lv/?object\\_id=383#Par186](http://www.baltikon.lv/?object_id=383#Par186)

The Constitution of the Russian Federation of December 12, 1993, as amended.

Act no. 1-FCZ/1996, The Federal constitutional law on the judicial system of the Russian Federation, as amended.

Act no. 21-FZ/2015, The Code of administrative legal proceedings of the Russian Federation, as amended.

Act no. 138-FZ/2002, The Civil Procedure Code of the Russian Federation, as amended.

Act no. 95-FZ/2002, The Arbitration Procedural Code of the Russian Federation, as amended.

Act no. 174-FZ/2001, The Code of penal procedure of the Russian Federation, as amended.

Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended.

Act no. 101-FZ/1995, The Federal law on international agreements of the Russian Federation, as amended.

Act of the Department of tax and customs policy of the Ministry of Finance of the Russian Federation no. 03-08-05/2008. <http://www.garant.ru/products/ipo/prime/doc/12063845/#12063845>

Act of the Ministry of Finance of the Russian Federation no. 03-02-07/2-138/2007, Explanations of provisions of tax laws regarding article 34.2 of the Tax Code of the Russian Federation.

Constitutional Court of the Russian Federation: 21-O/2015.

Supreme Court of the Russian Federation: 5/2003.

# SOFT LAW AS A DEVICE OF TRANSFORMING THE INTERNATIONAL TAX LAW ORDER (BY THE EXAMPLE OF THE BEPS PROJECT)<sup>1</sup>

*Maxim Belyaev<sup>2</sup>, Vladislav Denisenko<sup>3</sup>*

### Abstract

This contribution deals with some elements of soft law by the example of international tax regulations. The aim of this article is to identify the reasons why soft law instruments operate more efficiently than hard law instruments. The hypothesis of the study is that the benefits of flexible regulation are numerous, while burdens can be addressed or avoided. The following results are obtained in the article. Firstly, the objective of the multilateral instrument would be the implementation of measures to address BEPS and its consequence would be the modification of certain provisions of the existing network of bilateral tax treaties. Secondly, the multilateral instrument can offer parties flexibility in their level of commitment within certain defined boundaries in order to move towards a level playing field. The level of commitment of parties can also be modulated through the language used in the multilateral instrument (strong or soft wording) and types of obligations. Thirdly, multilateral instrument ensures the transparency and clarity of the commitments undertaken by the parties. Mechanisms are available to ensure clear and publicly accessible information as regards, on the one hand, the interaction between the multilateral instrument and bilateral tax treaties and, on the other hand, the use of the mechanisms for flexibility set up by the multilateral instrument. Consequently, hard law and soft law can be complementary to each other. This is achieved when these two regulatory approaches operate within the same regulatory area and build on each other with a view to achieving the same goals. Hard and soft law can be complementary either when soft law leads to the adoption of legally binding measures or where hard law is developed through soft law measures.

### Key words

Tax; soft law; OECD; BEPS Action Plan.

---

<sup>1</sup> The reported study was supported by RFBR, research project no. 16-03-00291.

<sup>2</sup> Associate professor for Philosophy, Department of Ontology and Epistemology, Faculty of Philosophy and Psychology, Voronezh State University, Russian Federation. The author specializes in theory of law. He is the author of 3 books and coauthor of 2 books. He is also author of 40 articles in peer-reviewed journals. Contact email: [yurist84@inbox.ru](mailto:yurist84@inbox.ru)

<sup>3</sup> Associate professor for Law, Department of Theory of State and Law, International and Comparative Law, Faculty of Law, Voronezh State University, Russian Federation. The author specializes in theory of law. He is the author of 3 books and 20 articles in peer-reviewed journals. Contact email: [vsu\\_vlad@mail.ru](mailto:vsu_vlad@mail.ru)



**JEL Classification:** K340

## 1 Introduction

Soft law and hard law interact in many ways. Soft law and hard law measures can be classified as ‘alternatives’ to each other. They can also be rival to each other. The coexistence of hard and soft laws can also be described as complementary. Finally, the interaction of soft and hard laws can take a very close form and lead to a merger or a hybrid construction. These issues will now be considered in more detail. The attributes and deficiencies of soft and hard laws as alternatives are widely recognised in the literature (Best, 2003; Blutman, 2010; Boyle, 1999). Without denying the regulatory value of both hard law and soft law instruments, it is admitted that hard and soft laws are simply different. They respond to different regulatory needs and thus offset each other’s shortcomings. In other words, soft law offers answers to problems created by hard law regulation and hard law instruments prevent problems that soft law could create.

This article will discuss some elements of soft law by the example of tax regulations. The aim of this article is to identify the reasons why soft law instruments operate more efficiently than hard law instruments. The hypothesis of the study is that the benefits of flexible regulation are numerous, while burdens can be addressed or avoided. Such opportunities are realistic due to fine-tuning of the legal order. Regarding the methodology, to perform an appropriate research to support the findings throughout this thesis a twofold methodology is pursued. Firstly, a substantial part of the research is literature-based, especially the findings regarding the base erosion, profit shifting and OECD’s BEPS initiative. The main sources of findings were the articles and literature published by the OECD itself. Other sources supporting this thesis were articles and journals found through available databases. Secondly, this text evaluates whether the current version of the BEPS initiative by the OECD is capable to solve the issue. Evaluation of the BEPS Action Plan is done based on some arguments.

### 2.1 The concept of soft law

The term soft law, which causes heated debates, has become widespread and has caused controversies in the international setting since the 1970s.

According to Mörth, soft law is associated with governance (Mörth, 2004: 9). The term governance is typically used in two different ways. First, it is applied in a broad sense to encompass every mode of political governance, including the traditional modes of hierarchical governance within the setting of a government. Second, governance can be used in a more restrictive sense, referring only to types of political governance in which non-hierarchical modes of guidance are employed. Thus, governance is a counter-

concept to government. The latter, limited meaning of governance is the one applicable throughout the thesis. Governance summarises ‘new’ styles of governing and places less emphasis on legally embedded institutions that produce enforceable decisions. Its nature is inclusive and participatory because governance relies on the engagement of public and private, legal and non-legal actors in the process of decision-making. Governance is about the inclusion of all relevant stakeholders – citizens, groups and public authorities – in deciding on pursued policies.

The methods of achieving a satisfactory result in managing communities are not prescribed by law. Despite fundamental questions that the issue of soft law stimulates, such as questions of power, legitimacy and democracy, there is no agreement among scholars about the significance and regulatory potential of the soft law phenomenon. Soft law is disputed and criticised for its misleading character (Zemanek, 1998: 843 ff.). In essence, it is associated with norms of behaviour that do not create legal obligations. Hence, these norms do not have a legally binding force on the addressees of the norms.

The opponents of the soft law concept reason that if norms do not produce any legal obligations, then such norms cannot be called law. That understanding of law is reflected in a binary vision of law: there is either law or politics and there are no grey areas in between that could be compared to hard law (Baxter, 1980: 549 ff.). If non-legally binding measures are called soft law, there is a risk of blurring the division of what might or might not be binding. Additionally, it is worth mentioning that soft law is not the only term used to depict the phenomenon of the increasing application of non-legally binding devices. In legal writing, uncomfortable with naming regulation without legal effects as soft law, notions such as ‘informal instruments’ or ‘quasi-legislation’ have been applied. It is interesting to note a shift in the approach to soft law presented by Klabbers. Initially, his criticism of soft law was moderate. He merely claimed that it was redundant. In his view, hard law had the capacity to fulfil all functions that were usually assigned to soft law (Klabbers, 1996: 167 ff.). Hard law ‘can accommodate various shades of grey without losing its binary character’. In effect, soft law served no identifiable purpose. A few years later, Klabbers modified his position towards a more radical stance. (Klabbers, 1998: 381 ff.) He asserted that soft law was not only redundant but it was generally undesirable because soft law had the potential to undermine entire legal systems by endangering the rule of law. This is because even non-legally binding norms have the potential to influence behaviour and fulfil functions traditionally assigned to law, namely the regulation of behaviour. Undoubtedly, soft law has been a challenge as far as traditional sources of law and structures of law making were concerned. It provides for greater diversity and a wider scope of choices in regulation.

However, soft law plays an important role in developing law, in general. Its evolution might be an indication that there is a need for a change in the theory of law. Some argue that law does not have to be understood in a solely positivist sense. Soft law is best perceived as a point on the continuum running between fully binding hard norms

and politics. In effect, soft law is also law and cannot be deprived of this quality because a failure to observe soft law does not constitute a breach of legal obligation. In other words, soft law is not legally irrelevant because it can bring results in practice. It also has to be clarified that soft law cannot be described as ‘unsanctioned’ (Beveridge and Nott, 1998: 291).

Some authors speak of soft responsibility or soft liability as a counterpart of soft law (Snyder, 1994: 198). Although soft law does not create legal obligations, it is not a phenomenon that governments necessarily ignore and that would not impose extra-legal pressures, because soft law instruments may incorporate compliance procedures. There are many channels through which soft law measures can exert influence and affect and change behaviour despite the absence of a legally binding nature. Trubek, Cottrell and Nance describe how soft law can influence behaviour (Trubek, Cottrell and Nance, 2006: 78). First, naming and shaming can deter states from non-compliance with a soft law measure. States are induced to follow soft law measure in order to avoid criticism and being pointed out as non-compliant. In this context, a reputation mechanism plays a part. Reputation cost is taken into consideration when deciding on whether to comply with the soft law instrument or not. Second, discourse and debates can lead to the development among states of a common approach to a problem. The development of a common vocabulary can help soft law regulation to become influential. Third, networking facilitates the process of learning among states. Fourth, when a proposal of behaviour laid down by the relevant institutions in the form of a soft law measure forms a coherent policy model, states are encouraged to copy this behaviour in practice. Consequently, they are assessed against this standard. Fifth, exchange of policy knowledge and deliberation allows actors to learn about each other’s governing systems and thus promotes a common identity through this interaction. A long-term exchange of information on practices may lead to decentralised learning networks. Consequently, despite being of a non-legally binding nature, soft law can affect behaviour and may result in changes being introduced through legislative measures in the future. As a result of the lack of common agreement as to whether or not one should acknowledge soft law as a regulatory device that is different from both hard law and politics, it becomes difficult to find a definition of soft law that reflects its complexities. At times, soft law is compared to a shadow area existing between politics and law (Senden, 2004: 19).

In the next section, we consider BEPS Project as the point of application of the efforts of the international community to reform the tax law. The purpose of section is to highlight legal means of reform (as opposed to economic means, organizational, etc.).

## **2.2 The BEPS Project: Content and OECD planned actions**

International financial regulations concerning ‘tax havens’ – countries that do not share any information on account holders – have been a recurring issue for policy makers

and the political world as a whole. In March 2012, the Organization for Economic Cooperation and Development (OECD) complained that ‘tax havens, in the service of the richest and most powerful individuals and companies, promote global inequalities. Their offer of opaque services and risk taking contribute to speculative finance and the serious consequences in terms of loss of business and jobs’ (OECD, 2012: 1).

Similarly, the concern of many officials and government bodies is the avoidance of taxation by corporations. Senior executives from companies like Amazon, Apple, Google, and Microsoft were hauled before legislative committees around the world to face heated inquiries into their international tax strategies (Cook and Oppenheimer, 2013: 35 ff.). Demonstrators picketed Starbucks to protest aggressive international tax planning (UK Uncut Protests over Starbucks ‘Tax Avoidance’ BBC, December 8, 2012). Australian diplomats started calling international tax a “barbecue stopper,” meaning that Australians stop eating their beloved barbecue to discuss international tax avoidance (Sheppard, 2015). Across Europe, Asia, and the United States, press exposes and high-profile legislative hearings concentrated public attention on aggressive international tax planning. In a time of public austerity – a result of the greatest financial crisis in a generation – citizens around the world are more focused on the erosion of the corporate income tax base than ever before. In response to that concern, presidents and prime ministers are now insisting on change in the international tax regime.

The growing demand for correction of legal order is a key consequence of the Base Erosion and Profit Shifting (BEPS) project – a global effort to address international tax avoidance launched by the G-20, the annual gathering of the leaders of the world’s twenty largest economies. The BEPS project is the most extensive attempt to change international tax norms since the 1920s (G-20, 2012). At its core, the focus of the project is simple: address features of the tax regimes of different countries that allow MNCs to shift income to low-tax or no-tax jurisdictions and expenses to high-tax jurisdictions, thereby eroding the corporate income tax base of higher tax, often larger market economies.

Backed by both G8 and G20 countries, the OECD report *Addressing Base Erosion and Profit Shifting* was released on February 12, 2013. BEPS was described as ‘tax planning strategies that exploit gaps and mismatches in tax rules to make profits ‘disappear’ for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low resulting in little or no overall corporate tax being paid’ (OECD, 2013).

At a ministerial council meeting in Paris on May 29-30, 2013, the OECD adopted a declaration on BEPS. It reiterated that BEPS ‘constitutes a serious risk to tax revenues, tax sovereignty and the trust in the integrity of tax systems of all countries that may have a negative impact on investment, services and competition, and thus on growth and employment globally’ (OECD, 2013a). The declaration emphasized the need for governments to work together to develop methods of addressing asymmetries in

domestic and international tax laws that can result in double non-taxation or very low effective taxation. There was a pressing need to address BEPS and to work towards a level playing field in this area.

In July 2013, the OECD launched the BEPS Action Plan, in which it identified specific courses of action to be taken. The OECD recognised that fundamental changes were needed to effectively prevent double non-taxation, but also cases of no or low taxation ‘associated with practices that artificially segregate taxable income from the activities that generate it’ (Ibid). A realignment of taxation and substance was needed, as international tax standards may not have kept pace with changing business models and technological developments. While the Action Plan was not directly aimed at changing the existing international standards on the allocation of taxing rights on cross-border income, it sought to restore both source and residence taxation where cross-border income would otherwise go untaxed or would be taxed at very low rates. (Ibid).

The need for consensus and multilateralism was emphasised. ‘[I]f the Action Plan fails to develop effective solutions in a timely manner, some countries may be persuaded to take unilateral action for protecting their tax base, resulting in avoidable uncertainty and unrelieved double taxation’ (Stewart, 2013). The BEPS Action Plan, which was fully endorsed by the G20, outlined 15 actions that need to be taken across a range of areas.

Action 1: Addresses the tax challenges of the digital economy and identifies the main difficulties that the digital economy poses for the application of existing international tax rules. The Report develops detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation.

Action 2: The work on neutralising the effects of hybrid mismatch arrangements develops model treaty provisions and recommendations regarding the design of domestic rules to neutralise the effect (e.g. double non-taxation, double deduction, long-term deferral) of hybrid instruments and entities.

Action 3: Work to strengthen the rules for controlled foreign corporations develops recommendations regarding the design of controlled foreign company rules.

Action 4: Work on limiting base erosion via interest deductions and other financial payments, develops recommendations regarding best practices in the design of rules to prevent base erosion through the use of interest expense, for example through the use of related-party and third-party debt to achieve excessive interest deductions or to finance the production of exempt or deferred income, and other financial payments that are economically equivalent to interest payments.

Action 5: The work to counter harmful tax practices more effectively, taking into account transparency and substance, revamps the work on harmful tax practices with a priority on improving transparency, including compulsory spontaneous exchange on rulings related to preferential regimes, and on requiring substantial activity for any preferential regime.

Action 6: The work on preventing treaty abuse develops model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances.

Action 7: The work on preventing the artificial avoidance of permanent establishment status develops changes to the definition of permanent establishment to prevent the artificial avoidance of permanent establishment status in relation to BEPS, including through the use of commissionaire arrangements and the specific activity exemptions.

Actions 8 – 10: Work to assure that transfer pricing outcomes are in line with value creation including work on (i) intangibles by developing rules to prevent BEPS by moving intangibles among group members, (ii) risks and capital by developing rules to prevent BEPS by transferring risks among, or allocating excessive capital to, group members, and (iii) other high-risk transactions develops rules to prevent BEPS by engaging in transactions which would not, or would only very rarely, occur between third parties.

Action 11: The work to establish methodologies to collect and analyse data on BEPS and the actions to address it, develops recommendations regarding indicators of the scale and economic impact of BEPS and ensure that tools are available to monitor and evaluate the effectiveness and economic impact of the actions taken to address BEPS on an ongoing basis

Action 12: The work on requiring taxpayers to disclose their aggressive tax planning arrangements develops recommendations regarding the design of mandatory disclosure rules for aggressive or abusive transactions, arrangements, or structures, taking into consideration the administrative costs for tax administrations and business and drawing on experiences of the increasing number of countries that have such rules.

Action 13: The work to re-examine transfer pricing documentation develops rules regarding transfer pricing documentation to enhance transparency for tax administrations, taking into consideration the compliance costs for business.

Action 14: The work on making dispute resolution mechanisms more effective develops solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases.

Action 15: The work on developing a multilateral instrument to modify bilateral tax treaties provides an analysis of the tax and public international law issues related to the development of a multilateral instrument to enable countries to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties.

It is easy to understand that actions 3, 6, 14, and 15 indicate the soft law par excellence. This accessory is derived from the following factors: (1) these actions are not made by sovereign subjects, but they do not harm political sovereignty; (2) they are obligatory, but leave the possibility of adjustment at the national level; (3) judicial control does not

have a unique significance in their execution; (4) they are made in such a way as to make the contract attractive to non-participants. In the next section we consider multilateral instruments as the soft law instruments produced by OECD. We will show that in these agreements the instruments of soft and hard law are combined (Koniuszewska, 2015), and therefore the effectiveness of regulation exceeds traditional bilateral treaties.

### **2.3 Developing a multilateral instrument to modify tax treaties**

The possible form of multilateral co-operation available to nations to combat the effects of globalization on the international tax system is the multilateral tax treaty. As globalization has had a profound effect on the current bilateral tax treaty system creating such issues as treaty shopping and tax competition, several authors have argued that the current bilateral tax treaty system should be replaced by a multilateral tax treaty. In practice, there are several possible methods to implement a multilateral tax treaty, notably: (1) a worldwide multilateral tax treaty to replace the current tax treaty system, (2) a multilateral tax treaty designed to complement the current tax treaty system in the same way the OECD and Council of Europe Convention on Mutual Administrative Assistance in Tax Matters does with the exchange of information or (3) a multilateral tax treaty by region/trading block.

The multilateral instrument provides an innovative approach to address the rapidly evolving nature of the global economy and the need to adapt international rules quickly. Changes to the OECD Model Tax Convention are intended to produce changes to the network of bilateral tax treaties that forms a key component of the broader international tax architecture. This is, for example, the case for the introduction of an antitreaty abuse provision, changes to the definition of PE (Permanent establishment), improvements to dispute resolution procedures, and the introduction of treaty provisions in relation to hybrid mismatch arrangements. It may also include provisions that clarify the relationship with double tax treaties of special measures that aim to counter abuses. The main objective of a multilateral instrument would be to modify existing bilateral tax treaties, in a synchronised and efficient manner, to implement treaty measures developed in the course of the BEPS Project, without a need to individually renegotiate each treaty within the 3000+ treaty network. Some of the measures developed in the BEPS Project are multilateral in nature. A number of treaty-based outputs of the BEPS Project can be drafted as stand-alone measures that complement and co-exist with bilateral tax treaties. These provisions can be directly implemented without the need to take bilateral specificities into account. Indeed, some provisions would be much more effective if implemented through a multilateral instrument.

Multilateral tax treaty or a series of multilateral tax treaties would have various advantages over the current bilateral tax treaty system, notably with regards to the legal certainty of the text, the degree of co-operation between nations, the avoidance of competitive

distortions, triangular cases and treaty shopping. A multilateral tax treaty would avoid competitive distortions and treaty shopping by ensuring that the treaty effects on the flow of capital are the same throughout all of the contracting nations of the multilateral tax treaty.<sup>198</sup> In other words, a multilateral tax treaty would preclude situations such as the following: State A has tax treaties with both State B and C; however under the treaty with State B the source tax on dividends is 10% compared to 5% under the treaty with C. Residents of state A would choose to place their companies in State C rather than State B based on the lower tax treatment in the tax treaties. This would place State B at a competitive disadvantage to State C and would perhaps force State B to attempt to renegotiate its treaty with State A, which may or may not be feasible. A multilateral agreement would ensure that such competitive distortions do not occur within the contracting states. In keeping with the principle of national sovereignty, a multilateral tax treaty could not require all nations to harmonize tax rates but it would ensure that investments in a particular country are treated equally regardless of the country of origin, thereby eliminating the potential of competitive distortions and treaty shopping within the contracting states. Moreover, a multilateral tax treaty would be better suited to meet the international tax principles of flexibility, simplicity and administrative efficiency, as any changes to the treaty would have almost immediate effect in all contracting states. Allowing nation states to circumvent the burdensome negotiations and decades it would take for a single nation to succeed in amending its entire tax treaty network allowing the multilateral tax treaty to be flexible and dynamic enough to ensure that it keeps pace with technological and commercial developments.

In terms of interpretation, a multilateral treaty would ensure the coherent interpretation of treaty provisions for all treaty partners, as it would be unacceptable to have differing interpretations with relation to one source of law (the multilateral tax treaty). Since the document would be the same in all countries, one nation's court's interpretation would be given greater weight by other treaty partner courts. In addition, a multilateral treaty would allow for much closer cooperation between tax administrations leading to greater ongoing revisions of the treaties, enabling the treaty system to better respond to the ongoing changes created by globalization. Finally, a multilateral treaty would also provide for reduced negotiating times as it would allow nations to avoid the prospect of separate negotiations with each nation. This would be most useful to smaller countries with a lack of resources and limited treaty negotiating staffs.

Multilateral MAP (Mutual agreement procedure): as highlighted above, there is merit in developing a truly multilateral MAP if the goal is to resolve multi-country disputes. Such a provision would enable MAP consultation with the competent authority of all parties to a multilateral instrument that are concerned with a case involving a taxpayer active in many jurisdictions. To provide certainty and resolution of disputes in the post-BEPS environment, such a provision would further provide for arbitration where the competent authorities are unable to resolve the case by mutual agreement.



Addressing dual-residence structures: although dual-residence for business entities is relatively rare, an increasing number of BEPS strategies involve dual-resident companies. Given the risk of abuse arising from the use of these structures, countries may conclude that it is better to address dual-residence situations on a case-by-case basis in order to deter aggressive tax planning that facilitates BEPS. However, this simple anti-abuse measure would be most effective if adopted consistently across the existing bilateral tax treaty network.

Addressing transparent entities in the context of hybrid mismatch arrangements: hybrid mismatch arrangements often lead to ‘double non-taxation’ that may not be intended by either country, or to unintended long-term tax deferral. It is difficult to determine unequivocally which individual country has lost tax revenue under such arrangements, but they often impact negatively on tax revenues, and also undermine transparency and fairness. Addressing hybrid mismatch arrangements comprehensively requires changes to domestic law. Nevertheless, a coherent policy response that also avoids double taxation would be facilitated – both at the domestic level and at the multilateral level – by consistently modifying existing tax treaties so that the eligibility for tax treaty benefits of payments made to entities in another jurisdiction is determined based on whether the payment is considered to be income of a resident for purposes of the tax law of the jurisdiction of residence of the payee.

Addressing ‘triangular’ cases involving PEs in third states: the so-called triangular cases can arise where income of a tax treaty resident is attributed by the country of residence to a PE in a third State and exempt from tax in the residence State, often together with low taxation in the State of the PE. Bilateral treaties can provide rules that partially address such cases, but comprehensively addressing the problem requires incorporating a solution into all of a country’s tax treaties. Thus, a multilateral instrument represents the most efficient mechanism for action.

Addressing Treaty Abuse: there are a number of arrangements through which a person who is not a resident of a treaty country may inappropriately obtain the tax benefits that a bilateral tax treaty is intended to provide on a reciprocal basis to appropriate claimants. A multilateral instrument could incorporate approaches to prevent the granting of treaty benefits in inappropriate circumstances.

Some tax treaty provisions that may implicate BEPS concerns are bilateral in nature, and for these provisions, flexibility can be provided within certain boundaries. Some treaty outputs of the BEPS Project may need to reflect specificities in the economic relations and/or in existing bilateral tax treaties between pairs of parties. For instance, a multilaterally agreed provision which introduces changes to the definition of PE may need to provide for some flexibility to tailor the level of commitment towards all the other parties and/or depending on the partner country. At the same time, flexibility has to be within certain boundaries to ensure consistency and administrative feasibility.

Generally, it will be important to determine a set of core provisions to which all parties to a multilateral instrument will have to adhere to ensure a consistent and internally coherent approach to addressing treaty-related BEPS issues.

The precise content of a multilateral instrument is yet to be defined but the sense of direction is clear. OECD and G20 governments are vigorously working towards agreement on substantive treaty-based measures to counter BEPS. A multilateral instrument might also facilitate coordination across a wider range of BEPS-related issues. For example, the implementation of work on country-by-country reporting may be facilitated by the use of a multilateral instrument which also includes rules regarding the confidentiality of the information obtained by tax administrations. Similarly, problems of both double taxation and double non-taxation associated with expense allocation are particularly noteworthy in the context of interest expense. A multilateral interest expense allocation agreement could be implemented through the multilateral instrument (Drywa, 2017). It may also be possible to develop new dispute resolution mechanisms that could further ensure that double taxation does not result from unilateral and uncoordinated responses to BEPS.

A multilateral instrument to implement BEPS outputs is an effective and innovative solution. This feasibility study concludes that despite potential challenges, a multilateral instrument is a promising way to quickly implement treaty-related BEPS measures. The G20 asked for this feasibility study to be prepared in parallel to the development of the actual measures to counter BEPS-related issues so as to most efficiently lay the groundwork for implementation. Continuing that process would require convening an International Conference to implement treaty-related BEPS measures. The mandate of the Conference should be limited in time and in scope (implementing the BEPS Action Plan).

A multilateral instrument should be conceived in a dynamic way. Many countries recognise the need to update their international tax rules to reflect changed circumstances of international business, and tax treaties are an important part of that process. Recognising that the initial work is focused on BEPS-related treaty measures, it is sensible to also reflect on possible further steps to continue to streamline the implementation of changes to the international tax treaty architecture using the same mechanism. For example, further updates to the model tax conventions might be implemented multilaterally. On the other hand, any decision to address a broader range of international tax issues multilaterally would represent a more significant step towards multilateralism in tax matters than the current work to use a multilateral instrument to address BEPS-related tax treaty issues. For the moment, it is important to keep the multilateral instrument narrowly targeted, and at the same time start a reflection on what further incremental opportunities may be available.

After having outlined the advantages of a multilateral tax treaty, it is important to present the obstacles to a multilateral agreement. Unlike trade negotiations there is no obvious

reference point and therefore it would be difficult to agree on where to begin. Secondly, there is little reason to believe that countries will be ready to give up some of their national sovereignty over tax policy to a global tax treaty. Major divergences of tax systems and cultures may prove to be too great an obstacle to overcome. Also, one can easily imagine the substantial work input that would need to be done to get such a treaty off the ground as well as the ghosts from the past that might haunt any new attempt to put such a system in place.

### 3 Conclusion

The objective of the multilateral instrument would be the implementation of measures to address BEPS and its consequence would be the modification of certain provisions of the existing network of bilateral tax treaties. The bilateral tax treaties would remain in force for all nonBEPS related issues. It would be preferable, for reasons of efficiency and transparency, to define this relationship through the inclusion of compatibility clauses in the multilateral instrument. There are several options in order to ensure consistency in the interpretation and implementation of the multilateral instrument. Solutions also exist with regard to the dates of entry into force of different provisions and logistical issues including differences in the authentic languages of the multilateral instrument and bilateral tax treaties.

The multilateral instrument can offer parties flexibility in their level of commitment within certain defined boundaries in order to move towards a level playing field. Defined flexibility as to the level of commitment of the parties vis-à-vis all or certain parties can be achieved through the use of opt-out mechanisms allowing parties to exclude or modify the legal effects of certain provisions; a choice between alternative – and clearly delineated – provisions; and opt-in mechanisms offering parties the possibility to take on additional commitments. The level of commitment of parties can also be modulated through the language used in the multilateral instrument (strong or soft wording) and types of obligations (of results and/or means).

Considering the complexity of the network of bilateral tax treaties and the number of interested stakeholders (tax administrations, tax payers, third parties), it is vital that the multilateral instrument ensures the transparency and clarity of the commitments undertaken by the parties. Mechanisms are available to ensure clear and publicly accessible information as regards, on the one hand, the interaction between the multilateral instrument and bilateral tax treaties and, on the other hand, the use of the mechanisms for flexibility set up by the multilateral instrument.

At the end of the study, it is important to note the following. The concepts of hard law and soft law were explored as alternative ideas. However, their coexistence and engagement must also be acknowledged. Hard law and soft law can be complementary to each other. This is achieved when these two regulatory approaches operate within the

same regulatory area and build on each other with a view to achieving the same goals. Hard and soft law can be complementary either when soft law leads to the adoption of legally binding measures or where hard law is developed through soft law measures. The first example refers to a situation when a soft law measure is adopted first and the adoption of a hard law instrument follows as a result of the ground being prepared by the soft law measure. Thus, soft regulation provided the Member States with time for the political will to harmonise national rules to mature. The second situation occurs when soft and hard law measures exist at the same time. Soft law instruments might be produced in order to explain the meaning of the hard law means and to clarify the goals it attains. Hereby the hypothesis of our research was fully confirmed.

## References

- Baxter, R.: International Law in “Her Infinite Variety”, *International and Comparative Law Quarterly* no. 29:4 (1980).
- Best, E.: Alternative Regulations or Complementary Methods? Evolving Options in European Governance, *Eipascope* no. 1 (2003).
- Beveridge, F. and Nott, S.: A Hard Look at Soft Law, in: Craig, P. and Harlow, C. (eds.): *Lawmaking in the European Union*, London: Kluwer, 1998.
- Blutman, L.: In the Trap of a Legal Metaphor: International Soft Law, *International and Comparative Law Quarterly* no. 59:3 (2010).
- Boyle, A.: Some Reflections on the Relationship of Treaties and Soft Law, *International and Comparative Law Quarterly* no. 48:4 (1999).
- Cook, T. and Oppenheimer, P.: Offshore Profit Shifting and the U.S. Tax Code – Part 2, in: *Hearing Before the Permanent Subcomm on Investigations of the S. Comm. on Homeland Security and Governmental Affairs, 113th Cong.* (2013).
- Drywa, A.: The Quality of the Tax Law as A Factor Shaping the Taxpayer’s Legal Position, in: Radvan, M., Gliniecka, J., Sowiński, T., Mrkývka, P. (eds.). *The financial law towards challenges of the XXI century*, Conference proceedings. 1st ed., Brno: Masaryk University (2017).
- Klabbers, J.: The Redundancy of Soft Law, *Nordic Journal of International Law* no. 65:2 (1996).
- Klabbers, J.: The Undesirability of Soft Law, *Nordic Journal of International Law* no. 67:4 (1998).
- Koniuszewska, E. Local Initiative as A Financial Form of Cooperation between Local Government Units and Non-governmental Organizations, in: Mrkývka, P. (ed.) *System*

- of Financial Law: General Part: Conference Proceedings. 1st ed., Brno: Masaryk University, Faculty of Law. (2015).
- Mörth, U.: *Soft Law in Governance and Regulation: An Interdisciplinary Analysis*, Northampton: Edward Elgar Publishing, 2004.
- OECD: *Addressing Base Erosion and Profit Shifting*, OECD Publishing, 2012.
- Senden, L.: *Soft Law in European Community Law*, Oxford: Hart Publishing, 2004.
- Sheppard, L.A.: *Barbecue Stoppers and Permanent Establishment*, 2015, *WORLDWIDE TAX DAILY* 113–14 (June 12, 2015).
- Snyder, F.: *Soft Law and Institutional Practice in the European Community*, in: Martin, S. (ed.), *The Construction of Europe: Essays in Honour of Emile Noël*, Dordrecht: Kluwer, 1994.
- Stewart, D.D.: *Unilateral Changes in Anticipation of OECD BEPS Project Risk Fragmenting Tax Rules*, 2013, *WTD* 226-2 (November 22, 2013).
- Trubek, D., Cottrell, P. and Nance, M.: *Soft Law, Hard Law and EU Integration*, in De Búrca, G. and Scott, J. (eds.): *Law and New Governance in the EU and the US*, Oxford: Hart Publishing, 2006.
- Zemanek, K.: *Is the Term “Soft Law” Convenient?*, in: Hafner, G., Loibl, G., Rest, A., Sucharipa-Behrmann L., and Zemanek K. (eds.): *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday*, Hague, London, Boston: Kluwer, 1998.

## **Legal Acts**

- G-20 Communique, Los Cabos Summit Leaders’ Declaration, no. 48 (Jun. 19, 2012).  
<http://www.g20.utoronto.ca/2012/2010-0619-loscabos.html>
- OECD: *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, 2013.  
<http://dx.doi.org/10.1787/9789264202719-en>
- OECD: *Declaration on Base Erosion and Profit Shifting Adopted on 29 May 2013*.  
<http://www.oecd.org/mcm/C-MIN%282013%2922-FINAL-ENG.pdf>

---

# BANK TAX IN POLAND: EFFICIENCY AND IMPACT ON FINANCIAL STABILITY

*Anna Jurkowska-Zeidler<sup>1</sup>*

## **Abstract**

The contribution deals with legal architecture of the tax on certain financial institutions (bank tax) in the Polish tax system and its impact on financial market. Despite harmonisation proposals made at the EU level, including the idea of the introduction of a uniform financial transaction tax, no political consensus has been struck so far between Member States which keep enjoying full jurisdiction in the field. A majority of them have introduced individual systems of taxes and charges whose parameters (the base, rate and scope) differ greatly between one another, mirroring the various objectives, specific internal situation and fiscal sovereignty of the countries.

Poland was one of the last Member States to introduce, at the beginning of 2016, a tax on certain financial institutions. When analysing its architecture, the author pays special attention to the most contentious issues, such as the origin of the tax, its efficiency as a source of budget revenues and importance of the tax for the financial market and its stability. The study presents the entities subject to taxation, object of the tax and the tax base, as well as exemptions from the levy, tax rate and mode of tax payment. Assessments and conclusions are based on data gained from financial market regulators and supervisory agencies expressing their views on impact of the tax on the standing of commercial banks and effects of the regulation on financial stability.

## **Key words**

Tax; law.

**JEL Classification:** K34

## **1 Introduction**

The global financial crisis of 2008 stirred up, in a sense, another debate on taxation of financial institutions and the financial sector (the precursor of the idea of the banking

---

<sup>1</sup> Professor at the Faculty of Law (Department of Financial Law), University of Gdansk, Poland. Her research focuses on the issues of Law of the European Financial Market, Financial Law of the European Union and Safety Net of the Financial Market. She is the author of 3 monographs and more than 100 other publications: chapters in books and reviewed articles in prestigious journals. She was a fellow at the European University Institute in Florence (Italy) and visiting professor at the Masaryk University in Brno (Czech Republic), Omsk F.M. Dostoevsky State University (Russian Federation) and Caspian University Adilet School of Law in Almaty (Kazakhstan). Throughout her academic career, she has acted as an expert for the European Commission, the Polish Financial Supervisory Authority and the Financial Ombudsmen. She is also a member of Information and Organisation Centre for the Research on the Public Finance and Tax Law in the Countries of Central and Eastern Europe and the Polish Association for European Law. E-mail: Anna.JurkowskaZeidler@prawo.ug.edu.pl.

tax was John M. Keynes, who – as early as in 1936 – proposed a tax preventing banks from undertaking speculative activities; the concept of a tax on financial transactions was presented, in the 1970s, by James Tobin, an economist). Since 2009, additional taxation of banks has been introduced in many Member States of the EU (Shackelford, Shaviro, Slemrod, 2012: 149)<sup>2</sup>. The banking tax was supposed, first of all, to refund the costs of earlier support provided during the crisis by the central budget to banks, but also to reinforce financial stability of the banking system, and to penalise the unwanted, risky financial market behaviour (Hemmelgarn, Nicodeme, 2012: 116). The tax solutions adopted by EU Member States varied greatly in terms of the level of tax rates and scope of the taxed turnover (EFC AHWG, 2010; Narodowy Bank Polski, 2010). In the opinion of the European Commission this could have led to distortion of competition in the European single market and to a transfer of financial transactions to the countries where no taxation was imposed on the financial sector or where lower tax rates were applied. In that very situation, due to a need of coordinated approach to the additional taxes and charges imposed on banks within the internal financial market, at the EU level efforts were taken to harmonise the fundamental rules concerning bank taxation under the debate on the Union-wide Financial Transaction Tax and Financial Activities Tax (Jurkowska-Zeidler, 2016: 279-294)<sup>3</sup>. It should be stressed that the intention to introduce additional taxation of banks was, in the EU, part of the regulatory response to the effects of the financial crisis, a measure to improve crisis management and a way of increasing the engagement of private funds in the meeting of costs sustained to resolve banking crises (Jurkowska-Zeidler, 2017: 379).

<sup>2</sup> In the years 2009-2012 special bank taxes or charges were introduced by fifteen Member States of the EU.

<sup>3</sup> On October 7, 2010, the European Commission examined the importance of developing a financial sector taxation in its Communication on taxation of the financial sector: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of October 7, 2010 – Taxation of the Financial Sector, COM(2010) 549 final. This Communication proposes further exploration of two tax instruments which could be applied to the financial sector. Eventually, in 2011 the Commission submitted a proposal for a Council Directive of September 28, 2011 on a common system of financial transaction tax and amending Directive 2008/7/EC (COM(2011) 594 final. The proposal is aimed at establishing a common system of financial transaction tax (FTT). It put the development into practice and therefore represented a first step towards a more global system of financial sector taxation. The proposed EU financial transaction tax would be separate from a bank levy, or a resolution levy, which some governments are also proposing to impose on banks in order to insure them against the costs of any future bailouts. As a unanimous agreement of all Member States proved impossible to reach, on February 14, 2013 the European Commission tabled a proposal for a Council Directive implementing „enhanced cooperation“ in the area of financial transaction tax (COM(2013) 71 final). As requested by the eleven Member States involved, this proposal mirrors the scope and objectives of the original FTT proposal, while also strengthening the anti-relocation and anti-abuse rules. At this stage, 10 Member States continue to participate in the enhanced cooperation in the area of FTT, embracing: Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain. However, no compromise has been struck so far as regards the final shape of the directive authorising a EU financial transaction tax, which would apply to ten of the EU's 28 Member States.

In Poland, the taxation of the financial sector was introduced by means of the Act of January 15, 2016 on Tax on Certain Financial Institutions, hereinafter referred to as u.p.n.i.f. (the Polish abbreviation for the law's title). Unlike in a majority of EU Member States where taxation of the banking sector was introduced, levying of the tax in Poland was not related to specific risks faced by the domestic financial system, nor was it linked to any earlier state aid provided to the financial sector during the global banking crisis<sup>4</sup>. The objective of the tax was purely fiscal: proponents of the new law indicated that they wanted to create yet another source of budget revenues, for the financing of social expenditures contemplated by the government in particular. In addition, the law was supposed to increase the contribution of the financial sector to funding of the budget outlays (as the explanatory memorandum to the bill, submitted by a group of MPs in 2015, indicated).

It is assets that are subject to taxation under the Polish tax on financial institutions. In modern world the solution is very rarely applied, as it brings about negative results – a limitation of lending activities carried out by banks. Recognised as the most appropriate base for calculation of the tax is the amount of liabilities (EFC AHWG report on levies on financial institutions, 2010). Importantly, current regulations and supervisory measures concerning the operation of Polish banks already have substantial impact on the structure of their assets (due to enhanced capital requirements and contributions to the Bank Guarantee Fund, as far as protection of deposits and restructuring is concerned), profitability of the banks being affected. It was thus not without reason that fears were expressed lest the tax in question should have negative impact on the banking system (Narodowy Bank Polski, 2016: 118).

## 2 Tax on certain financial institution: legal architecture

Entities being banking payers of the tax include: domestic banks, branches of foreign banks, branches of credit institutions, cooperative savings and credit unions, domestic insurance societies, domestic reinsurance companies, branches and main branches of foreign insurers and reinsurers, and (consumer) lending institutions. Regarding banks, it should be emphasised that embraced by the group are, as a rule, all legal forms in which the entities may operate in the Polish market, i.e. those of joint-stock companies, state

<sup>4</sup> In that respect the European Central Bank, opining on all legislative proposals concerning financial institutions and systems insofar as they materially influence the stability of financial institutions and markets (and therefore also the proposed Polish tax on certain financial institutions), has consistently recommended that taxes on financial institutions should be considered in relation to the objective of 1) ensuring a more equitable distribution of the costs arising from their potential failure between tax payers and the financial sector and 2) mitigation of the risks posed by the institutions. At that occasion the ECB pointed out that imposing taxes on banks *ad hoc*, for fiscal reasons only (to satisfy general needs of the budget), should be preceded by a thorough analysis of potential adverse effects to the banking sector, in particular in order to avoid creation of a risk for financial stability and dynamics of the lending activity which might eventually affect the growth of the real economy. (European Central Bank: CON/2016/1).



banks and cooperative banks. Despite the colloquial name of „bank(ing) tax“, the tax thus called does not apply only to banks; it does not, by the way, cover all categories of financial institutions, either. Outside the scope of the tax remain, for example, investment funds, brokerage offices, companies providing factoring or leasing services.

The tax on financial institutions is a wealth tax. Pursuant to Art. 3 of u.p.n.i.f. the subject of the taxation are assets of the taxed entities. Therefore the tax on financial institutions is, in fact, a tax on the scale of the conducted business; it thus disregards the level of the risk borne by a specific institution (Panfil, 2017: 393).

The tax base is the amount of the taxpayer's assets, as resulting from the trial balance at the end of each month for which the tax is being paid. No legal definition of „assets“, a term of key meaning for determining the tax base has, however, been provided by the Act. Responding to doubts as to the interpretation of the law (which were raised by relevant business circles as early as at the legislative stage), on March 3, 2016 the Ministry of Finance provided a general interpretation aimed at explaining certain provisions of the Act. However, the fact alone that part of the doubts which emerged during the process of legislation was not removed in time simply by making respective legal rules sufficiently clear devalues the work of the legislators (besides, a hasty one). The result is a need to resort to available legal instruments (general and individual tax interpretations), which provide, unfortunately, only limited protection to tax payers.

The tax base is reduced by certain categories. These include: the tax-free amount (which varies, depending on the tax payer); own funds; the amounts whereby own funds were increased by a bank or credit union following a decision of the Polish Financial Supervision Authority (KNF); in banks affiliating cooperative banks – the amounts accumulated in the accounts of the affiliated cooperative banks; in banks – the amount of assets acquired from the National Bank of Poland (NBP) securing the refinancing credit; in banks and credit unions – the amount of assets held in the form of Treasury bonds.

The lowest tax-free amount has been established for lending institutions (PLN 200 million). Insurance societies and reinsurance companies enjoy the tax-free amount of PLN 2 billion, whereas banks, cooperative savings and credit unions and branches of lending institutions – of PLN 4 billion. In the submitted explanatory notes to the draft Act (u.p.n.i.f.) no reasons for the PLN 4 billion tax-free amount concerning banks and credit unions were provided. The objective of the solution was indicated, though, and described as protection of the emerging banks and insurance societies which have a positive influence on market competition. In practical terms, however, the provision results in actual exclusion of a prevailing majority of credit unions (except for one, exempted in any case due to its being under restructuring proceedings) and all cooperative banks from the scope of the tax discussed here.

Banks involved in cross-border banking activities are not subject to the tax. Exempt from it are state banks (meaning ones that have a special legal form, not banks with a

majority shareholding of the State Treasury). The only bank now meeting the eligibility requirements is Bank Gospodarstwa Krajowego (the Home Economy Bank).

In addition, the Act provides for two more groups of exemptions (of either objective or subjective nature). First, exempt from the levy are tax payers covered by a decision of the Polish Financial Supervision Authority (KNF) mentioned in specific legal regulations (the scope of the relevant matters being determined by provisions of the Act of July 21, 2006 on Supervision over Financial Market – consolidated text: Journal of Laws of 2017, item 196, as amended). As regards banks, the decisions in question concern: the liquidation of a bank, suspension of its operation and filing a bankruptcy petition regarding it or appointment of the administrator at a bank. The other category of the exemptions concerns tax payers covered by a restructuring procedure or plan.

The tax rate is 0.0366% of the tax base monthly. The tax payable is calculated by the taxpayers independently (so-called self-calculation). The tax payers are expected to file monthly tax returns and pay the tax until the 25th day of the month following the one for which the return is drawn up. The first payment period for the tax was February, 2016.

The tax is a state tax supplying the national budget. The state authority competent for matters of the tax is the head of the fiscal office having jurisdiction over the place of the registered office of the tax payer.

In order to dismiss any possible doubts, the Polish legislator has stated that the tax on certain financial insitutions is not a deductible cost within the meaning of the provisions on the income tax.

### **3 Fiscal efficiency of banking taxation**

The supporters and opponents of additional taxation of the financial sector provide diverging opinions as to the effects of the tax and quote different experience of the countries having introduced the levy into their tax systems. Serious concerns are also raised as to the effectiveness of the banking tax in preventing speculative financial transactions and future financial crises (Piotrowski, 2017: 26-36).

As far as the sector of banking services is concerned, although Poland's cooperative savings and credit unions are also subject to the tax, in practical terms only one credit union exceeds the minimum value of taxable assets (the assets of other credit unions being lower than PLN 4 billion, i.e. the limit of the tax-free amount). The credit union is, however, covered by a restructuring programme and is tax-exempt due to the reason. Also none of cooperative banks has assets sufficiently sizeable to be taxed. As a result, the economic burden of the tax is, in fact, borne by banks (other than the cooperative ones), insurance societies and reinsurance companies.

It may appear that the bank tax has been applied to insurance societies somewhat accidentally, using the opportunity that a new burden is levied on banks, as it were

(Marszelewski, 2016: 107)<sup>5</sup>. Actually, the reason lies not only in the insurance sector being part of the broader system of financial institutions, but also – as the explanatory notes to the bill indicate – in insurance being a business more profitable than the banking industry. Nonetheless, the notes to the law introducing the tax were largely focused on banks.

For the same reasons the scope of the analysis of tax efficiency presented below is limited only to commercial banks.

As results from the information of the Polish Financial Supervision Authority about the impact of the tax on certain financial institutions on the standing of commercial banks in 2017 (Urząd Komisji Nadzoru Finansowego, 2018), that very year, i.e. the first full year of the taxation, banks paid a total of PLN 3.6 billion in bank tax, which accounted for 1% of budget revenues. The amount was greater by PLN 435 million compared to the preceding year figures, since the tax came into effect in February, 2016<sup>6</sup>. Monthly payments of the tax in 2017 ranged from PLN 298.8 million to PLN 314.5 million.

From the information on collection of the tax it also follows that 18 banks and 3 branches of credit institutions were payers of the bank tax in 2017. In terms of assets, the banks accounted for 74.1% of the assets of the banking sector, more than a half of them being banks with majority foreign shareholding. In practice the number of banks paying the tax is thus very small, but in terms of assets they represent a great majority of the banking system.

However, what is most important, the legal architecture of the tax on certain financial institutions is vulnerable to aggressive and creative tax optimisation (Gajewski, 2016: 23). The efficiency of the bank tax was undoubtedly affected by a rising interest of banks in acquiring Treasury bonds (which trend contributes to the decrease in the tax base). It should be stressed that between the end of December, 2015 and the end of May 2016 the value of the securities, as held by the banks expected to pay the tax, rose by PLN 54 billion, i.e. 33.07%. As a result, the total tax base in banks decreased, over the initial five months of the tax being in effect, by 6.43% (Urząd Komisji Nadzoru Finansowego, 2016: 6-7). In its report on impact of the tax on standing of the banks the Polish Financial Supervision Authority indicated that a month prior to the introduction of the tax, the item in question rose on bank balance-sheets by as much as 45%. In absolute figures the portfolio changed, until January 2018, by PLN 71.0 billion. During the same period the assets rose by 11% (PLN 133.8 billion) and the total tax base by 3% (PLN 26.9 billion).

<sup>5</sup> Covered by the tax on certain financial institutions are more than half of the operating insurance societies. The annual burden of the tax is estimated, over a period of two years of the tax being in force, to be about PLN 0.6 billion, almost a half of the sum being paid by the country's largest insurance group (Narodowy Bank Polski, 2017:107).

<sup>6</sup> In the Budget Bill for 2017, of December 16, 2016, receipts from the tax on financial institutions were determined to amount to PLN 3.9 billion. The estimated budgetary execution figures concerning 2017 were actually higher: PLN 4.3 billion. (Ministerstwo Finansów, 2018(a)). In 2016 budgetary receipts from the tax on financial institutions were much lower than those assumed – the forecast amount had been PLN 5.5 billion. (Panfil, 2017: 395).

The dramatic rise of the volume of Treasury bonds on balance-sheets of banks was, however, one-off in nature (the lap having occurred in the beginning of 2016). Over the months that followed stabilisation of the item could be observed (Urząd Komisji Nadzoru Finansowego, 2018: 5).

Another form of bank tax evasion involves the implementation of a restructuring programme, also provided for in the Act. The banking law mandates development and launching of such a programme where a balance-sheet loss has occurred (or just a threat of such a loss emerged), which solution may, however, be open to abuse. (Gajewski, 2016: 101). A couple of banks have already followed that way – they worked out a restructuring programme and submitted themselves to the rigours resulting from the latter (Związek Banków Polskich, 2017: 66).

#### **4 Banking tax and financial stability**

In Poland, profits of banks make up the main source of capital development for the entities; it is upon the capital that bank resilience to external threats and capability to provide credits is conditional. Limitation of bank profits affects thus both the said resilience of the sector and its capacity to launch lending activities. At present profitability of the domestic banking system is lower due to limited income sources, low interest rates, enhanced contributions to the Bank Guarantee Fund to finance bank restructuring and the deposit guarantee scheme, but also owing to the Act on Tax on Certain Financial Institutions. It is also essential to note that the limited profitability of the sector may reduce the propensity of investors to invest in banks; some of the latter may find it difficult to raise capital in the market (Komisja Nadzoru Finansowego, 2017(a): 14). In 2017 profitability of banks suffered another reduction: operating costs rose to decrease the bottom line, mostly due to the introduction of the tax in question. Recently the main factors determining bank profitability were the banking tax and regulatory burden. In order to address the impact of the banking tax on profitability, banks raised their credit margins and lowered interest on deposits (Narodowy Bank Polski, 2017: 10). Results of the analyses launched by the NBP show that bank profitability will keep decreasing, results of the banks remaining under a heavy pressure of low interest rates (Narodowy Bank Polski, 2017: 72).

Definitely, in the forthcoming years a considerable impact on results of the banking sector will be exerted, besides the tax on certain financial institutions, by changes in the legal and regulatory environment of the banks, resulting in heavier burdens placed on the latter. It is well-worth emphasising that on the national level the years 2016 and 2017 were marked by a few essential regulatory changes generating high costs to the banks in the compliance area. One of the problems to banks was the implementation, within the safety net, of new regulations on orderly restructuring of the entities in question (resolution). In that respect banks had to bear new requirements concerning development of restructuring

plans and highly detailed and comprehensive reporting duties. A considerable problem to banks is still posed by credits indexed to Swiss francs. A special fund to support borrowers in a tough position was established for the restructuring of the credits, to which fund the amount of PLN 600 million had to be contributed by banks. High costs to banks are also entailed by the additional capital requirements set up in the field of macroprudential supervision. Hence banks themselves keep warning that there is no more room left for further increase of the burdens without a rise of fees, commissions and interest rates charged to bank customers.

Profitability of banks may also be affected by other future events, the probability of materialisation of which events or the scale of their impact, if any, may not be reliably estimated yet. Big costs are bound to be placed on banks in connection with further attempts undertaken to resolve problems related to credits indexed to/expressed in foreign currencies<sup>7</sup>. Given a considerable rise in numbers of court proceedings concerning foreign-currency housing loans there may arise a need for the banks to establish additional provisions for litigation. A particularly high financial challenge to banks may also be posed by bills on voluntary restructuring of foreign-currency housing loans (providing for an additional Restructuring Fund formed from bank contributions) and refund of foreign exchange spreads to customers; the draft laws are being worked on in the Parliament right now.

The introduction of the tax on financial institutions had an essential impact on the market of Treasury bonds – debt securities issued by the State Treasury (Panfil, 2017: 395). This has translated into a change of the structure of the sovereign debt, in which the share of the entities of domestic banking sector rose from 22.1% as at the end of 2015 to 28% in January, 2018 (Ministry of Finance, 2018(b): 2). In that respect the architecture of the tax from financial institutions distorts operations of the market mechanism and forces tax payers to make decisions beneficial for the financial interests of the Treasury. The rise of value of State Treasury bonds held as bank assets, as seen in 2016, is the best proof of the phenomenon.

By enforcing indirectly – via granted tax exemptions – bank investments in the Treasury bonds, the funding of borrowing needs of the central budget is facilitated. This, however, means violation of the ban on privileged access of public sector authorities to financial

---

<sup>7</sup> A considerable depreciation of PLN against CHF at the beginning of 2015 resulted in intensification of adverse social phenomena and brought about initiatives to intervene, by means of a statute, in the sphere of foreign-currency housing credits, since a majority of such credits in Poland are credits denominated in Swiss francs. As at the end of September, 2017, foreign-currency housing credits accounted for about 36.4 % of all housing borrowings. Of 37.8 thousand of bad credits (PLN 11.4 billion worth) in banks' loan portfolios as at the end of 2016, 20.9 thousand were credits in PLN (PLN 4.3 billion worth) and 16.8 thousand foreign-currency credits (amounting to PLN 7.1 billion – 4.4%). (Komisja Nadzoru Finansowego, 2017:80). Although foreign-currency housing credits are promptly repaid, and the bad credit ratio is not considerably higher than in the case of credits provided in PLN, liabilities on account of foreign currency housing credits may, nevertheless, be a heavy burden to some borrowers, in particular due to a rise of the amount of instalments and/or of credit principal/real estate value ratio.

institutions, as set up by Art. 124 of the Treaty of the Functioning of the European Union (Panfil, 2017: 399).

The introduction of the banking tax entailed a high risk that the tax burden placed on banks would be transferred by them, in the economic sense, onto customer shoulders. In fact, the big banks already faced with the tax could, due to their market position, pass the taxation costs onto clients. Some of the banks did so by fixing higher fees for their services. And in 2016 interest rates on savings fell considerably down in Poland, even though interest rates of NBP were not decreased by Poland's Monetary Policy Council over the last two years. On the other hand, the charges for administering bank accounts, issue of payment cards, ATM withdrawals and mortgage credit margins have grown significantly (Boczoń, 2017).

## 5 Conclusion

The taxation of banks definitely counts among the available instruments of financial market regulation. Owing to the financial crisis that struck financial markets at the end of the first decade of this millennium we could watch reactions of governments aimed at expanding the regulation of the markets, also by means of levying additional taxes and charges on financial institutions. It was emphasised at that occasion that responsible for triggering the crisis were, to a considerable extent, banks, while it was the governments that had to bear the costs of the large-scale, taxpayer-funded rescue operations carried out to support the banking sector. And, compared to other sectors, taxation of the banking system is milder, considering that a majority of financial services are VAT-exempt.

In Poland there was no need to “compensate” the expenditures related to governmental involvement in bailing out private banks, a fact being the most often quoted reason for introduction of the discussed levy into tax systems elsewhere. Introduction of the tax on certain financial institutions here is not, in any way, caused by a need to balance the relations between the budget and tax payers, following some extraordinary events having taken place in the financial market. Instead, the tax is aimed simply at funding social expenditures contemplated by the government. Emphasised thus has been just a single – fiscal – purpose of the tax and viewed from that perspective, the tax on financial institutions represents only the fiscal interests of the Treasury, a thing happening very rarely in the European Union. A review of the literature on the subject reveals that – theoretically – there exist reasons to believe that the introduction of the banking tax may serve the purpose of reducing the scale of speculative movements in the financial market. The assumption is that the market should be stabilised as a result and future financial crises averted.

The legislative procedure was, in case of the Act on Tax on Certain Financial Institution, carried out extremely quickly, compared to the work done on other bills from the field of the tax law. The draft was tabled with the Sejm (the first chamber of the Parliament) on

3.12.2015. After haste work and amendments made by the Senate (the second chamber) the law was finally adopted by the Sejm on 15.01.2016 and became effective on 1 February, 2016. In essence, there was thus no time for a comprehensive analysis of the effects of the proposed legislation.

As the European Central Bank indicates in its opinions, imposing taxes on banks *ad hoc*, to satisfy general needs of the budget, should be preceded by a thorough analysis of potential adverse effects to the banking sector, in order to avoid creation of a risk for financial stability and dynamics of the lending action (which might eventually affect the growth of the real economy). Such an effect could lead to banks offering their customers credits or other service on less advantageous terms. The introduction of the tax should also be thoroughly considered in terms of its impact on profitability of relevant financial institutions, their capital adequacy and resilience to emergencies and risks, as well as – looking from a broader perspective – the influence the tax may have on financial stability, growth of the lending volumes and the economy in general.

In the opinions accompanying the drafted law in 2015 many demands and objections were raised. The most important of those concerned the forecast negative impact of the tax on financial institutions on the operation of banks.

From the perspective of almost two years of the tax being in force in Poland, its effects – save for the fiscal aspect – are hard to assess. The tax on certain financial institutions has almost doubled the amount of the levies received by the state from the sector, as every year banks also pay income tax to the budget (ca. PLN 3-4 billion). Not all the original concerns about implementation of the tax were eventually confirmed. Since the introduction of the tax growth of the lending volumes has been observed. What makes the empirical research on impact of the tax on financial stability and operation of banks difficult is the need to discern the influence of the tax itself from the impact exerted by other factors. Paradoxically enough, the effects of introduction of the bank tax on the banking industry must be examined, all other regulations and current economic environment of the banks being taken into account.

## References

- Boczoń, W.: Po wprowadzeniu podatku bankowego ceny nie wzrosły? Sprawdzamy (Didn't prices rise after introduction of the bank tax? Let us check), 2017. <https://www.bankier.pl/wiadomosc/Po-wprowadzeniu-podatku-bankowego-ceny-nie-wzrosly-Sprawdzamy-7516173.html>
- Gajewski, D.: Podatek bankowy w Polsce – wady i zalety (Bank tax in Poland – advantages and drawbacks), Centrum Analiz i Studiów Podatkowych, Analizy i Studia CASP (Centre for Tax Analyses and Studies, CASP Analyses and Studies) no. 1 (2016). [http://kolegia.sgh.waw.pl/pl/KES/casp/Documents/CASP\\_001.pdf](http://kolegia.sgh.waw.pl/pl/KES/casp/Documents/CASP_001.pdf)

- Hemmelgarn, T., Nicodeme, G.: Can Tax Policy Help to Prevent Financial Crisis?, in: Alworth, J.S., Arachi G. (eds.): *Taxation and the Financial Crisis*, Oxford: Oxford University Press, 2012.
- Jurkowska-Zeidler, A.: EU financial market law : from minimal harmonization to federalization, in: Radvan, M., Gliniecka, J., Sowiński, T., Mrkývka, P. (eds.): *The financial law towards challenges of the XXI century : (conference proceedings)*, Brno : Masaryk University, 2017; Publications of the Masaryk University, theoretical series, edition Scientia, file no. 580. [https://www.law.muni.cz/sborniky/Radvan\\_Financial\\_challenges.pdf](https://www.law.muni.cz/sborniky/Radvan_Financial_challenges.pdf)
- Jurkowska-Zeidler, A.: The use of tax instruments for financial market regulation. The European integration context, in: Smoleń, P. (ed.): *Selected issues in taxation and tax authorities in Central, Lublin* : Wydawnictwo KUL, 2016.
- Marszelewski, M.: Wpływ ustawy o podatku od niektórych instytucji finansowych na rynek ubezpieczeniowy (Impact of tax on certain financial institutions on insurance market), *Wiadomości Ubezpieczeniowe (Insurance News)* no. 1 (2016).
- Panfil, P.: Podatek od niektórych instytucji finansowych w świetle art. 124 Traktatu o Funkcjonowaniu Unii Europejskiej (Tax on certain financial institutions in the light of Art. 124 of the Treaty on the Functioning of the European Union), *Gdańskie Studia Prawnicze (Gdańsk Studies in Jurisprudence)*, Tom (vol.) XXXVIII (2017). [https://prawo.ug.edu.pl/dzialalnosc\\_naukowa/wydawnictwa/gdanskie\\_studia\\_prawnicze/spis\\_tresci\\_-\\_teksty\\_online](https://prawo.ug.edu.pl/dzialalnosc_naukowa/wydawnictwa/gdanskie_studia_prawnicze/spis_tresci_-_teksty_online)
- Piotrowski, J.: Podatek od transakcji finansowych. Dylemat wyboru między rozwiązaniem fiskalnym a antykryzysowym (Tax on financial transactions. Dilemma of a choice between fiscal and anti-crisis solutions), *Instytut Badań Rynku, Konsumpcji i Koniunktur (Institute for Market, Consumption and Business Cycles Research)*, *Unia Europejska.pl (European Union.pl)* no. 3 (2017). <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-29b4529c-42e0-4730-b53c-6ba2686c61ca>
- Shackelford, D., Shaviro, D., Slemrod, J.: *Taxation and the Financial Sector*, in: Alworth J.S., Arachi G. (eds.): *Taxation and the Financial Crisis*, Oxford: Oxford University Press, 2012.

## Legal Acts

- Act no. 549/2010, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of October 7, 2010 – Taxation of the Financial Sector, COM(2010) 549 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:mi0063>



Act no. 629166/2010, EFC (The Economic and Financial Committee) AHWG (The Ad Hoc working group) report on levies on financial institutions.

Komisja Nadzoru Finansowego (Polish Financial Supervision Authority), Informacja o sytuacji banków w okresie I-IX 2017 r. (Information about situation of banks during the period from January to September, 2017), Warszawa, grudzień (December) 2017 (a). [https://www.knf.gov.pl/knf/pl/komponenty/img/RAPORT\\_O\\_SYTUACJI\\_BANKOW\\_2017\\_09\\_60663.pdf](https://www.knf.gov.pl/knf/pl/komponenty/img/RAPORT_O_SYTUACJI_BANKOW_2017_09_60663.pdf)

Komisja Nadzoru Finansowego (Polish Financial Supervision Authority), Raport o sytuacji banków w 2016 r. (Report on situation of banks in 2016). [https://bip.knf.gov.pl/pliki/RAPORT\\_O\\_SYTUACJI\\_BANKOW\\_2016\\_59975\\_tcm6-59975.pdf](https://bip.knf.gov.pl/pliki/RAPORT_O_SYTUACJI_BANKOW_2016_59975_tcm6-59975.pdf), Warszawa 2017 (b)

Ministerstwo Finansów (Ministry of Finance): Interpretacja ogólna ws. podatku od niektórych instytucji finansowych (General interpretation concerning tax on certain financial institutions), PK1.8201.1.2016, 3 marca (March) 2016.

Ministerstwo Finansów (Ministry of Finance): Szacunkowe dane o wykonaniu budżetu państwa za styczeń – grudzień 2017 r. (Estimations of budget execution from January to December, 2017), 31 stycznia (January) 2018 r. (a). [https://www.mf.gov.pl/documents/764034/5924039/20180131\\_Szacunkowe\\_wykonanie\\_budzetu\\_styczen\\_grudzien\\_2017+r.pdf](https://www.mf.gov.pl/documents/764034/5924039/20180131_Szacunkowe_wykonanie_budzetu_styczen_grudzien_2017+r.pdf)

Ministerstwo Finansów (Ministry of Finance): Zadłużenie Skarbu Państwa, Biuletyn Miesięczny (Sovereign, debt. Monthly Bulletin) no. 1(2018) (b). [https://www.finanse.mf.gov.pl/documents/766655/1170488/zsp\\_2018\\_01.pdf](https://www.finanse.mf.gov.pl/documents/766655/1170488/zsp_2018_01.pdf)

Narodowy Bank Polski (National Bank of Poland): Raport o stabilności systemu finansowego (Report on financial system stability), grudzień (December) 2017 r. <http://www.nbp.pl/systemfinansowy/rsf122017.pdf>

Narodowy Bank Polski (National Bank of Poland): Wybrane aspekty dodatkowego opodatkowania banków w kontekście debaty na forum Unii Europejskiej (Selected aspects of additional taxation of banks in the context of debate within the European Union), Warszawa, 15 października (October) 2010. [https://www.nbp.pl/systemfinansowy/banki\\_aspekty\\_opodatkowania.pdf](https://www.nbp.pl/systemfinansowy/banki_aspekty_opodatkowania.pdf)

Narodowy Bank Polski (National Bank of Poland): Raport o stabilności systemu finansowego, Ramka 8: Skutki wprowadzenia podatku od aktywów dla sytuacji sektora bankowego (Report on stability of financial system. Box 8: Effects of introduction of tax on assets on banking sector situation), Warszawa 2016. <http://www.nbp.pl/systemfinansowy/rsf022016.pdf>

Opinion of the European Central Bank of January 12, 2016 on a tax for certain financial institutions (CON/2016/1). [https://www.ecb.europa.eu/ecb/legal/pdf/en\\_con\\_2016\\_1\\_f\\_sign.pdf](https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2016_1_f_sign.pdf)

- Proposal for a Council Directive of September 28, 2011 on a common system of financial transaction tax and amending Directive 2008/7/EC, COM(2011) 594 final – Not published in the Official Journal. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013PC0071>
- Urząd Komisji Nadzoru Finansowego (Office of Polish Financial Supervision Authority): Syntetyczna informacja na temat wpływu podatku od niektórych instytucji finansowych na sytuację banków komercyjnych (Synthetic information about impact of tax on certain financial institutions on situation of commercial banks), Departament Bankowości Komercyjnej i Specjalistycznej oraz Instytucji Płatniczych (Department of Commercial and Specialist Banking and Payment Institutions), Warszawa, lipiec (July) 2016. [https://www.knf.gov.pl/knf/pl/komponenty/img/info\\_nt\\_wplywu\\_podatku\\_od\\_niektorych\\_instytucji\\_finansowych\\_na\\_syt\\_bankow\\_47509\\_56228.pdf](https://www.knf.gov.pl/knf/pl/komponenty/img/info_nt_wplywu_podatku_od_niektorych_instytucji_finansowych_na_syt_bankow_47509_56228.pdf)
- Urząd Komisji Nadzoru Bankowego (Office of Polish Financial Supervision Authority): Syntetyczna informacja na temat wpływu podatku od niektórych instytucji finansowych na sytuację banków komercyjnych (Synthetic information about impact of tax on certain financial institutions on situation of commercial banks), Departament Bankowości Komercyjnej i Specjalistycznej (Department of Commercial and Specialist Banking and Payment Institutions), Warszawa, 2018. [https://www.knf.gov.pl/knf/pl/komponenty/img/Podatek\\_bankowy\\_2017\\_61001.pdf](https://www.knf.gov.pl/knf/pl/komponenty/img/Podatek_bankowy_2017_61001.pdf)
- Ustawa z dnia 15 stycznia 2016 r. o podatku od niektórych instytucji finansowych (Act of January 15, 2016 on Tax on Certain Financial Institutions) – tekst jedn. Dz. U. z 2017 r. poz. 1410.
- Ustawa z dnia 21 lipca 2006 r. o nadzorze nad rynkiem finansowym (Act of July 21, 2006 on Financial Market Supervision) – tekst jedn. Dz. U. z 2017 r. poz. 196 z późn. zm, as amended.
- Uzasadnienie do poselskiego projektu ustawy o podatku od niektórych instytucji finansowych z dnia 3 grudnia 2015 r. (druk sejmowy nr 75).
- VIII Kadencja Sejmu RP (Explanatory notes to the draft Act on Tax on Certain Financial Institutions of December 3, 2015, submitted by MPs – Sejm paper no. 75; 8th term of office of the Parliament of the Republic of Poland); <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=75>
- Związek Banków Polskich (Polish Bank Association): Raport o sytuacji ekonomicznej banków, Banki 2016 (Report on economic standing of banks), Warszawski Instytut Bankowości (Warsaw Banking Institute), kwiecień (April) 2017; <https://www.wib.org.pl/uploaded/Raport%20Banki%202016.pdf>

---

# THE PRINCIPLE OF TRUST IN THE LIGHT OF THE PROVISIONS OF THE CODE OF ADMINISTRATIVE PROCEDURE AND THE TAX ORDINANCE ACT

*Ewa Koniuszewska*<sup>1</sup>

## **Abstract**

The paper is devoted to the characteristics of the principle of deepening trust of the participants in the proceedings in a public authority implemented in the course of general administrative proceedings and tax proceedings. The basic purpose of the study is to analyze the normative material aimed at identifying legal regulations guaranteeing the implementation of the principle in question. The latest regulations determining the administrative procedure which significantly modified the principle of deepening trust of the participants in the proceedings in a public authority were taken into account. Then, a discussion was taken up to answer the question whether it would be possible to introduce analogous changes in the Tax Ordinance Act with regard to the analyzed principle and what legal consequences it would bring. In the conducted research, a method of analyzing the legal text, the achievements of the jurisprudence and the doctrine was used.

## **Key words**

General rules of procedure, trust proceedings' participants' in a public authority.

**JEL Classification:** K34, H20

## **1 Introduction**

The purpose of the study is to analyze the normative material aimed at identifying legal regulations guaranteeing the implementation in the administrative and tax proceedings of the principle of trust of the participants in the proceedings in a public authority. The most recent regulations determining the administrative procedure were taken into account, which substantially modified the principle in question. The structure of the study has been adapted to the delineated research field. The starting point was a presentation of general issues of an introductory nature. Then, considerations were carried out to answer the question whether it is possible to introduce analogous changes in the Tax Ordinance Act shaping the principle of deepening citizens' trust in state bodies and what

---

<sup>1</sup> JUDr., Assistant Professor for Department of Self-Government Law, Faculty of Law and Administration, University of Szczecin, Poland. Author specializes in self-government law. She is the author of more than 50 publications. She is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. Contact email: ewa.koniuszewska@usz.edu.pl.

legal consequences it would entail. The analysis of the normative material is intended to justify the thesis that, as a result of the amendment to the Code of Administrative Procedure, the principle described has been limited. For the needs of the conducted research, the method used in the indicated scope was the analysis of legal acts, judicial and administrative decisions and doctrinal views. The research results presented in particular in such publications as the following were taken into account: Z. Kmiecik, *Ochrona zaufania w prawie administracyjnym* (Protection of trust in administrative law), G. Łaszczycza, *Komentarz do art. 8 Kodeksu postępowania administracyjnego* (Commentary to Article 8 Code of Administrative Procedure), H. Dzwonkowski, *Komentarz do art. 121 Ordynacji podatkowej* (Commentary to Article 121 Tax Ordinance Act).

## **2 The principle of deepening trust of the participants in the proceedings in a public authority in general administrative proceedings**

The principle of deepening trust of the participants in the proceedings in a public authority is one of the general principles of administrative proceedings, included in the framework of their catalog formulated in chapter II of the Code of Administrative Procedure (hereinafter: CAP). It is worth noting that the general rules of administrative proceedings are legal principles, i.e. norms of positive law. They are defined as procedural principles that are rules of proceedings contained in the applicable law. The principles are distinguished from other legal rules on the basis of the following criteria: they occupy a “higher” position in the hierarchical structure of procedural law; they are the premises of other (legal) rules for which they provide a rationale; they are an important element of the institution of procedural law treated as sets of (legal) rules separated into one functional whole; they are “more important” than other rules from the point of view of assumed socio-economic (political) assessments (Wróbel, 2009: 35).

The principle of deepening trust of the participants in the proceedings in a public authority is expressed in Article 8§1 CAP. According to its content, public administration bodies conduct proceedings in a way that inspires its participants’ trust in a public authority, guided by the principles of proportionality, impartiality and equal treatment. Characterizing this principle should be preceded by a remark that the current shape of the principle is the result of three amendments to the Code of Administrative Procedure, which significantly changed its content. In the pre-existing legal status, this principle stipulated an obligation for state administration bodies to conduct proceedings in such a way as to increase the citizens’ trust in the State bodies as well as to enhance the citizens’ awareness and culture. Representatives of science claimed that the regulations laying it down should be treated as a buckle that binds together all general rules of procedure. It was pointed out that it was the broadest and the most politically significant rule. The legislator adopted a political assumption that citizens’ trust in state power determines

the strength of the state and the effectiveness of its operation. Proper activity of state administration bodies in the course of administrative proceedings may bring measurable political benefits, while flawed activity may cause political damage.

The universal nature of the principle was also emphasized in case law. The Constitutional Court stressed that the principle of citizen's trust in the state underlying many constitutional regulations is similar to the principle of the substantive rule of law, a constitutional law rule which means that it creates specific obligations in the sphere of state's activity. In particular, it results in the obligation to shape the law in such a way as not to limit the rights of citizens, by constructing a system of law that is clear, consistent and understandable to the citizens, giving them the guarantee of stability of law (Constitutional Court: K 7/89).

The doctrine has pointed out that the principle of deepening the trust of citizens imposed duties on the public administration bodies as regards the manner of conducting administrative proceedings. This method, however, has not been determined directly, but by indicating the purpose of how to achieve it. Two desirable goals were formulated: deepening citizens' trust in state organs, enhancing citizens' awareness and legal culture (Łaszczyca, 2010: 124). These goals should be determinants of the operation of public administration bodies. For the implementation of this principle, it was not enough for the administration body to avoid actions that could undermine citizens' trust, but it was necessary to take initiatives that would increase this trust. Achieving this status was favored by the better and more efficient functioning of the administration apparatus (Łaszczyca, 2010: 125). In the doctrine, the regulation of Article 8 CAP, requiring the public administration body to conduct proceedings in a way that deepens citizens' trust in state organs, was assessed as inconsistent with the decreasing level of citizens' trust in the state and the activities of its organs (Chróścielewski, 2009: 47).

By the act amending the Code of Administrative Procedure the principle of increasing trust was changed, among others, by releasing public administration bodies from the obligation to enhance certain citizens' properties, abilities or attributes. It was given a new wording, according to which public administration bodies shall conduct proceedings in a way that inspires its participants' trust in a public authority. By changing the wording of Article 8 CAP the already established obligation was imposed not only on public administration bodies that are "state bodies", but also on other bodies and entities performing public tasks, in particular by adjudication in individual cases by means of administrative decisions. In addition, the personal scope of the obligation included not only "citizens", but all participants of the proceedings (Kędziora, 2014: 94).

The legislator, shaping in Article 8 CAP the obligation of administrative authorities as regards conducting administrative proceedings, did not specify the conditions for its implementation. Therefore, the selection of premises and methods for its implementation was left to the competent authority. In the doctrine, against the background of the analysis

of judicial decisions of administrative courts, a view was expressed that the provisions of Article 8 CPA are the basis for interpreting the rules and requirements that are required to be taken into account in the course of proceedings. These include: the principle of equality before the law; the requirement of uniformity (coherence) of views expressed in the decisions of the authorities with respect to the same addressee, issued against the same facts, with the indication of the same legal basis of the decision; the principle of protection of an entity acting in the belief that the actions of state organs referring to it are correct and corresponding to the law; the requirement to ensure impartiality of administrative proceedings; the requirement to clarify the actual will of the party, if the nature of the pleading brought by the party raises doubts; the requirement to resolve doubts in favor of the citizen, if it is not prevented by an important social interest (Łaszczycza, 2010: 125-128). Some of the above-mentioned principles and requirements, in the opinion of the legislator, required emphasizing, which was reflected in the next amendment to the procedural law. By the Act amending the Code of Administrative Procedure and certain other acts once again Article 8 CAP was given a new wording. In the current state, according to its content, public administration bodies conduct proceedings in a way that inspires its participants' trust in a public authority, guided by the principles of proportionality, impartiality and equal treatment. In addition, subsection 2 was added to Article 8, which established a prohibition for administrative authorities to derogate without reasonable justification from a fixed practice of settling cases with the same factual and legal status. It should be assumed that giving the principle of deepening citizens' confidence in the state organs a new shape was dictated by the need to take into account the recommendations of the European Code of Good Administrative Behavior. Although this act is not binding, being an important instrument for implementing the principles of good administration in the work of EU institutions, it is also a source of inspiration in the development of texts of legal acts in individual Member States of the European Union. The principles of proportionality, impartiality, equal treatment and legitimate expectations introduced into the domestic administrative procedure have their origin in the provisions of the European Code.

The principles of proportionality, impartiality and equal treatment were expressed *expressis verbis* in Article 8§1 CAP and set a standard for a public administration body for implementing the protection of trust in a public authority (Kędziora, 2017: *Legalis*). The principle of proportionality establishes the requirement for public administration bodies to maintain a balance between adverse effects of a decision on the individual and the objectives that are pursued (Klat-Wertelecka, et al, 2016: 67). From this principle a directive results for the authorities to strive to apply measures towards citizens that are not excessively burdensome. These should therefore be measures: useful for pursuing a specific purpose; necessary in a given situation; proportional in the strict sense, which means that the proper relationship between the purpose of the action and the burdens is maintained. In turn, the principle of impartiality should be interpreted as a prohibition on the administrative bodies and their employees to follow any interests or non-legal

motives that may violate the interests of the parties. The third of the principles expressed in Article 8§1 CAP is the principle of equal treatment, according to which all parties should be treated in a comparable way in the same situation, without any expression of discrimination. The doctrine positively assessed the modification of the principle of deepening trust of the participants in the proceedings in a public authority. It was emphasized that the transfer of the content of constitutional standards of the operation of a public authority to the legal regulation of the Code of Administrative Procedure fills the general principle of deepening trust in a public authority with the established values. The adopted principles of proportionality, impartiality and equal treatment are assigned a basic meaning for examining and resolving an individual case by way of a decision, in the course of administrative proceedings, giving it both material and procedural value (Adamiak; 2017: 86). Establishing the determinants of the implementation of the principle of deepening trust of the participants in the proceedings in a public authority should be approved. Objections may, however, arise from the way of drafting the provision that captures these determinants into a framework of a closed catalog. In this way, the legislator created an impression that only if the principles of proportionality, impartiality and equal treatment are respected in the course of the proceedings, will the requirement of deepening the trust of its participants in a public authority be fulfilled. The linguistic wording of Article 8§1 CAP may lead to the erroneous conclusion that striving to maintain consistency of views expressed in the decisions of the authorities with respect to the same addressee, care for clarification of the actual will of the party, if the nature of the pleading submitted by the party raises doubts, an attempt to resolve doubts in favor of the party, if not precluded by an important social interest, are of marginal importance for the implementation of the described principle. And yet, as emphasized by representatives of science, it is not possible to create an exhaustive catalog of behaviors that are conducive to building trust of the participants in the proceedings in a public authority. The assessment of whether a certain action or a set of actions are consistent with the principle of deepening trust must be carried out against specific facts while taking into account the entirety of accompanying circumstances (Kmieciak, 1997: 33-34). It should be believed that Article 8§1 CAP would not raise any interpretation doubts if the standard of implementation of the protection of trust in a public authority was defined on the basis of exemplification.

### **3 The principle of trust in tax authorities**

The principle of trust in tax authorities was expressed in Article 121§1 of the Tax Ordinance Act, hereinafter referred to as TO. The characteristics of the principle should be preceded by a remark that until the entry into force of the Tax Ordinance Act tax proceedings were regulated in the Code of Administrative Procedure. Its provisions served as a model on which the construction of the Tax Ordinance Act (also in the field of general principles) was based, which was criticized in the subject literature

(Dzwonkowski, 2000: 18). It should also be noted that in the doctrine tax proceedings were defined as a special administrative procedure (Mastalski, 1980: 79). At the same time, the main difference between these procedures was shown, consisting in administrative procedure having as its object the solving of an individual case by way of a unilateral administrative act (Dawidowicz, 1962: 10), whereas in tax proceedings, due to the tax technique, there is not always the need for preliminary actions to be taken by the tax authority (Kosikowski, 1986: 52).

Taking into account the relation of the Tax Ordinance Act to the provisions of the Code of Administrative Procedure (relating to tax proceedings), three groups of regulations can be distinguished: provisions with identical wording as in the CAP, provisions differing from the relevant provisions of the CAP only in terms of terminology and editing; provisions containing regulations other than those on the basis of the CAP or regulating issues not regulated in the CAP. The regulations shaping the principle of trust in tax authorities should be classified in the second of these groups. They remain unchanged from the start of the Tax Ordinance Act being in force. Pursuant to the provisions of Article 121§1 TO, proceedings should be conducted in a way that inspires trust in tax authorities. Following the solutions adopted in Article 8 CAP, the obligation imposed on tax authorities did not include the requirement to enhance citizens' awareness and legal culture. Its omission was assessed negatively, arguing that citizens' awareness and legal culture are of fundamental importance in a system based on self-declaration, i.e. developing and submitting a self-declaration by the taxpayer. Due to the prevalence of self-declaration, as well as due to the importance of awareness and legal culture for shaping the right attitudes towards this technique, the abandoning of this requirement was found to be contrary to the tendency of the whole system (Dzwonkowski, 2013: 623)

Placing the principle of trust in tax authorities in the catalog of general principles of tax proceedings needs to be considered significant. Its location immediately after the rule of law can be interpreted as the legislator's desire to draw attention to values such as fairness, equality of entities, respect for the rules of human behavior (Presnarowicz, 2013: 758).

It has already been pointed out that it is not possible to create a complete catalog of the behavior of bodies implementing the principle of trust. However, in the judicature, against the background of the analysis of specific facts and taking into account the accompanying circumstances, the types of actions that serve its implementation have been indicated. When analyzing the case law in this respect, it should be emphasized that despite the general take on the principle of trust, the norm contained in Article 121 § 1 TO cannot be treated only as a postulate referring to the manner of conducting proceedings. It is a provision which the authorities are obliged to comply with on a par with other regulations containing guidelines as to their actions (WSA: I SA/Sz 304/17). The principle of trust in tax authorities should be taken into account when interpreting procedural rules and implemented at all stages of the proceedings. The case law of the administrative courts has emphasized that the occurrence of opposing adjudicating



stands regarding the interpretation of specific procedural provisions creates an extremely inconvenient situation for the party in the proceedings. It may raise serious doubts as to the manner in which the powers are exercised in the proceedings, in a manner ensuring the occurrence of certain procedural consequences.

In such a situation, the procedure consistent with the principle of trust in tax authorities is the adoption by the authority of such an interpretation of provisions from among the opposing views presented in the case-law, which in given circumstances will be beneficial to the party (WSA: I SA/Wr 76/16). In addition, according to the Court, the procedure that raises trust is one that is meticulous and factually correct. In its course, the interests of the taxpayer and the State Treasury are treated equally, the assessments of these interests are not changed, and substantive legal doubts are not settled to the detriment of the taxpayer (WSA: III SA/GI 1564/14).

Bearing in mind the difficulty in formulating a catalog of activities embodying the principle of trust and taking into account the course of actions taken in tax proceedings specified by the legislator, it should be noted that at the initiation stage, actions consisting in its initiation just before the expiry of the tax liability are considered as non-compliant with the principle. Such an action violates the discussed principle all the more, if the tax authority has enough evidence to resolve the case or for reasons not on the part of the taxpayer it does not verify the submitted declaration for almost five years (WSA: I SA/GI 13/17).

At the stage of evidence proceedings, it is contrary to the principle of trust in tax authorities to block the evidential initiative of the party who seeks to demonstrate circumstances favorable to them. In such a situation, the tax authority cannot assume by default that the circumstances for which the evidence is requested will not affect the outcome of the case. It is obliged to respond to the evidence requested by the party after having properly taken the evidence (WSA: III SA / GI 1491/16). Resignation of the original intention to take expert evidence, motivated by the refusal to grant funds for research will also undermine confidence in tax authorities (NSA: I GSK 79/17).

At the stage of making a decision on an individual case, the tax authority will implement the principle of trust giving due reasoning for the decision. It should reflect the authority's process of reasoning, conclusions regarding the assessment of evidence and arguments for adopting a specific opinion. This will allow the addressee, as well as the court reviewing the legality of the act, to get acquainted not only with the authority's statement, but also with the analysis that the authority has carried out in relation to each piece of evidence and the reasons why some of the evidence was considered reliable and the credibility of other was denied (WSA: VIII SA/Wa 344/17). In turn, the mere issuing of a decision that does not meet the expectations of the party to the proceedings cannot constitute sufficient justification of the allegation of breach of the principle of trust in tax authorities (WSA: I SA/Po 1600/16), especially if the assessment of the collected

material is logical, the conclusions are correct and the principle of free evaluation of evidence was not abused (WSA: I SA/Łd 74/17).

The presented positions of the judiciary reveal the diversity of activities and actions of tax authorities, both being an expression of the implementation of the principle of trust, as well as those undermining its essence. Despite this diversity and the legislator's general approach to the discussed principle, the bodies applying procedural rules and courts reviewing the legality of acts are able to identify actions that serve to implement it.

## 4 Conclusion

Expressed in Article 8§1 of the Code of Administrative Procedure and Article 121§1 of the Tax Ordinance Act, the principle of trust in public authorities and tax authorities has not been formulated by the legislator in a homogeneous manner. As a result of the amendment of the Code of Administrative Procedure, public administration bodies were given an obligation to shape trust based on the principles of proportionality, impartiality and equal treatment. Reservations concern the manner of drafting the provision introducing the amendment, the interpretation of which may lead to the conclusion that the ways in which the principle of trust is implemented by the authority conducting the proceedings have been limited. Therefore, to prevent the impression that the requirement of shaping trust in tax authorities will be met only if the principles of proportionality, impartiality and equal treatment are respected, it is postulated not to introduce identical changes to the tax proceedings.

## References

- Adamiak, B.: Komentarz do art. 8 (Commentary to Article 8), in: Adamiak, B. and Borkowski, J. (eds.): *Kodeks postępowania administracyjnego, Komentarz* (Code of Administrative Procedure. Commentary), Warsaw: C.H. Beck, 2017.
- Chróścielewski, W., Nykiel, W.: *Ordynacja podatkowa a przepisy Kodeksu postępowania administracyjnego* (Tax Ordinance Act and the provisions of the Code of Administrative Procedure), in: Brzeziński, B., Kosikowski, C. (eds.): *Studia nad Ordynacją podatkową* (Studies on the Tax Ordinance Act), Łódź-Toruń: Dom Organizatora, 1999.
- Chróścielewski, W.: *W sprawie projektu nowelizacji przepisów k.p.a. dotyczących postępowania ogólnego opracowanego w Ministerstwie Spraw Wewnętrznych i Administracji w 2009 r.* (On the draft amendment of provisions of the CAP regarding general procedure prepared in the Ministry of the Interior and Administration), in: Posłuszny, J. et al (eds.): *Instytucje procesu administracyjnego i sądownictwa administracyjnego, Księga jubileuszowa dedykowana profesorowi Ludwikowi*

- Żukowskiemu (Institutions of administrative and law and administration proceedings. Professor Ludwik Żukowski commemorative book), Przemysł-Rzeszów: Wyższa Szkoła Prawa i Administracji w Przemysłu, 2009.
- Dawidowicz, W.: Ogólne postępowanie administracyjne. Zarys systemu (General administrative procedure. Outline of the system), Warsaw: Państwowe Wydawnictwo Naukowe, 1962.
- Dzwonkowski, H.: Komentarz do art. 121 (Commentary to Article 121), in: Dzwonkowski H. (ed.): Ordynacja podatkowa. Komentarz (Tax Ordinance Act. Commentary), Warsaw: C.H. Beck, 2013.
- Dzwonkowski, H.: Zakres i struktura postępowania podatkowego (Scope and structure of tax proceedings), Państwo i Prawo (State and Law) no. 7 (2000).
- Kędziora, R.: Kodeks postępowania administracyjnego. Komentarz (Code of Administrative Procedure. Commentary), Warsaw: C.H.Beck, 2014.
- Klat-Wertelecka, L., et al: Zsady ogólne postępowania administracyjnego (art. 8, 8a, 13–16 k.p.a.) (General rules of administrative procedure (Articles 8, 8a, 13–16 CAP)), in: Reforma prawa o postępowaniu administracyjnym. Raport zespołu eksperckiego (Reform of the law on administrative procedure. rapport of the expert team), Warsaw 2016. [www.nsa.gov.pl/download.php?id=345&mod=m/11/pliki\\_edit.php](http://www.nsa.gov.pl/download.php?id=345&mod=m/11/pliki_edit.php)
- Kmiecik, Z.: Ochrona zaufania w prawie administracyjnym (Protection of trust in administrative law), Samorząd Terytorialny (Territorial Self-Government) no. 11 (1997).
- Kosikowski, C.: Postępowanie finansowe (Financial proceedings), Warsaw: Państwowe Wydawnictwo Naukowe, 1986.
- Łaszczyca, G.: Komentarz do art. 8 (Commentary to Article 8), in: Łaszczyca, G., et al (eds.): Kodeks postępowania administracyjnego. Komentarz (Code of Administrative Procedure. Commentary), vol. I, Warsaw: Wolters Kluwer, 2010.
- Mastalski, R.: Postępowanie podatkowe jako szczególne postępowanie administracyjne (Tax proceedings as special administrative proceedings), Państwo i Prawo (State and Law) no. 6 (1980).
- Presnarowicz, S.: Komentarz do art.121 (Commentary to Article 121), in: C. Kosikowski, et al (eds.): Ordynacja podatkowa. Komentarz (Tax Ordinance Act. Commentary), Warsaw: Wolters Kluwer, 2013.
- Wróbel, A.: Zasady ogólne postępowania administracyjnego (General rules of administrative procedure), in: Chorąży, K., et al (eds.): Postępowanie administracyjne, egzekucyjne i sądownoadministracyjne (Administrative, enforcement and judicial and administrative proceedings), Warszawa: Wolters Kluwer, 2009.

**Legal Acts**

Act of June 14, 1960, Code of Administrative Procedure, as amended.

Act of August 29, 1997, Tax Ordinance Act, as emended.

Act of December 3, 2010, On amending the act – Code of Administrative Procedure and the act – Law on proceedings before administrative courts.

Law of April 7, 2017, On amending the act – Code of Administrative procedure and certain other acts.

Constitutional Court: K 7/89.

NSA (Supreme Administrative Court): I GSK 79/17.

WSA (Voivodship Administrative Court): I SA/Sz 304/17.

WSA (Voivodship Administrative Court): I SA/Wr 76/16.

WSA (Voivodship Administrative Court): III SA/GI 1564/14.

WSA (Voivodship Administrative Court): I SA/GI 13/17.

WSA (Voivodship Administrative Court): III SA/GI 1491/16.

WSA (Voivodship Administrative Court): VIII SA/Wa 344/17.

WSA (Voivodship Administrative Court): I SA/Po 1600/16.

WSA (Voivodship Administrative Court): I SA/Łd 74/17.

---

# TAX REPORT ANALYSIS IN THE SYSTEM OF CITIZENS' OBLIGATIONS TO THE STATE

*Larisa Korobeinikova*<sup>1</sup>

## Abstract

In the modern world, tax reporting is becoming more and more important, as it is used for creating an economic analysis and financial management database, as well as for practical application by specialists in tax accounting and analysis. The target of tax reporting is determined solely by the needs of the economic analysis performers, who are concerned with the tax base of a particular enterprise.

## Key words

Taxpayer, tax reporting, economic analysis, performer of the analysis, tax report analysis.

**JEL Classification:** K340

## 1 Introduction

Amidst economic recession, tax reports acquire special significance for the purposes of fiscal control, as well as for strategic management of cash flow of an enterprise. The target of tax report analysis is determined with due regard to the performers and the intended recipients of the analysis. This target must be based upon the obligations to the state concerning taxes and levies' assessment and payment. It must be noted that tax reports comprise information about the tax base and tax obligations of the enterprise. The reports are drawn in compliance with the legal requirements and are submitted to the relevant tax authority.

In the field of analysis of economic activities of an enterprise there is a separate research area concerned with the analysis and optimization of tax policy and tax assessment, where special attention is paid to tax reports analysis. Russian researchers, such as K.P. Agupova, R.F. Galyamzyanov, A.R. Gorbunov, S. Guskov, T.A. Kozenkova, N.A. Lytneva, A.N. Medvedev, N.V. Parushina, A.I. Pogorelitsky, T.A. Pozhidayeva, B.A. Rogozin, N.F. Scherbakova, D.N. Tikhonov, N.G. Varaksa, M.V. Vasilyeva, and D.A. Yendovitsky, give special consideration to the analysis and optimization of tax assessment, define the substance of tax report analysis, and evaluate the possibilities of tax relief for enterprises.

---

<sup>1</sup> Candidate of economic sciences, Assistant professor and Head of the Department of Economic Analysis and Audit, Faculty of Economics, Voronezh State University, Voronezh, the Russian Federation. The author specializes in economic analysis and audit. She is the author of more than 200 scientific and scientific-methodical works, including 2 monographs. She is a member of the Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. Contact email: korobeinikova@vsu.ru

## 2.1 Performers of tax report analysis

The basic principles of the Russian tax legislation are aimed at optimization of taxable base and tax rates, as well as at the reduction of the number of taxes and other charges. As a result, the tax burden is optimized and the enterprises are encouraged to legalize their business activities. While studying tax reports of a particular enterprise, investors, creditors and audit institutions evaluate the taxpayer's financial condition and stability. The following measures have to be taken for the purposes of tax policy optimization of an enterprise:

- check the accuracy of assessment of tax and payment obligations, as well as tax accounting accuracy;
- justify the inevitability of fines and penalties, estimate the unjustified losses;
- analyze the correctness of business activities representation with the prospect of tax burden optimization;
- organize tax planning for the forthcoming business operations;
- evaluate the financial risks associated with the protection of property rights violated by the state.

Given that the aim of an enterprise while performing certain economic activities is to achieve financial results, the effect of tax report analysis has to be a set of recommendations on cutting down the tax expenses and the reduction of the tax burden. The tax report recipients analyze tax statements in the context of the enterprise's reports, which are an important means of financial and legal communication (Pozhidayeva, 2011). Tax reports must be prepared in compliance with the needs of their recipients and the performers of tax report analysis. The performers of tax report analysis can be classified by a number of criteria stated in Table 1.

Table 1: Taxpayers' classification by various criteria

Classification criterion	Types of taxpayers	Brief description of the relevant group
1	2	3
The role in the relations regulated by the tax legislation (Article 9 of the Tax Code of the Russian Federation) [1]	tax and levy payers	entities and individuals obliged to pay taxes and levies (Article 19 of the Tax Code of the Russian Federation) [1]
	fiscal agents	parties responsible for assessment, collection and remittance of taxes to the budget of the Russian Federation (Article 24 of the Tax Code of the Russian Federation) [1]

Table cont. 1

1	2	3
	tax authorities (Federal executive bodies responsible for tax control and inspection, and their local branches)	parties, whose responsibility is to ensure that the taxes (levies) stated in the tax report are correctly assessed and paid in full and in due time, and all the procedures and terms of tax reporting have been complied with
	customs authorities (Federal executive body responsible for customs procedures, and subordinate customs agencies)	parties, whose responsibility is to ensure that the customs charges stated in the customs declaration are correctly assessed and paid in full and in due time, and the declaration is filed in due time
The recipient of the tax report	actual parties	parties having direct interest in the structure and quality of the information provided in tax reports: fiscal control bodies (Ministry of Taxation, Federal Customs Service, Ministry of Finance of the Russian Federation), owners and managers of the enterprise, accountants
	potential parties	third parties that may in certain circumstances be interested in the data presented in a tax report: owners (founders) of the enterprise, auditors and audit firms, arbitration courts, law enforcement agencies (Federal Service for Economic and Tax Crimes of the Ministry of Internal Affairs)
Relations with the taxpayer being an independent market participant	internal parties	parties using the data from tax reports for decision-making purposes in the sphere of financial management, tax planning, preparation of cash-flow pro forma statements: owners and managers of the enterprise, accountants
	third parties	parties whose activities are carried out outside the enterprise: owners (founders) of the enterprise, auditors and audit firms, arbitration courts, law enforcement agencies
The level of financial interest	having direct financial interest	owners (founders) of the enterprise are interested in the net profit available for distribution; tax authorities control tax revenues flow into the budget (ensuring the correctness of tax assessment and payment, as well as the performance of taxpayer's obligations) (Ministry of Taxation, Federal Customs Service of the Russian Federation)

End of table 1

1	2	3
	having indirect financial interest	auditors and audit firms consider the tax liabilities of the enterprise, as well as the tax implications associated with the failure to carry out the taxpayer's obligations or the infringement of tax legislation, to be the factors having influence on the financial status of the enterprise, which is important for audit risks evaluation and for the overall opinion based on the audit results
	having no financial interest	arbitration courts and law enforcement agencies use tax reports as evidence when considering whether the transactions carried out have been justified and the statutory duties have been carried out
The role of the tax surveyor	main parties	tax authorities having the right to carry out tax inspections, participants of the tax relations under surveillance (tax and levy payers, fiscal agents)
	subsidiary parties	parties contributing to the performance of tax inspections: experts, specialists, contractors, notaries, banks, witnesses

Table 1 shows that the performers of tax report analysis are not only tax authorities, but also other parties who are financially interested in the matter. From the point of view of tax surveillance organization, the performers of tax report analysis may also be called supervisory bodies.

## 2.2 The sources of information support of tax report analysis

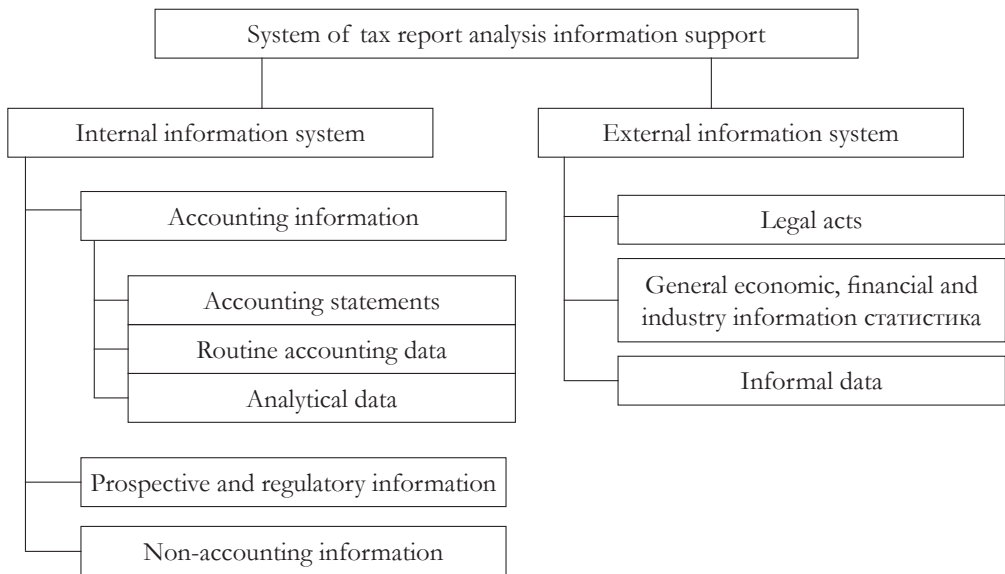
The main criterion for information differentiation is its source. Accordingly, we distinguish between external and internal information. Internal information may be classified into three categories: accounting information, prospective and regulatory information, non-accounting information. There are also three types of accounting information: accounting statements, routine accounting and analytical data (Yendovitsky (ed.), 2018) (Figure 1).

The main type of accounting information is presented in accounting statements (Yendovitsky (ed.), 2018), which reflect the economic phenomena, processes and their results to the fullest extent possible. Organization of routine accounting also helps to improve the effectiveness of the analytical procedures with the purpose of tax burden optimization. Analytical data normally comprise secondary information which has been analytically



processed, but cannot be used for tax report analysis. This information undergoes additional selection, grading and compilation processes, the aim of which is to make the information suitable for analysis. The prospective and regulatory information category comprises the tax and levy expenses plan, as well as any other plans developed by the enterprise (long-term, current or operational), as well as regulatory documents – internal administrative documents (statements, orders, acts, decisions, regulations and provisions) which are used for the performance of contracts and are applicable to different taxation schemes. Non-accounting information is an essential part of tax report analysis information support: technical and technological documents, results of inspections, case papers, certificates, internal audit reports. This is financial information, and it is not necessarily structured or organized. The main sources of statistical data are macroeconomic statistics, market conjuncture statistics, and the statistical data of certain market participants. Such statistics are normally published in the form of reports. Access to this data is provided by certain organizations (such SPARK, a system for professional analysis of markets and companies) and may be either free or on a fee basis. Taxpayers analyzing tax reports give special attention to timeliness, adequacy and accuracy of information representation (Panina, 2014).

Figure 1: Sources of information support of tax report analysis



### 2.3 Performers of tax report analysis

The most important requirement for tax reports preparation is timeliness. The parties analyzing tax reports pay special attention to quality and quantity of the information contained in the reports, as well as to the terms of the reports provision to tax authorities. To make the work of tax authorities more objective, it is necessary to specify a time frame

within which the regulatory authorities have a right to request a taxpayer to provide information. One of the important aspects is the volume of information provided in tax reports for the performers of economic analysis. It must be noted that not all the data required for economic analysis of the enterprise's activities are contained in tax reports. It has to be mentioned that besides tax returns and advance payment estimates tax reports comprise documents (such as analytical statements and explanatory notes) concerned with tax assessment and payment, which may be requested by regulatory authorities (tax authorities) or submitted on the taxpayer's initiative. Table 2 summarizes the existing tax accounting forms depending on the tax type and the performer of tax report analysis.

Table 2: Performers of tax report analysis by tax type

Type of tax	Tax accounting form	Performer of tax report analysis
1	2	3
VAT	VAT return	tax payer, tax agent
Excise duties	excise return for excisable goods, excluding tobacco goods	enterprise licensed for production of non-alcoholic products; enterprise licensed for processing straight-run gasoline; enterprise manufacturing excisable goods at the place of its location
Personal income tax	personal income statement according to 2-NDFL form	tax agent
Profit tax	corporate profit tax return (for the whole enterprise and its separate branches)	enterprise and its branches
	tax return for the profits obtained by a Russian company outside the Russian Federation	enterprise and its branches
	corporate profit tax return (with Page 03)	tax agent (pays dividends and interest on government and municipal securities)
	tax assessment of the amounts paid to foreign enterprises and the taxes withheld	tax agent
Levies for the use of fauna and water biological resources	data concerning the acquired licenses for the use of fauna, the amounts of levies to be paid and actually paid	enterprise having obtained a license for the use of fauna in the territory of the Russian Federation
	data concerning the acquired licenses for the use of water biological resources, the amounts of levies for the use of water biological resources to be paid once or on a regular basis	enterprise having obtained a license for the use of water biological resources

End of table 2

1	2	3
Water tax	water tax return	enterprise using water for special purposes
Mineral extraction tax	mineral extraction tax return	mining enterprise
Unified agricultural tax	unified agricultural tax return	agricultural enterprise
Simplified tax system	tax return filed in compliance with the simplified tax system	enterprise paying taxes under the simplified tax system
Unified tax on imputed income for particular types of activities	tax return for the unified tax on imputed income for particular types of activities	enterprise carrying out activities subject to unified tax on imputed income
Transport tax	transport tax return	enterprise possessing vehicles registered at the place of the enterprise's location
Gambling tax	tax return	enterprise possessing taxable items registered at the place of its location
Corporate property tax	corporate property tax return (tax assessment for advance payment)	enterprise
Land tax	land tax return	enterprise possessing land property at the place of its location

Table 2 shows that the main tax accounting forms are tax returns for various types of taxes. Tax returns and advance payment assessments may be presented in both soft and hard copy (Act no. 146-FZ/1998, Act BG-3-32/169/2002). It must be noted that the order of providing tax returns in soft copy was approved by the order of Ministry of Taxation of the Russian Federation dated April 2, 2002 no. BG-3-32/169. The tax payer who has submitted completed tax returns in soft copy in accordance with the prescribed procedure may consider such documents to be valid original copies. In this case the taxpayer will not have to submit such documents in hard copy. It creates an opportunity to expand the data base for economic analysis of the activities of an enterprise by means of electronic document flow.

It should be also stressed that while performing economic analysis of tax reports, special attention must be paid to the taxpayer's legal status. We need to distinguish between general legal status and the status of the payer of a particular tax (Karaseva (ed.), 2016). For example, a special taxpayer's status (see Table 2) may be obtained on the date of registration with a tax authority (gambling tax, transport tax). The results of the enterprise's economic activities (Panina, 2014), as well as the role of the enterprise in the elaboration of the state development strategy determine the status of the major taxpayers which are distinguished on the federal, as well as regional level. When carrying

out economic analysis, one needs to take into account not only the tax reports, but also consolidated statements.

### 3 Conclusion

A tax payer is a special type of tax report analysis performer. It has a certain legal status (tax status) and in the context of its tax relations with the state, the tax payer is responsible for paying taxes in compliance with the current legislation. Managerial decisions in the sphere of investment and innovation policy, changes in the product mix and the assortment of goods and services, as well as market segmentation imply the need for forecasting tax implications which may influence the sources of tax liabilities. We have to note that access to such data is restricted to the participants of the taxation process. At the same time, the internal parties are represented by the managers and employees of the enterprise, while third parties are the owners and state supervisory bodies.

### References

- Karaseva, M. (ed.): Финансовое право Российской Федерации (Financial Law of the Russian Federation: student's book), 4th ed., M.: КНОРУС (Moscow: KNORUS), 2016.
- Panina, I., Korobeinikova L.: Формирование и анализ отчетной информации о сегментах деятельности организации (Generation and analysis of accounting information concerning business segments of the enterprise), Экономический анализ: теория и практика (Economic analysis: theory and practice) no. 13 (2014).
- Pozhidayeva, T., Scherbakova, N., Korobeinikova, L.: Практикум по анализу финансовой отчетности (A Course of Financial Reports Analysis: student's book), M.: КНОРУС (Moscow: KNORUS), 2011.
- Yendovitsky D. (ed.): Бухгалтерский учет и отчетность (Financial accounting and reporting: student's book), M.: КНОРУС (Moscow: KNORUS), 2018.

### Legal Acts

- Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended.
- Act no. BG-3-32/169/2002, Order of the Ministry of Taxation of the Russian Federation On the order of providing tax returns in digital form via telecommunications. [www.consultant.ru](http://www.consultant.ru)

---

# USE OF THE CONCEPT OF THE ACTUAL RIGHT TO INCOME AT THE SETTLEMENT OF TAX DISPUTES IN THE RUSSIAN FEDERATION

*Iuliia Ledneva*<sup>1</sup>

## **Abstract**

The article is devoted to the analysis of tax disputes in the resolution of which the tax and judicial authorities of the Russian Federation used the concept of the actual right to income, or, in other words, the concept of a beneficial owner. The problem of establishing a beneficial owner is currently very relevant for law enforcement practice in the Russian Federation, since it is connected with preventing the illegal use of the advantages provided by the agreements on avoidance of double taxation by taxpayers of corporate income tax.

The purpose of the article is to identify the vectors for the development of law enforcement activities of tax and judicial bodies that are formed when resolving tax disputes using the concept of the actual right to income on the basis of studying the materials of judicial practice, analyzing the national legislation of the Russian Federation and international legal acts.

The author of the article poses the task of examining the concept of the actual right to income from the point of when and how it is applied by the tax and judicial authorities in resolving tax disputes; of considering how the innovations of the legislation of the Russian Federation on taxes in this regard are reflected in the results of the resolution of tax disputes; and of determining the criteria for the beneficial owner used in law enforcement practice by the tax and judicial authorities.

The methodological basis of the research was analytical, logical, historical and formal legal methods.

## **Key words**

Business Law, Corporate Law, Regulated Industries, Regulation, Tax Law, tax dispute, actual right to income, beneficial owner, law enforcement practice, double taxation avoidance agreement.

**JEL Classification:** K29

## **1 Introduction**

The relevance of the stated subject is due to the need to form the revenue side of the Russian budget in full, including through income from corporate income tax. The corporate income tax is an income-generating tax for budgets of all levels of the budgetary system of the Russian Federation. When it is paid and collected, the opposition of the public

---

<sup>1</sup> Candidate of legal sciences, associate professor, The Institute of Legislation and Comparative Law under the Government of the Russian Federation; the areas in which the author specializes are financial, budgetary, tax, and currency law; the number of books published – 6; the number of articles in peer-reviewed journals – 19; member of the Center for Information and Research Organization in Public Finance and Tax Law of Central and Eastern European Countries; E-mail: ulivik@yandex.ru.

interests of the state and the private interests of taxpayers is particularly acute, since this tax is imposed on the profit of the organization, which is the goal of all entrepreneurial activity. Thus, the state seeks to collect as much revenue as possible from this tax, and entrepreneurs, on the contrary, try to minimize the corporate income tax using various opportunities, including the advantages of double tax treaties (hereinafter referred to as “DTAT”). The contradiction between public and private interests when paying and levying corporate income tax in connection with the application of DTAT’s tax advantages is the “ground” for the emergence of tax disputes, in which the tax and judicial authorities in the Russian Federation increasingly use the concept of the actual right to income.

The purpose of the article is to identify the vectors for the development of law enforcement activities of the tax and judicial bodies in the Russian Federation that are formed when resolving tax disputes using the concept of the actual right to income on the basis of studying the materials of judicial practice, as well as analysis of the legislation of the Russian Federation on taxes and international acts. In the article the author investigates tax disputes, the reasons for their occurrence, analyzes the most significant court decisions in which the concept of the actual right to income was applied and which influenced further law enforcement practice in this sphere; identifies and studies the problems arising from the application of the legislation of the Russian Federation on taxes, international legal instruments, including DTAT and the Model tax convention on income and on capital of the Organization for Economic Development and Cooperation, connected with the illegal use of the advantages contained in agreements on avoidance of double taxation by taxpayers of corporate profit tax and tax agents.

The methodological basis of the research was analytical, logical, historical and formal legal methods.

The problems of using the concept of actual right to income in law enforcement practice in Russia, as well as the problems associated with the development of criteria for classifying persons as beneficial owners have recently been the subject of research by Russian legal scientists (for example, Havanova, 2016; Arakelov, 2017; Anischenko, 2016; Brooke, 2014).

## **2 Content of the concept of the actual right to income**

### **2.1 The content of the concept of the actual right to income and its securing in the tax legislation of the Russian Federation**

The concept of de facto right to income or, in a different way, the concept of a beneficial owner<sup>2</sup> was worked out by the international community in the 1970s to determine who

<sup>2</sup> The concepts of a person with an actual right to income and a beneficial owner in the relevant article will be used as similar. Such an approach is applied by the state authorities of the Russian Federation, for example, the Ministry of Finance of the Russian Federation in letter no. 03-00-P3/16236/2014 uses the terms "actual recipient of income" and "beneficial owner" as equivalent; a similar approach is used in judicial practice.

is covered by the preferential treatment of double taxation agreements. It found its way into the articles of Model tax convention on income and on capital and by now has quite firmly taken a place in the system of the tax and legal mechanism of the Russian Federation, which is confirmed by changes in the legislation on taxes of the Russian Federation (Act no. 376-FZ/2014, On Amending Part One and Two of the Tax Code of the Russian Federation (regarding taxation of profits of controlled foreign companies and income of foreign organizations)), and the trends in the development of law enforcement practice.

The content of the concept of the actual right to income is as follows. In accordance with paragraph 1 of Article 7 of the Tax Code of the Russian Federation, “if the international treaty of the Russian Federation establishes other rules and norms than those provided for by the Tax Code of the Russian Federation and regulatory legal acts adopted in accordance with it, rules and norms of international treaties of the Russian Federation are applied.” DTAT may be set at a reduced or zero rate with respect to income from sources in the Russian Federation for a foreign company, but in order to take advantage of DTAT, a foreign company must confirm its actual right to income, that is, in full, without any limitations, in its discretion to dispose of the income received. Otherwise, the provisions of DTAT cannot be applied to the legal relationships that have arisen, and the tax agent is required to withhold the corporate profit tax calculated according to the general rules established by Chapter 25 “Corporate Income Tax” of the Tax Code of the Russian Federation. Moreover, the tax agent is subject to the tax risks of additional charging of corporate income tax, penalties and tax liability in accordance with Article 123 “Failure by the tax agent to keep and (or) transfer taxes” of the Tax Code of the Russian Federation providing for “a fine of 20 percent of the amount to be withheld and (or) transferred “for” unlawful non-holding and (or) non-enumeration (incomplete retention and (or) transfer) in accordance with this Code of the amount of tax to be withheld and transferred by the tax agent “.

## **2.2 The concept of tax disputes and their levels in applying the concept of the actual right to income**

In carrying out control activities, tax authorities pay close attention to the analysis of the validity of the use of the benefits provided by DTAT by taxpayers and tax agents, namely, they determine whether a resident of a foreign country with which the Russian Federation has concluded DTAT is the actual recipient of income. In case of unlawful use of the benefits of DTAT by a taxpayer, a foreign company that is not the actual recipient of income, and the tax agent’s failure to maintain a tax on profits of organizations, which is not the actual recipient of income, and the failure by the tax agent of the amount of corporate income tax payable under the general rules established in Chapter 25 “Corporate Income Tax” of the Tax Code of the Russian Federation, the tax authorities

issue decisions on additional taxation of corporate income tax; the additional amount of tax is to be paid by the tax agent to the budget. If the tax agent that is the source of payment of income in the Russian Federation does not agree with the conclusions of the tax authority, then the tax agent has the right to apply to the arbitration court<sup>3</sup> with the application on invalidation of the decision of the tax authority. The tax dispute that has arisen is considered by the arbitration court and the latter makes a decision. If the court recognizes the decision of the tax authority to be lawful, the court refuses the applicant (the payer of the corporate income tax) in meeting its requirements and leaves the decision of the tax authority in force. If the court recognizes the position of the tax authority unfounded, then the court issues a decision that is satisfied by the requirement of the applicant (the payer of the corporate income tax), by canceling the decision of the tax authority in full or in part.

Accordingly, it is possible to distinguish two levels of law enforcement activity in the sphere in question. The first level is the level of decision-making by the tax authority based on the results of the tax audit conducted by the payer of the corporate income tax on the legitimacy of using the benefits of DTAT. The second level is the level of the decision of the arbitration court on the application of the disagreeing with the conclusions of the tax authority of the taxpayer (tax agent).

### **3 Tax disputes arising in connection with the application of the advantages of agreements on the avoidance of double taxation by taxpayers and tax agents**

#### **3.1 The case of “Eastern Value Partners Limited” and the Case of “Naryanmarneftegaz”**

Law enforcement practice on the resolution of tax disputes arising in connection with the use of the benefits of DTAT by taxpayers and tax agents has evolved in Russia ambiguously. Earlier, approximately until 2011, judicial practice was proceeding along a formal legal path: the courts recognized the foreign company as the actual recipient of income in the presence of legal grounds for obtaining it – the fact of concluding the contract and accordingly made decisions in favor of taxpayers and (or) tax agents (Brooke, 2014: 43).

From this point of view, the so-called “Eastern Value Partners Limited” case is of interest. In this case, judgments in both instances were made in favor of the applicant – the “Eastern Value Partners Limited” company: The Moscow Arbitration Court declared

<sup>3</sup> In the Russian Federation, the state judicial system consists of courts of general jurisdiction and arbitration courts. The arbitration courts, first of all, have jurisdiction over economic disputes between legal entities or with their participation. As applied to this article, the terms “court” and “arbitration court” will be used as equivalents, considering that tax disputes involving legal entities are considered by arbitration courts.



invalid the decision of the Interdistrict Inspectorate of the Federal Tax Service of the Russian Federation no. 47 in the city of Moscow to prosecute for committing a tax offense taken in respect of the company “Eastern Value Partners Limited” (Moscow Arbitration Court: A40-60755/2012). The higher instance – the Ninth Arbitration Court of Appeal, left the said decision of the Moscow Arbitration Court unchanged, and the appeal of the tax authority was left without satisfaction (Ninth Arbitration Court of Appeal: 09AP-33421/2012). And the first and second judicial instances expressed the view that it is necessary to apply the income (interest) received by the foreign company “HypoReal East Limited” (the Republic of Cyprus) under the loan agreement concluded between the company “Eastern Value Partners Limited” “and foreign organizations “HypoReal East Limited”, Agreement between the Government of the Russian Federation and the Government of the Republic of Cyprus “On the avoidance of double taxation with respect to taxes on income and capital” of 05.12.1998. This case was the subject of close attention of researchers (Havanova, 2014: 51).

And it was precisely this path that led to the judicial practice in Russia at that time: without going into the economic essence of the relationship, the courts were guided by the availability of DTAT and the benefits they provided to them in paying corporate income tax.

One of the first judgments in which a formal legal and economic-legal approach was applied was the decision of the Moscow Arbitration Court in the case of Naryanmarneftegaz (Moscow Arbitration Court: A40-1164/2011). This decision was upheld by all higher courts. The Arbitration Court upheld the position of the tax authority on additional assessment of the amounts payable to the budget for profits tax of organizations and penalties and substantiated the possibility of applying the concept of the actual right to income in resolving the tax dispute arising through the operation of the principle of international law about the identity of the interpretation and understanding of an international legal treaty. At the same time, the court stated: “... although the Russian Federation is not currently a member of the Organization for Economic Co-operation and Development (OECD), but for it the official interpretation contained in the comments to the OECD Model becomes mandatory as a result of the action the principle of the identity of interpretation and understanding of an international legal treaty, when concluding a bilateral treaty on avoidance of double taxation with a member state of OECD ...”

In the considered case of Naryanmarneftegaz and in some subsequent cases, such as in the case of Oriflame Cosmetics (Moscow Arbitration Court: A40-138879/2014; Supreme Court of the Russian Federation: A40-138879/14/2016), the courts recognized sister companies as conduit companies (intermediary companies), agreeing with the decisions of the tax authorities on the additional taxation of corporate income tax at the source of payment – the resident company and the latter’s involvement in tax liability.

From this time the transition period begins before a radical turn of the whole judicial practice in the sphere in question.

### **3.2 Significance of the resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation for the Case “Northern Kuzbass” for resolving tax disputes**

The most important decision for the development of the entire law enforcement practice on the resolution of tax disputes in the light of the concept of the actual right to income was the decision of the Presidium of the Supreme Arbitration Court of the Russian Federation of November 15, 2011 in case no. 8654/2011 “OJSC Coal Company” North Kuzbass “.

By repealing the decisions of the three previous courts, the Presidium of the Supreme Arbitration Court of the Russian Federation expressed the position that it is impossible to apply the advantages of international tax agreements in circumvention of the provisions of the Tax Code of the Russian Federation, and also formulated a legal position according to which an official commentary is to be submitted to the Model Tax Treaty on income and on capital application in the interpretation of international agreements for the avoidance of double taxation, since the Model Tax Convention on income and on capital is a framework document containing the general principles and approaches to eliminating double taxation. Thus, the Presidium of the Supreme Arbitration Court of the Russian Federation legalized the use by the courts of the Model tax convention on income and on capital when establishing a beneficial owner.

Subsequently, the courts, when motivating their decisions, began to refer more actively to the Model Tax Convention on income and on capital and official comments to it. For example, the Ninth Arbitration Court of Appeal, in its decision of February 7, 2017 in case no. 09AP-63463/2016, on the application of the Public Joint Stock Company Severstal to the Interdistrict Inspectorate of the Federal Tax Service of the Russian Federation for the largest taxpayers no. 5, cites a commentary to Article 10 of Model tax convention on income and on capital. Another example is the first appeal court of arbitration in the order of May 15, 2017 in case no. A11-6602/2016 on the application of the Public Joint Stock Company “Vladimir Energy Retail Company” to the Interdistrict Inspectorate of the Federal Tax Service of the Russian Federation for the largest taxpayers in the Vladimir region, why the applicant’s argument about the unjustified application by the tax authorities and courts of the provisions of the Model Tax Convention on income and on capital was rightfully rejected by the court of first instance.

The question is of the possibility of the Russian courts applying the provisions of the Model Tax Convention on income and on capital to justify their decisions, as the Russian Federation is not a member of the OECD, and therefore the Convention not ratified in

the Russian Federation is not a source of Russian rights. This is a matter of principle, since when making a decision the court must determine which laws and other normative legal acts should be used in a specific case. Despite the prevailing jurisprudence on the use of references to the Model Tax Convention on income and on capital to substantiate its position, and despite its actual legalization by the Presidium of the Supreme Arbitration Court of the Russian Federation in the case of Northern Kuzbass, the author of the article is of the opinion that the application of the provisions of the Model Tax Convention on income and on capital and official comments to it is illegal.

### **3.3 Peculiarities of the resolution of tax disputes in the Russian Federation using the concept of the actual right to income at the present time**

The concept of the actual right to income was implemented in the Russian legislation by Act no. 376-FZ/2014, On Amending Part One and Two of the Tax Code of the Russian Federation (regarding the taxation of profits of controlled foreign companies and the incomes of foreign organizations). And now increasingly in the resolution of tax disputes, courts in their decisions refer to special provisions of the Tax Code of the Russian Federation, namely, to Article 7 “International treaties on taxation”, which contains the definition of a person with de facto right to income, as well as article 309 “Peculiarities of taxation of foreign companies that do not operate through a permanent establishment in the Russian Federation and receive income from sources in the Russian Federation”, article 310 “Peculiarities of calculating and paying tax on income received by a foreign organization from sources in the Russian Federation withheld by a tax agent” and article 312 “Special “Regulating certain aspects of taxation of foreign companies” (Supreme Court of the Russian Federation: 307-KG16-7111/2016; Arbitration Court of the Moscow district: F05-21597/2016; Arbitration Court of the Moscow district: F05-6667/2016). Thus, in accordance with clause 2 of Article 7 of the Tax Code of the Russian Federation, “a person having an actual right to income for the purposes of this Code is a person (a foreign entity without the formation of a legal entity) that, by direct and (or) indirect participation in the company, control over the company (foreign structure without the formation of a legal entity) or, due to other circumstances, has the right to independently use and (or) dispose of the income received by this company (foreign structure without the formation of a legal entity). The person having the actual right to income for the purposes of this Code is also recognized as a person (a foreign entity without the formation of a legal entity) in whose interests another person (another foreign entity without the formation of a legal entity) is entitled to dispose of the income received by the company (foreign structure without the formation of a legal entity person) indicated in the first paragraph of this paragraph, or directly by such other person (other foreign structure without the formation of a legal entity). When determining the person who has the actual right to income, the functions performed by the persons specified in

this paragraph (by foreign structures without the formation of a legal entity) and the risks they take are taken into account. “

At present, the situation in the Russian Federation is as follows: the application of the Model Tax Convention on income and on capital remains at the discretion of the court. So, in some cases, courts justify their decision referring solely to the norms of the Tax Code of the Russian Federation, while in others – simultaneously to the norms of the Tax Code of the Russian Federation and the provisions of the Model Tax Convention on income and on capital.

The inclusion of the concept of the actual right to income in national Russian legislation should be assessed positively, as it allows courts to avoid the need to refer to their decisions on the provisions of an unratified international act – the Model Tax Convention on income and on capital.

## **4 Criteria for attributing a person to a beneficial owner used by Russian courts when considering tax disputes**

### **4.1 Scientific approaches to determining the criteria of a beneficial owner**

In the Russian Federation, law enforcement officials, using the concept of the actual right to income, when considering tax disputes arising in the sphere of use of the advantages of DTAT by the payers of the corporate profit tax, proceed from the fact that a person (a foreign company) that has received income in the form of dividends, interest or royalties, is not its beneficial owner. This position was stated officially by the Federal Tax Service of the Russian Federation in letter no. CA-4-7/9270 @/2017, On the Practice of Considering Disputes Regarding the Misuse of Tax Benefits by Tax Agents in Charging Profits Tax on Foreign Organizations, which states that “for the tax authority to refuse to apply benefits under the agreement it is sufficient to prove that the direct recipient of income is not the actual recipient of income, and not to establish the ultimate beneficial owner of income ...”

The main problem that arises in law enforcement practice in such cases is the establishment of criteria for a beneficial owner. In general, positively assessing the inclusion in the Tax Code of the Russian Federation of the concept of a person who has an actual right to income, as well as the introduction of the obligation of foreign companies to confirm their actual right to income for Russian tax agents, we believe that this is not enough. We believe that for the sake of uniformity of judicial practice, it is necessary to develop and secure legally clear criteria on which the actual (beneficiary) owner is determined. Attempts to define and systematize such criteria were previously undertaken by a number of authors: I. Havanova (Havanova, 2016), S. Arakelov (Arakelov, 2017), B. Brooke (Brooke, 2014), O. Fedorova (Fedorova, 2017).

However, in the context of the emerging law enforcement practice, it is more promising and relevant to determine not the criteria by which persons relate to the beneficial owners, but the criteria that indicate the opposite, that is, that the person is not the actual owner of the income.

#### **4.2 Criteria for referring a person to the beneficial owner (actual owner) used by tax authorities and courts**

On the basis of the examined judicial practice and normative legal acts, it is possible to single out the following criteria used by law enforcement bodies when assessing the presence or absence of a person's actual right to income.

##### 1. Criteria directly or indirectly enshrined in the Tax Code of the Russian Federation.

1.1. Criterion for the performance of intermediary functions in the interests of another person in the presence of legal obligations to transfer, distribute the revenues received in favor of another person. In accordance with paragraph 2 of Article 7 of the Tax Code of the Russian Federation, when determining a person who has an actual right to income, the functions performed by foreign companies (foreign entities without the formation of a legal entity) are taken into account. The assessment of the presence or absence of an intermediary function is the prerogative of the court.

1.2. The criterion of the limited power of the recipient of income, the nominee of the director and (or) the limited competence of the board of directors to manage the revenues received. This criterion follows from the legislatively fixed concept of a person with an actual right to income, in which one of the features of a beneficial owner is the right to use and (or) dispose of the income received by these companies (paragraph 2 of Article 7 of the Tax Code of the Russian Federation).

##### 2. Criteria developed by tax authorities and courts applied in the resolution of this category of tax disputes. The following criteria do not have legislative design. The presence or absence of these criteria is established and evaluated by the tax authorities when conducting a tax audit, and by the court during the course of the case.

2.1. A criterion for the systemic nature of transit payments for the transfer of income on behalf of a resident of a country participating in the DTAT to a third party that does not have benefits from DTAT.

2.2. The criterion for the reflection of disputable funds over the balance sheet as the placement of deposits on its own behalf, but in the interests of other legal entities and individuals, when only agency fees are recognized as own income.

2.3. The criterion of the absence of obstacles to the conclusion of direct contracts, and not through a country having DTAT.

- 2.4. A criterion for the existence of a tax benefit from the actions of a taxpayer in the absence of other activities, other than that income from which the taxpayer is exempt in accordance with the DTAT.
- 2.5. The criterion for the payment of income to such a third party which, with direct receipt of such income from sources in the Russian Federation, would not have the right to apply benefits and preferences for DTAT.
- 2.6. The criterion of a “mirror” listing of the income received by a foreign companies from the source of payments in the Russian Federation to a third party, when immediately after receiving income, the foreign companies transfer money on similar conditions to a third party.

Law enforcement practice shows that for a tax authority or court to recognize a person as the one who does not have an actual right to income, one of any of the above criteria may be sufficient.

## 5 Conclusion

The study allowed to distinguish two levels of law enforcement practice in resolving tax disputes arising when taxpayers take advantage of the benefits of DTAT, and the leading role of the courts in its formation; to periodize the development of law enforcement practice, noting what happened in 2011-2014, and its “turn”; to evaluate from the positive point of view for the resolution of tax disputes the implementation of the concept of the actual right to income in the national legislation of the Russian Federation, and also to formulate the criteria for assigning or not assigning income recipients to the beneficial owners that are guided by tax authorities and courts.

Currently, the development of law enforcement practice in the Russian Federation in assessing and determining the validity of the use of the benefits of DTAT by taxpayers and tax agents is proceeding along the path of active application by the tax and judicial authorities of the concept of the actual right to income.

In the opinion of the author of the article, it is the law enforcement activity of the courts on the resolution of tax disputes in the sphere of the use of the advantages of DTAT by the taxpayers that will become the source for the identification, clarification and consolidation at the level of the Tax Code of the Russian Federation of clear criteria for attributing (or not) persons to beneficial owners (actual owners).

## References

- Anischenko, D.: Концепция «фактического права на доход» в российской судебной практике (The concept of “de facto right to income” in Russian jurisprudence), *Налоги (Tax)* no. 4 (2016).

- Arakelov, S.: Развитие концепции фактического права на доход: подходы ФНС России с учетом сформировавшейся судебной практики (Development of the concept of the actual right to income: approaches of the Federal Tax Service of Russia, taking into account the established judicial practice), Закон (Law) no. 5 (2017).
- Brooke, B.: Перспективы кодификации концепции бенефициарного собственника в российском налоговом законодательстве (Prospects for the codification of the concept of a beneficial owner in Russian tax legislation), Закон (Law) no. 8 (2014).
- Kuchеров, I., Поветкина, N. (eds.): Контроль в финансово-бюджетной сфере: научно-практическое пособие (Control in the financial and budgetary sphere: a scientific and practical guide), М.: Институт законодательства и сравнительного правоведения при Правительстве Российской Федерации: Юридическая фирма КОНТРАКТ (Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation: Law Firm CONTRACT), 2016.
- Fedorova, O.: Налог на прибыль: актуальные вопросы из практики налогового консультирования (Income tax: current issues from the practice of tax advice), Налоги и финансовое право (Taxes and financial law) no. 7 (2017).
- Наванова, I.: Международные договоры Российской Федерации об избежании двойного налогообложения (International treaties of the Russian Federation on avoiding double taxation), М.: Институт законодательства и сравнительного правоведения при Правительстве РФ: Юриспруденция (Moscow: The Institute of Legislation and Comparative Law under the Government of the Russian Federation: Jurisprudence), 2016.
- Наванова, I.: Концепция бенефициарного владельца (собственника) в налоговом праве (The concept of a beneficial owner (owner) in tax law), Журнал российского права (Journal of Russian Law) no. 12 (2014).
- Machekhin, V.: Фактическое право на доход: российские фискальные органы развивают концепцию (The actual right to income: the Russian fiscal authorities develop the concept), Налоги (Tax) no. 4 (2015).
- Povetkina, N.: Финансовая устойчивость Российской Федерации. Правовая доктрина и практика обеспечения (Financial stability of the Russian Federation. Legal doctrine and practice of providing), М.: Институт законодательства и сравнительного правоведения при Правительстве РФ: Юридическая фирма КОНТРАКТ (Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation: Law Firm CONTRACT), 2016.

## Legal Acts

Model Tax Convention on income and on capital.

Act no. 146-FZ/1998, The Tax Code of the Russian Federation, part 1, as amended.

Act no. 117-FZ/2000, The Tax Code of the Russian Federation, part 2, as amended.

Act no. 376-FZ/2014, On Amending Part One and Two of the Tax Code of the Russian Federation (regarding taxation of profits of controlled foreign companies and income of foreign organizations).

Act no. CA-4-7/9270@/2017, The letter of the Federal Tax Service of the Russian Federation “On the practice of considering disputes on the misuse by tax agents of preferential taxation conditions when levying a profit tax on income of foreign organizations”.

Supreme Arbitration Court of the Russian Federation: 8654/2011.

Supreme Court of the Russian Federation: 307-KG16-7111/2016.

Ninth Arbitration Court of Appeal: 09AP-33421/2012.

Ninth Arbitration Court of Appeal: 09AP-63463/2016.

Moscow Arbitration Court: A40-1164/2011.

Moscow Arbitration Court: A40-60755/2012.

Arbitration Court of the Moscow district: F05-21597/2016.

Arbitration Court of the Moscow district: F05-6667/2016.



---

# MECHANISM OF REVERSE CHARGE VALUE ADDED TAX IN TRANSACTIONS CONCERNING THE PROVISION OF BUILDING SERVICES – SELECTED ISSUES

*Katarzyna Martko-Mazur<sup>1</sup>, Marta Sagan<sup>2</sup>*

## **Abstract**

On January 1st, 2017, the Act of December 1st, 2016 amending the Act on the Value Added Tax and certain other acts (Journal of Laws of 2016 item 2024) entered into force. The Act introduced a number of amendments to the Act of March 11th, 2004 on Value Added Tax (consolidated text, Journal of Laws of 2017, item 1221). The changes were introduced mainly to seal the VAT system and to improve the collection of this tax. One of them, which is the subject of this study, is the extension of the scope of application of the so-called reverse charge mechanism of VAT on transactions involving construction services. These changes concern the application of the reverse charge mechanism to building services provided by subcontractors. The purpose of this article is to characterize the reverse charge mechanism of VAT in the Polish legal order. Undertaking this subject seems to be justified due to the fact that it is a solution that the previous regulations did not envisage on such a large scale, and consequently – many problems at the stage of applying the law. In the research a logical-linguistic method was used.

## **Key words**

VAT, reverse charge, construction services, transactions.

**JEL Classification:** K34, H20

## **1 Introduction**

On January 1st, 2017, the Act of December 1st, 2016 amending the Act on the Value Added Tax and certain other acts<sup>3</sup> entered into force. The Act introduced a number of amendments to the Act of March 11, 2004 on Value Added Tax<sup>4</sup>. The changes were introduced mainly to seal the VAT system and to improve the collection of this tax.

---

<sup>1</sup> M. A., Lawyer, Legal Office, Poland. The author specializes in civil, construction and tax law. She actively works in the Legal Office. The author is also a legal counsel trainee. Contact e-mail: katarzyna.martko@gmail.com.

<sup>2</sup> M. A., assistant at the Financial Law Department, Faculty of Law and Administration of the University of Rzeszów, Poland. Legal counsel trainee. Author specializes in public finance law and tax law in connection with constitutional law. She is the author of several scientific articles. Contact E-mail: m.sagan@o2.pl.

<sup>3</sup> Later as „amending Act”.

<sup>4</sup> Later as „ Act on VAT”.

© Martko-Mazur K., Sagan M., 2018.

One of them, which is the subject of this study, is the extension of the scope of application of the so-called reverse charge mechanism of VAT<sup>5</sup> on transactions involving building services. These changes concern the application of the reverse charge mechanism to building services provided by subcontractors. These services have been subject to a reverse-charge mechanism from January 1st, 2017.

The purpose of this article is to characterize the reverse charge mechanism in the Polish legal order and to identify problems related to the application of the provisions regulating this institution. Undertaking this subject seems to be justified due to the fact that it is a solution that the previous regulations did not envisage on such a large scale, and consequently – many problems at the stage of applying the law.

## 2 The genesis of regulation and principles of VAT settlement

In accordance with the general rule, the VAT settlement is made by the seller who delivers the goods or provides the service, as provided in art. 19a paragraph 1 of the VAT Act. Making delivery referred to in art. 19a paragraph 1 of the Act means actual delivery. If the parties have indicated a moment other than the release of goods for the passage of benefits and burdens, in case of doubt it is assumed that the same moment concerns the transfer of the risk of accidental loss or damage to the goods. On the other hand, in the case of services, the scope of the service provided and consequently the moment of its execution should be objective. The contractual provisions in this matter are undoubtedly important, however, one should bear in mind the nature and specifics of the given benefit in order to prevent the parties from manipulating the moment the service is performed and, consequently, unjustified shifting of the tax obligation in the goods and services tax. (Matarewicz, 2018). It is worth noting that, according to the dominant approach presented in administrative case law, the date of execution of these services is not determined by the date of signing the delivery and acceptance protocol. On the other hand, the actual date of these services is decisive (Supreme Administrative Court: 28/04/2017, I FSK 1811/152). This statement was also confirmed by the Minister of Finance in the general interpretation of April 1, 2016.

One of the exceptions to the above principle is the reverse charge mechanism, which assumes that the obligation to settle the tax due on the activity subject to VAT belongs to the purchaser of goods or services. This mechanism has been used in Polish law for certain categories of goods and services since 2011, e.g. on the steel and electronics market.

---

<sup>5</sup> Later as „reverse charge mechanism”.

The reverse charge mechanism was first introduced in the Polish VAT Act on April 1st, 2011. Since then, the provisions in this area have been evolving and new categories of goods have been covered every two years. It is worth noting that in Council Directive 2006/112/EC of November 28, 2006 on the common system of value added tax the right for national legislators to establish a reverse charge mechanism in the construction industry was established and the Polish legislator, as indicated above, exercised this right. According to the current art. 17 sec. 1h of the VAT Act, a taxpayer in respect of construction services is their purchaser, in case when four conditions are met in total, which will be discussed in the further part of the study.

### **3 Reverse charge-application mechanism**

By the end of 2016, the reverse charge mechanism could in principle only be referred to goods, as the reverse charge procedure included only one service category – the transfer of greenhouse gas emission allowances. At the beginning of 2017, the catalog of services subject to this procedure significantly increased, covering the vast majority of construction services, but importantly those provided by subcontractors.

It should be emphasized here that the provision of services by the main contractor to the investor will not therefore be subject to a reverse charge mechanism, regardless of the tax status of each of the parties to the transaction. The above is related to the fact that on January 1, 2017 the Annex no. 14 was introduced to the VAT Act, in which the service covered by the reverse charge mechanism so far is the first one, i.e. the transfer of greenhouse gas emission allowances. Other items, i.e. items 2-48, are various types of construction, finishing and even renovation services (item 2-3 of the annex).

The reason for introducing these changes were irregularities on the market for the provision of this type of services. Without questioning the occurrence of the irregularities in question, it should be considered, as it seems, that they concerned income tax and contributory dues to a greater extent and were mainly related to the employment of employees “in black”. The solution will bring the results intended by the legislator.

Turning to the characteristics of the discussed changes, the reverse charge mechanism – in relation to all services covered by this procedure – will apply if the service provider is a taxpayer whose sales are not exempt from tax pursuant to art. 113 paragraph 1 and 9 of the VAT Act, and the recipient will be a taxpayer registered as an active VAT payer (Bartosiewicz, 2017). Both of these conditions must be met jointly. The list of construction services covered by the reversed load is a closed list and the services listed therein are identified using the Polish Classification of Products and

Services<sup>6</sup> and methodological guidelines issued to it. This is a logical consequence of the fact that in the case where the service provider benefits from this exemption, its sale is not taxed, and therefore there is nothing to flip (reverse).

In addition, this is due to the fact that the use of the reverse charge mechanism is practical, provided that the buyer who is to settle the tax submits periodic tax returns (VAT-7) and, as a rule, deducts the tax. In turn, such duties and rights are, as a general rule, VAT taxpayers registered as active VAT taxpayers. With regard to construction works, the Act introduces an additional condition relating to the nature of the service provider's activities. It is supposed to act as a subcontractor.

It should be emphasized that VAT will be required to settle VAT, all entities that purchase the above-mentioned goods or services are entities that are active VAT taxpayers (not benefiting from the subjective exemption). It does not matter for what purposes the entity will acquire the above-mentioned services. Even if they are intended to be used in tax-exempt or non-taxable activities, the reverse charge procedure will apply. At the same time, it must be stipulated that the requirement that the service buyer acts as a subcontractor – and this means that the service buyer will be a contractor – in practice means that it will not be possible to purchase the above-mentioned goods. Services for purposes other than taxable activities. It is known that supplies of building materials have not been included in the procedure. Contrary to the original plans, Annex 'No 14' has not been introduced as 'Renting of constructions and construction machines with operators and hiring of personnel for these services', due to the risk that the reverse charge of this category of services will be inconsistent with the previously mentioned Directive.

#### 4 The notion of a subcontractor

The VAT Act does not contain a legal definition of a subcontractor. Other tax laws do not provide it. The concepts are also not defined at the stage of justifying a project regarding changes to the VAT Act. The Civil Code<sup>7</sup> does not define it despite the fact that

<sup>6</sup> The Polish Classification of Products and Services was introduced by the Regulation of the Council of Ministers of September 4, 2015 (Journal of Laws of 2015, item 1676) for use from January 1, 2016, in statistics, records and documentation and accounting, as well as in official registers and information systems of public administration. Pursuant to the introductory regulation, in the records, documentation and accounting as well as in official registers and information systems of public administration, until December 31, 2016, the Polish Classification of Products and Services introduced by the Ordinance of the Council of Ministers of October 29, 2008 is applied in parallel. r. (Journal of Laws no. 207, item 1293, as amended).

For the purposes of: 1) taxation of goods and services, 2) corporate income tax, personal income tax and flat-rate income tax in the form of a lump sum on registered income and a tax card – by December 31, 2017, the Polish Classification of Goods and Services is applied, introduced by the regulation of the Council of Ministers of October 29, 2008 on the Polish Classification of Products and Services.

<sup>7</sup> Hereinafter „CC”.

art. 6471 uses the concept of subcontracting. In connection with the above, it is worth paying attention to the case law. The Supreme Court in its judgment of October 17, 2008, I CSK 106/08 pointed out that subcontracting can not be understood as contracts concluded by the contractor with a supplier of machinery and equipment needed to perform construction works or contracts concluded by the contractor with a supplier of building materials, so a contrario contractor may only be an entity actually providing construction services. Referring to the subject matter of the subcontractor's concept, we can conclude that acting as a subcontractor is in principle when the effect of services constituting construction works provided by the recipient constitutes part or all of the construction works provided by another taxpayer (Murawski, 2017).

The Act of January 29, 2004 on Public Procurement Law<sup>8</sup> defines a contract for subcontracting. However, it cannot be said that it is the will of the tax legislator. Article 2 point 9b of the PPL stipulates that whenever the Act refers to a subcontract agreement, it should be understood as a written agreement of a pecuniary nature the subject of which are services, supplies or construction works being part of a public contract concluded between the ordering party (a contractor) and another entity (subcontractor), and in the case of public works contracts, also between a subcontractor and a subcontractor or between further subcontractors.

Taking into account the comments made above, it seems that one should assume that a subcontractor is not an entity that performs (sells) its services directly to the investor, for an entity that does not resell these services to anyone. The investor is the entity to which (for whose benefit) the building permit has been issued, or who has notified the works that do not require a permit. Therefore, if the entity performs its construction works directly for the entity that has a building permit, which has notified the construction works, it is not a subcontractor. Therefore, if the service provider performs its activities directly for the investor, the reverse charge does not apply.

In conclusion, it should be assumed that by performing work by a subcontractor in the construction industry one should understand the actual provision of construction services. The service is thus provided using other entities that perform work constituting an element or the whole of the service. However, if a given entity sells and invoices its activities to an entity which is not an entity having a building permit – making a notification of construction works, it should be considered a subcontractor. It is worth noting that the introduction of a reversed burden for subcontractors signifies a significant deterioration of the business environment, e.g. by disrupting financial liquidity. Until now, subcontractors received remuneration in gross amounts from contractors. The tax due on their services, which they received as part of the price, financed a significant part or the entire input tax, which they incur by acquiring the means of production.

At present, these entities will receive net amounts from contractors, while at the same time they will be in a situation of a permanent surplus of input tax over output. Either

---

<sup>8</sup> Hereinafter „PPL”

there will be a lack of tax due to them, or it will be in a low amount due to the fact that their activities will be subject to a reverse charge, and the amount of tax charged on purchases will not change. It can be expected that these surpluses will be difficult to recover for these subcontractors.

## **5 Time range of adjustment**

The services referred to in this study, which were executed from January 1, 2017, are subject to the reverse charge, with the reservation that this does not apply to services related to the transfer of greenhouse gas emission allowances, which have been subject to and continue to be subject to reverse charge. The regulations do not answer the question about how to treat services provided on a continuous basis. It seems that they should be settled in proportion to the progress of works before January 1, 2017 and from that date.

It is worth mentioning that the transitional provisions included in the Act show that the reverse charge will also apply to those services and works that were performed from January 1, 2017, even if they have been paid in full or in part before the above date. It is necessary in this case to correct the tax on the payment made. Transitional provisions stipulate that such an adjustment is made in the settlement for the period in which the service was performed. Therefore, it is carried out on a regular basis, not retrograde.

This will be both a correction of the tax due to the service provider, i.e. a reduction of the tax due to zero, as well as an adjustment of tax payable to the recipient and, therefore, a tax due on the services purchased. The adjustment of input tax will practically not occur, because it will formally be a tax correction on the minus – from the amount invoiced by the service provider – plus a correction in the plus amount in the same amount – in connection with showing the tax due by the service provider.

In practice, if the above conditions are met, the buyer of construction services listed in item 2-48 of Annex no. 14 to the Act on VAT provided by a subcontractor is responsible for the VAT settlement. This means that the buyer will at the same time declare and, as a general rule, deduct this tax if he has full right to deduct, i.e. he will actually settle the “accountant” of tax amounts, without engaging funds for the amount of tax when making payments for the service of the service provider.

## **6 Selected problems at the stage of applying the provisions regulating the reverse charge mechanism**

### **6.1 Delivery of concrete**

In individual interpretations and judicial and administrative decisions there is no uniform position whether the delivery of concrete should be considered a delivery of goods

or the provision of services. Applications for individual interpretations and court and administrative disputes arising as a result of issuing these interpretations concerned the possibility of applying a reduced rate (8%) to services related to housing. However, this does not change the fact that the delivery of concrete cannot be treated as a supply of goods in relation to housing, but as a provision of services in relation to services provided by a subcontractor for the reverse charge mechanism or vice versa. The resolution of this issue is complicated by the imprecise wording of point 44 of Annex 14, "Concrete works." The boundary between the delivery of concrete and the concrete service is not indicated. This is not the only doubt. The controversy is noticed by the delivery of goods together with the service, so-called comprehensive, even comprehensive roofing. The general interpretation in this area would prevent disputes and dispel many doubts in this field.

## **6.2 Finishing works for premises for rent**

There were also doubts among practitioners regarding the finishing of premises for rent, including in shopping malls. It is a procedure in which the landlord concludes a tenancy agreement with the tenant with a record that the tenant will finish the premises at his own expense and then charge the lessor with all or part of the expenses incurred. This allows you to minimize investment in a tenant's foreign asset, and consequently the need to make multi-annual amortization write-offs. The tenant therefore concludes a contract with the contractor (who can use subcontractors) and receives an invoice with a VAT rate of 23 percent. Doubts arise at the next stage – switching costs to the owner of the premises. Should this activity be treated as subcontracting? Due to the circumstances cited below, it seems that it should not. It is not the provision of services, and certainly not construction services. The tenant cannot be treated as a subcontractor of the lessor, because there is no contract for construction works, the tenant does not perform any works, he only charges the renter in whole or in part for the costs incurred by him. Such an action can be regarded at most as a re-invoice on costs. Recognition of this type of transaction for construction services would be inconsistent with the teleological interpretation of the regulations introduced.

## **6.3 Consortium agreement and the application of the reverse charge VAT mechanism between the Consortium Partners**

In tax law, as well as in civil law, there is no statutory definition of a consortium, and the consortium agreement belongs to unnamed contracts (the content of the contract is independently created by the parties to the contract), to which the general provisions on legal acts contained in articles 56 -65 CC and general provisions on the conclusion of contracts regulated in Articles 66-81 CC apply.

Individual business entities signing a consortium agreement associate for a specific period of time, for a specific purpose. Due to the type of joint venture for which a consortium was established, investment consortia and financial consortia are distinguished. The most common form of the investment consortium is the building (construction) consortium. It is created for the implementation of large structural projects (roads, railway lines, other public facilities) or commercial projects (industrial facilities, office buildings, shopping centers) (Katner, 2015). Complicated facts are created because investment consortia are usually created by construction companies whose services are covered by the reverse charge VAT regulations. Improper interpretation of the provisions on reverse charge of VAT may have negative tax consequences. If the consortium is internal, the contract for the execution of the investment is concluded with the Consortium Leader, acting on its own behalf, but for the joint account of all the consortium participants – i.e. the Consortium Partners. In construction consortia, Leader acts as the general contractor in relation to the contracting authority (Investor), and in relation to other Partners (subcontractors) it is an indirect deputy. (Katner, 2015).

Partners, as part of the activities entrusted to them, are independent. However, they are limited by a consortium agreement, under which (as a rule) the declaration of will made by the Leader towards third parties, in the scope of joint operation within the consortium bind the Partners who are jointly and severally liable for the obligations undertaken in this mode. This creates a state in which, under a consortium agreement, there is a different construction of liability under civil law, in which the Leader is treated as an equal representative of Partners, and another role will be based on tax law, which treats Leader as a general contractor, and not an equal partner entity.

Recently, the jurisprudence line has been formed, which states that the Leader should be treated as a general contractor when issuing VAT invoices for the Investor for all works carried out by the consortium. Partner acts as a subcontractor of the Consortium Leader. Consequently, at the stage of settlements, the Lead Partner should apply the reverse charge mechanism applied.

Tax authorities recognize the correctness of such settlements, an example of which may be the individual interpretation of the Director of the National Tax Information of May 26, 2017, in which the authority found that: “(...) in the present case, it cannot be said that both the Leader and the member of the consortium (Consortium Partner) will simultaneously be the main contractors to the investor (the contracting authority). Irrespective of the fact that each of the consortium members is liable to the investor – as already indicated – the consortium cannot be considered as a single VAT taxpayer, and the relations between the parties to the consortium agreement (VAT taxpayers), for the purposes of the tax on goods and services, should not be evaluated on the basis of internal settlements of the consortium, and thus entrepreneurs operating within the consortium remain separate VAT payers. Therefore, when operating within a consortium,



they should apply general rules resulting from the Act on Value Added Tax to mutual settlements. As a consequence, the Applicant as a member of the consortium on the basis of art. 17 sec. 1 point 8 in connection with art. 17 sec. 1h of the Act, providing construction services listed in item 18 of Annex no. 14 to the Act is obliged to issue VAT invoices to the Applicant – the leader of the consortium using the reverse charge mechanism.

It should be emphasized that in practice there are different models of consortia. It is the provisions of a particular consortium agreement that determines the manner of its organization and settlements between its Partners and the investor, as well as the scope of services provided by individual Consortium Partners.

Recognition of a given service as being subject to settlement in accordance with the reverse charge mechanism, or the application of general tax settlement rules, will always be of an individual nature. This means that in each particular case it should be examined whether a given service is a service listed in Annex 14 to the VAT Act, whether this service is provided by a subcontractor, examine the provisions of the consortium agreement and the contract with the Investor.

#### **6.4 Trilateral agreement, and the moment of taking over responsibility for settlements using general principles by a former Subcontractor**

Contracts for construction works are concluded between the general contractor and the investor. It is a contract named and regulated in detail in art. 647-658 CC. In Polish law, by way of a tripartite agreement, subject changes are allowed, where a third party enters in place of the general contractor. A third party may be a person who until the conclusion of the tripartite agreement was in no way related to the investment. On the other hand, the problem arises in a situation where a subcontractor for a general contractor is to sign a three-party contract to take over his rights and obligations. At this point, a complex problem arises, first, when the subcontractor obtains the status of general contractor, and second, when he applies accounting using general rules, and not so far using the reverse charge mechanism.

Tax authorities note that any further subcontracting of the service by the contractor to subsequent service providers should be accounted for in accordance with the reverse charge mechanism. Therefore, they are not services provided by the subcontractor for construction services performed directly for the benefit of the investor, that is, the service provider (and not the contractor). Therefore, from the date of entry into force of the above tripartite contract, the entity will lose the status of a subcontractor and become a contractor, the services it performs for the benefit of the investor should be accounted for using general principles.

It is important that the trilateral agreement about the transfer of rights and obligations from the contract for construction works to another entity is so detailed that it does not give the possibility of free interpretation as to the date of entry into force of the indicated trilateral agreement. At the stage of creating agreements, it should be considered that there should be provisions regarding the indication of a specific date, which will be passed on to the subcontractor responsibility of accounting with the investor on general terms, and with other subcontractors including the reverse charge mechanism. Undoubtedly, it would contribute to the increase of contractors' awareness of the proper application of the law.

## 7 Conclusion

Mainly for invoices issued by subcontractors for construction services in this industry there were abuses consisting in the deduction of VAT due to invoices documenting non-existent activities or inflated invoices. Of course, it cannot be ruled out that the investor and the main contractor's abuses will not increase – in this case, the value of the transaction is most likely to be understated. The main contractor will depend on making as little financial expenses as possible to pay VAT, which he could not deduct in previous marketing phases. It should be borne in mind that if the general (main) contractor commissions the performance of services under its contract with another taxpayer, then the taxpayer becomes his subcontractor and each subsequent taxpayer in such a series of orders becomes a subcontractor in relation to the general / main contractor, regardless of the number of further service subcontracts. In this situation, subcontracted construction services will be taxed on a reverse charge basis and an approach should be taken to further subcontracts according to which the subcontractor “subcontracting” the service to the next taxpayer is – in relation to this subcontractor – the main contractor of his scope of work and hence settle “subcontracted” construction services on a reverse-charge basis.

## References

- Bartosiewicz, A.: *Ustawa o VAT. Komentarz (The VAT Act. Comment)*, 11th ed., WoltersKluwer, 2017.
- Katner, W. J.(ed.): *Prawo zobowiązań – umowy nienazwane. System Prawa Prywatnego tom 9 (Liability of obligations - unnamed contracts. Private Law System tom 9)*, 2nd ed., Beck 2015.
- Matarewicz, J.: *Ustawa o podatku od towarów i usług. Komentarz aktualizowany (Act on tax on goods and services. Comment updated)*, LEX/el., 2018.
- Murawski, M.(ed.): *Odwrotne obciążenie podatkiem VAT w usługach budowlanych (Reverse charge of VAT in construction services)*, WoltersKluwer, 2017.

## Legal Acts

Act of December 1, 2016, On amending the act on tax on goods and services and certain other acts.

Act of March 11, 2004, On Value Added Tax.

Act of January 29, 2004, On Public Procurement Law.

Act of April 23, 1964, Civil Code.

Council Directive 2006/112 / EC of November 28, 2006, On the common system of value added tax.

Regulation of the Council of Ministers of September 4, 2015, On the Polish Classification of Products and Services (PKWiU).

Supreme Administrative Court: I FSK 1811/152.

General interpretation of April 1, 2016, PT3.8101.41.2015.AEW.2016.AMT.141.

Individual interpretation of the Director of the National Tax Information from May 26, 2017, reference number 0111-KDIB3-1.4012.21.2017.2.IK.

## List of websites

<http://www.rp.pl/VAT/302019990-Odwrocony-VAT--noworoczny-zawrot-glowy.html>

<http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex%3A32006L0112>

<http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20040540535/U/D20040535Lj.pdf>

<http://www.sn.pl/sites/orzecznictwo/Orzeczenia2/I%20CSK%20106-08-1.pdf>

<https://interpretacje-podatkowe.org/konsorcjum/0111-kdib3-1-4012-21-2017-2-ik>

<https://poradnikprzedsiębiorcy.pl/-odwrotne-obciazenie-a-konsorcjum-w-swietle-vat>

[http://www.mf.gov.pl/ministerstwo-finansow/wiadomosci/komunikaty/-/asset\\_publisher/6Wwm/content/objasnienie-podatkowe-w-zakresie-odwroconego-obciazenia-podatkiem-vat-transakcji-dotyczacych-swadczenia-uslug-budowlanych](http://www.mf.gov.pl/ministerstwo-finansow/wiadomosci/komunikaty/-/asset_publisher/6Wwm/content/objasnienie-podatkowe-w-zakresie-odwroconego-obciazenia-podatkiem-vat-transakcji-dotyczacych-swadczenia-uslug-budowlanych)

[http://www.mf.gov.pl/ministerstwo-finansow/wiadomosci/komunikaty/-/asset\\_publisher/6Wwm/content/objasnienie-podatkowe-w-zakresie-odwroconego-obciazenia-podatkiem-vat-transakcji-dotyczacych-swadczenia-uslug-budowlanych](http://www.mf.gov.pl/ministerstwo-finansow/wiadomosci/komunikaty/-/asset_publisher/6Wwm/content/objasnienie-podatkowe-w-zakresie-odwroconego-obciazenia-podatkiem-vat-transakcji-dotyczacych-swadczenia-uslug-budowlanych)

---

# SCOPE OF DISCRETION OF A MUNICIPAL COUNCIL IN IMPLEMENTING AND DETERMINING THE AMOUNT OF RESORT TAX IN POLISH RESORTS

*Małgorzata Ofiarska<sup>1</sup>*

## **Abstract**

The paper demonstrates that a municipal council is not autonomous in executing the authority to introduce resort tax and determining its amount. The limits of independence of the municipal councils are specified by the provisions of the Constitution of the Republic of Poland, the Act on Local Taxes and Fees and the Act on Health Resort Medical Care. The legal-dogmatic and empirical methods have been used to examine the scope of competence of a municipal council and classify its powers in two areas. The first area comprises implementation of the resort tax and the second is related to determining the amount of this public levy. The aim of the paper has thus been achieved.

The material examined in the research includes the normative material, the administrative and financial legislation, the decisions by administrative courts, as well as the results of supervision of the regional chambers of audit (RACs). The hypothesis regarding the competence of municipal council fulfilling the standard of the so-called municipality's limited power to levy has been positively verified. The rational use of this power allows flexibility in adjusting the fiscal burden to the conditions of the particular locality holding the status of a resort.

It has also been pointed out that the supervision of the regional chambers of audit over the resolutions of the municipal council regarding the resort tax has a positive effect on the municipal legislation process. This allows to eliminate a part or all provisions of the resolutions materially breaching the law from legal transactions. The failures identified within this scope have been classified in two groups. The first group contains the cases of breach of the statutory limits of the competence of the municipal council (especially regarding the introduction of the resort tax exemptions), and the other group consists in the infringements regarding creation of local enactments (violations concerning proper *vacatio legis* prevail).

## **Key words**

Local fee, resort tax, special zone, resort, municipal council.

## **JEL Classification: H2, H71**

---

<sup>1</sup> Doctor of law, Head of the Department of Local Government Law, Faculty of Law and Administration, University of Szczecin, Poland. Author of over 250 publications, including 10 books, 40 articles, 94 studies in joint works and other electronic publications. Specialises in local government law and administrative enforcement proceedings. He is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the countries of Central and Eastern Europe. ORCID: 0000-0001-05311-0201. Contact email: malgorzata.ofiarska@usz.edu.pl

## 1 Introduction

Article 167 of the Constitution of the Republic of Poland sets forth the limits of independence of municipalities in establishing the local charges, stating that they are established by means of statutory provisions. This is due to the fact that the right to impose levies granted to a municipality does not provide for the opportunity to levy new charges, as these may only be imposed by the Parliament – as provided for in Article 217 of the Constitution of the Republic of Poland (Zawora, 2014: 24). Communes and municipalities are not autonomous not only in introducing the local fees, but in establishing their amount either, specifically through establishing the fees and exemption at their full discretion (Ofiarski, 2010: 47). Constitutional solutions, introducing the limited power to levy of communes and municipalities, respect the standard formulated in Article 9 section 3 of the European Charter of Local Self-Government establishing that local taxes and fees should be the source of at least part of the financial resources of local communities and the communities hold the right to determine the amount of those taxes and fees to the extent specified by the Act (Dowgier, 2015: 76).

The resort tax also holds the status of a local tax whose basic structural elements are statutorily determined (Act on Local Taxes and Fees, hereinafter ALTF). The tax may be introduced by a municipal council with reference to persons residing temporarily (however longer than 1 day) for health, tourist, leisure or training purposes in localities within the territories granted the resort status according to a procedure specified in a separate act (Article 2 point 3 on Health Resort Medical Care, Health Resorts, Health Resort Protection Areas and Health Resort Communes, hereinafter referred to as the Act on Resorts). The Act on Resorts has defined the term of “a resort” as an area where resort medical care is provided, delimited for the purpose of and protection of the natural medical resources located therein, jointly fulfilling the following criteria: having natural medical resources whose medical properties has been confirmed; its climate having medical properties; having medical care facilities and devices ready for providing resort medical treatment located therein; fulfilling the statutory requirements regarding natural environment; equipped with technical infrastructure for water and sewage management and energy industry, as well as maintaining waste management.

The aim of the paper is the analysis of the manner of exercising discretion in implementing and determining the amount of resort tax levied granted to the communes and municipalities – based on the current legislation, judicial decisions and the decisions of the regional accounting chambers.

The term of “a resort tax” has not been defined in the Act; however, the interpretation of the provisions of the Act on Local Taxes and Fees allows to conclude it is a local public levy, introduced on a delimited special area – a resort – by a resolution of a municipal council, constituting an equivalent to the possibility to use the assets of the resort (in terms of climate, tourism, landscape). The main elements of the legal structure

of this tax specified in the Act are as follows: the entities obliged to pay the tax (only the individuals temporarily residing at the health resort), maximum daily rate, exemption from the duty to pay the resort tax. Other structural elements of this tax are specified by a resolution of the municipal council. The resort tax is collected regardless the charges for accommodation and treatments in the medical establishment of the resort.

Application of legal-dogmatic and empirical methods and the analysis of the selected resolutions adopted by municipal councils in 2015-2017 allowed to identify the municipal arrangements regarding the rates of the resort tax and exemptions from this tax. A hypothesis has been verified that the discretion in implementing and determining the amount of resort tax levied by the communes and municipalities specified by the legislator may lead to significant diversification of the burden resulting therefrom, however it is justified by different conditions offered by particular resorts. The solutions adopted in the Act of Local Taxes and Fees not only allow execution of the certain elements of the power to levy by the commune or municipality, but also provide for flexibility in adjusting the burden of resort tax to the operating conditions of a particular resort.

The possibility to introduce the resort tax is one of a few legal solutions determining a special legal status of a resort and the health resort protection area. Such an area is defined as a “special area”, established to enable execution of a certain priority task (Ofiarska, 2016: 12). A separate legal regime regarding a health resort and the health resort protection area results from the statutory provisions and the statute. The regime is characterized by binding system of prohibitions, injunctions and restrictions regarding the delimited health resort protection areas (Ofiarska, 2016: 21). Moreover, certain financial mechanisms are applied, supporting the process of executing own tasks of the commune in the territory of the health resort protection area related to maintenance of the medical properties of the resort. The most important are the following: resort tax as a specific type of local public levy and the subsidy from the state budget to the municipality in the amount equivalent to the income from the resort tax collected in the resort in the year preceding the base year (pursuant to Article 2 point 3 Act on the Income of the Local Government Units, a base year is the year preceding the budget year), thus two years before, compared with the year when the subsidy was granted.

## **2 Statutory limits of the communes and municipalities discretion in implementing and determining the amount of resort tax**

### **2.1 Legal grounds for assessment and collection of the resort tax**

The legal grounds for assessment and collection of the resort tax in Poland have been contained in two acts as the legal status of the resort has been regulated by the Act on Resorts, whereas the main structural elements of these taxes have been regulated in the Act on Local Taxes and Fees. Moreover, the provisions of the particular municipal

councils in the area where the resorts are located are significant (as they specify the actual daily rates of these taxes, introduce their collection and specify additional exemptions from their payment).

Article 48 of the Act on Resorts sets forth general entitlement of the resort commune or municipality to collect resort tax, at the same time pointing out the separate act regulating the principles of calculating this tax. At the same time, it has been indicated that this public levy is aimed at obtaining funds necessary to complete the tasks listed in Article 46 of the cited Act (Gliniecka, 2007: 33-39). The tasks were listed in the form of an open catalogue, as their enumeration had been preceded with a phrase: “in particular”. The common aim of these tasks is maintenance of medical properties of the resort. Thus, it may be concluded that the Act is limited to indication of typical tasks – nevertheless, depending on the specificity of the particular resort, other own tasks of the resort commune may appear, carried out in order to maintain the medical properties of the resort. The standard tasks of a resort commune are as follows:

- a) land management, taking into account the needs of the resort medical treatment, protection of natural resources of therapeutic raw materials as well as construction or other activities prohibited in particular resort protection zones;
- b) protection of natural conditions of the resort or resort protection zone and fulfilling the requirements regarding the air pollutant limit values, noise level, discharging sewage into waters or into the ground, waste management, emission of electromagnetic fields;
- c) creating conditions for the operation of the resort treatment facilities and devices and development of the local infrastructure in order to meet the needs of people staying in the territory of the commune for the purpose of resort treatment;
- d) building and upgrading local and technical infrastructure aimed at health resorts or resort protection zone related to water and sewage management, energy industry and collective transport, as well as maintaining waste management (Ofiarski, Ofiarska, 2011: 258).

The separate act regulating the principles of calculating the resort tax is the Act on Local Taxes and Fees. It normalized all essential elements of the legal construction of this tax (i.e. subject, object, rates, exemptions and exclusions). The limits of the municipality's power to levy have also been established, within which the municipality is able to shape certain elements of the legal construction of the resort tax at its own discretion. Article 19 of the Act on Local Taxes and Fees defines the municipal authority vested with the limited power to levy, the legal form for execution of this task, as well as the elements of the legal construction of the resort tax regarding which such power may be executed (Zdebel, 2009: 265-274).

## 2.2 The legal nature of the resort tax

The analysis of the content of Article 48 of the Act on Resorts and Article 17 section 1 of the Act on Local Taxes and Fees proves the possibility of introducing the resort tax. Thus, it is not an obligatory public levy even if a particular area holds the status of a health resort. If such a specified area does not hold such status, introducing the resort tax there is not permitted by law. The commune or municipality may introduce or resign from introducing the resort tax at its own discretion only in the first of the aforementioned cases. The optional nature of this tax means that the municipal council may resign from introducing the tax if it is a source of income for the municipality that is insignificant in fiscal terms (Etel, Dowgier, 2013: 177).

A resort tax is introduced following the decision by the decision-making and supervisory body of a municipality, i.e. municipal council, by means of a resolution which constitutes an act of local law. A particular resolution is qualified as an act of local law due to the general nature of this act. Pursuant to Article 40, section 1 of the Act on Municipal Local Government, a municipality holds the right to establish local law applicable at the territory of the municipality. The phrase: “pursuant to statutory authorisations” means such authorisation should specify at least the subject and scope of the regulations (Kotulski, 2001: 7). When exercising authorisation to make local act of law, the municipal council is obliged to act strictly within the limits of empowerment resulting from the Act (Voivodeship Administrative Court in Opole: II SA/Op 452/12).

## 2.3 The scope of executive authorities of the municipal council regarding the resort tax

The provisions of Article 19 of the Act on Local Taxes and Fees indicate that a municipal council is entitled to exercise, through a resolution, the power to levy a resort tax consisting in specifying:

- the rules for establishing and collecting the tax,
- payment dates,
- the rates, however not exceeding the amount specified in the act.

The municipal council has also been authorized to manage the resort tax collection system and specify the collectors and their remuneration. Exercising the powers of the municipal council in terms of specifying the collectors should be set forth in the resolution precisely enough as to avoid any doubt regarding who the obligation has been imposed on. Entrusting a particular person with the function of a collector should be preceded by this person expressing their consent to accept the related obligations and such consent should be expressed before the appointment of the collector, not at the



stage of concluding the agreement with such a person (Voivodeship Administrative Court in Olsztyn: II SA/OI 79/15). The collector may not be an abstract, ambiguous subject, neither for the tax office, nor the taxpayer. Appointing the collector is the sole discretion of the municipal council and the council may not transfer such competence to other subjects, including the bodies authorised by the council, e.g. the municipal executive body (commune head, mayor, city president). A municipal council may also introduce exemptions from the resort tax other than listed in the Act. Thus, the power to levy of the municipal council refers to the elements of the legal construction of this tax (rates) as well as the conditions and manners of payment (date of payment, collection).

### **3 The analysis of the content of the selected resolution by the municipal council regarding resort tax**

Particular municipal councils usually opt for the solution consisting in complex regulation of the resort tax in one resolution, i.e. normalizing all elements of the power to levy the municipal council holds (except for the exemptions from this tax). Complex resolution on the resort tax contains the following provisions:

- 1) decision on implementing this public levy,
- 2) specifying the amount of this tax (occasional lower rates for children, young people in education up to 24 and persons over 75 years of age and higher rates for all other persons); uniform rates for all individuals, regardless the age,
- 3) specifying the collectors (mainly the entities rendering services in the field of accommodation, as well as the keepers of the holiday centres, homes and resorts, hotels, sanatoria, guest houses, private holiday quarters, rented summer houses, guest rooms, health resorts, hostels, camps and camp sites, etc.),
- 4) referring to the amount of the lump remuneration for collection of the tax (e.g. 10% or 15% from the amount collected),
- 5) specifying the dates for transferring the collected amounts to the account of the municipal budget (e.g. up to the 5th day of the month following the month when the tax was collected or in the specific settlement cycles, i.e. upon the lapse of 3 days or 14 days following the collection).

Resolutions regarding only one aspect of the power to levy by the municipal council regarding the resort tax, e.g. ordering its collection and appointing collectors have also been adopted. These cases, however, were exceptional.

Significant differences in the amounts of resort tax rates specified in particular resolutions are a characteristic phenomenon. In 2017, the provisions of the Act on Local Taxes and Fees have specified that the daily rate of the resort tax could not exceed PLN 4.24

(equivalent of EUR 1) from an individual residing temporarily (however longer than 1 day) for health, tourist, leisure or training purposes in localities within territories granted the status of a resort. Some municipal council calculated the basic rate of this tax at PLN 4.20, i.e. similar to the maximum rate established by the Act, at the same time specifying the reduced rate (e.g. for children up to 7 years of age), in the amount of PLN 1 for each day of stay. In other cases, there was a uniform rate of the resort tax for all individuals, in the amount slightly reduced in comparison with the maximum rate (e.g. the level of PLN 4 per person) or in the amount significantly lower compared with the statutory rate (e.g. the amount of PLN 3 per day). Moreover, two rates of this tax, i.e. basic (e.g. in the amount of PLN 3.50) and reduced for children up to 7 years of age (e.g. in the amount of PLN 2.50) were determined, thus in this case the difference between the base and reduced rate was not that significant. It should be emphasised that differentiating the tax rates based on subjective criterion (e.g. age, disability status) constitutes the excess of the statutory delegation granted to municipal council resulting in deeming the resolution invalid in part or in whole (e.g. RAC in Wrocław: 104/2009).

For 2018, the maximum rate of the resort tax established in the Act is PLN 4.33 (taking into account the average EUR to PLN exchange rate in January 2018, which is equivalent to EUR 1.04). The resort tax rates in the examined resolutions of the municipal council have been defined for 2018 subject to similar trends as in 2017. However, in some cases, the municipal councils have significantly increased the rate of the resort tax compared with the rate applied in 2017, e.g. Municipal Council of Ustka has increased the rate from PLN 3 to 4 for each day (Municipal Council of Ustka: XXXIV.427.2017). Actions taken in this regard are aimed at increasing the budgetary income of the resort communes in order to make the budgets sustainable or at least to limit the budgetary deficit covered by incurring public debt (loans, credits, issuing debt securities).

The revenue from the resort tax constitutes an important position in the budgetary income of the resort communes (e.g. in 2017 the budgetary income of Szczawnica Municipality totalled PLN 30 702 725, whereas resort tax amounted to PLN 850 000, thus 2.77% of the total budgetary income; resolution no. XLII/295/2017 Town Council of Szczawnica, whereas in 2018 the budgetary income of Rymanów Municipality has been planned in the amount of PLN 80 368 293, including PLN 630 000 resort tax, thus 0.78% total income, Municipal Council in Rymanów: XLVIII/452/17). Such relations in Krynica-Zdrój Municipality budget for 2018 are even more favourable, as the total revenue was planned in the amount of PLN 19 304 888, including the income from resort tax in the amount of PLN 4 100 000, thus 3.44% of the total budgetary income (Municipal Council of Krynica-Zdrój: XLIII.307.2017). The nominal revenues from the resort tax are often several times higher than the revenues from other common public levies, e.g. in 2018 in Rymanów Municipality they are three times higher than the revenues from the tax on civil law transactions planned in the amount of PLN 225 000 and over twice higher than the revenues from the tax on means of transport planned in the amount of PLN 266 900. The revenues from the resort tax in Krynica-Zdrój municipality in 2018 are over

nine times higher than the revenues from the tax on means of transport (planned in the amount of PLN 431 025) and over 45 times higher than the revenues from stamp duty (planned in the amount of PLN 90 000).

#### **4 The effect of supervisory activity of the Regional Chamber of Audit with reference to the resolutions on resort tax**

Supervisory competence of the Regional Chambers of Audit (RAC) comprises, among others, the resolutions adopted by the municipal councils regarding local fees (Act on the Regional Chambers of Audit, Art. 11), to which the provisions of the Tax Ordinance Act of August 29, 1997 apply. Pursuant to the provisions of the Constitution of the Republic of Poland, the RACs exercise their oversight applying the legality criterion. RAC's committee adjudicates invalidity of the resolutions materially breaching the law. In the event of a minor breach of law in the resolution, the RAC does not deem the resolution invalid, it only indicates the fact that it has been issued while violating the provisions of law. When assessing whether the infringements found in the resolution fulfill the prerequisites of a "minor breach of law", the supervisory body should take into consideration the conditions of each case, the outcome of such breach and the fact that the defects that may be deemed minor in terms of the procedural law and material law are the defects whose removal would not result in material changes to the contents of the resolution (Voivodeship Administrative Court in Warsaw: V SA/Wa 1249/08).

With reference to resolutions on a resort tax, the RACs, following supervisory actions, usually find infringements consisting in:

- regulating issues exceeding the authorisations resulting from statutory provisions, specifically setting the date for payment of remuneration for collection, defining the date and manner of clearing the pre-numbered forms taken by the collectors, regulating the issued regarding inspection of the correctness of resort tax collection,
- failure to fulfill the requirements of the acts of local law regarding proper publication or the day when the resolution enters into force (e.g. Dobek et al., 2017: 31-32).

In the opinion of the supervisory body, adding the provision stating that the payment of the collector's remuneration depends on timely payment of the resort tax to the contents of the resolution constitutes the excess of the limits of statutory authorisation. Pursuant to Article 19 section 2 of the Act on Local Taxes and Fees, a municipal council is only authorised to order withholding the tax by means of collection, specifying the collectors and determining the amount of remuneration for collection. A municipal council is not authorised to introduce additional regulations in the subject of collection, including the condition that the payment of the collector's remuneration depends on timely payment of

the collected fees. Duties of the collectors regarding – among others – timely payments of the collected fees to the tax authority, as well as the rules of the collectors' liability for non-performance of these duties, result directly from the Tax Ordinance Act. Decisions of the municipal council exceeding the statutory authorisation have thus been deemed a significant violation of the provisions of law (RAC in Szczecin: XXVII.208.S.2013). There are also no legal grounds to introduce the sanctions against the collectors for failure to pay the collected resort tax on time (e.g. depriving the collector of the right for commission) in the contents of resolution by a municipal council, as the statutory provisions already provide for repercussions for such collectors (RAC in Szczecin: XXV.193.K.2013). In addition, a collector may not be obliged to perform additional duties pursuant to the provisions of a resolution (Dowgier, 2010: 57), e.g. maintaining detailed register of persons arriving to a particular facility (guest house, hotel, etc.) in order to enable tax authorities to verify the correctness of the collected resort tax (RAC in Wrocław: 19/2013).

Moreover, the resolution may not contain provisions regarding the obligation to enter into civil law agreement with the collector regarding withholding the resort tax. The collector is appointed through a resolution of the municipal council. These are the grounds for administrative legal relations between the tax authority and the collector (Supreme Administrative Court: I FSK 1192/06). Rights and duties of the collector are regulated by the resolution and provisions of the tax law, specifically Tax Ordinance Act (resolution by the RAC in Szczecin: IX.80.K.2013). A resolution by the municipal council may not provide for the possibility of the collector subdelegating tax collection, e.g. to the collector's employee (RAC in Białystok: 2/13).

Another excess of authority of a municipality would also be introduction of the resort tax exemptions of subjective nature, consisting in specifying different day rates of such tax for disabled persons, war veterans and the military invalids. However, a municipal council may introduce exemptions from the resort tax other than listed in the Act. Introducing subjective tax exemptions is a material breach of law by a municipal council (RAC in Gdańsk: 257/P214/P/13). Determining PLN 0 rate in the resolution with reference to the disabled persons is another prohibited subjective tax exemption (RAC in Szczecin: XXVIII/161/K/2012).

The resolution on the resort tax has been deemed invalid in terms of failure to fulfill the requirements of the act of local law, as it has been concluded that it is prohibited to include the provisions stating that this act of local law takes retroactive effect in its contents, due to violation of the standards set forth in the Act of July 20, 2000 on promulgation of normative acts and certain other legal acts. Pursuant to Article 4 section 1 thereof, normative acts containing the generally applicable regulations, promulgated in the official journals, enter into force upon the lapse of fourteen days since the date of their promulgation, unless the given act specifies a longer period. Should an earlier date of entry into force than the date of publication be indicated in the contents of the

normative act, it will result in a decision stating this act is null and void in whole or in part (RAC in Zielona Góra: 196/2017). Pursuant to statutory rules, the acts of local law enter into force upon the lapse of fourteen days since the date of their promulgation in the proper official journal. This date is of minimal nature and it is possible for the communal employer to establish a later date for the act of local law to enter into force.

The obligation to establish appropriate *vacatio legis* results from the principles of legal security, reliability of legal transactions, respect for acquired rights and protection of citizen's trust in the state and the rule of law made by state authorities, originating from the principle of democratic rule of law expressed in Article 2 of the Constitution of the Republic of Poland (RIO in Zielona Góra: 61/2016). Prohibition of retroactivity is the foundation of a democratic rule of law and undermining it by a public authority should be considered highly reprehensible. In addition, retrospective legal power may only apply to granting the rights. However, it is not possible to apply this norm to the imposition of duties (RAC in Warsaw: 2/21/2016) – which is the nature of regulations referring to imposing public levies.

## 5 Conclusion

The aim of the paper adopted in the introduction has been achieved, demonstrating that wherever it is legally permissible, municipal councils use their rights to introduce a resort tax and to set the amount of this fee. Two separate areas of the municipal council competence have been indicated regarding the resort tax. The first area includes the competences regarding the introduction of a resort tax in a specific locality. A prerequisite for the municipal council to exercise the competences in the second area – consisting in determining the amount of this fee – is exhausting the competences in the first area. Adoption of a resolution on the resort tax introduction should precede the municipal council taking other decisions regarding determining the construction elements of this fee (rates, exemptions) and the manner of its collection by collectors (Pahl, 2017: 286).

It was established that the competences of the municipal council regarding the resort tax vary in terms of the scope of freedom of action. The council has a relatively large scope of freedom in the sphere of implementing this public levy, as in the case of a given area having the status of a health resort, the municipal council may decide on the introduction of a resort tax or resignation from this levy in this location. However, the need to balance municipal budget means that the resort tax is introduced wherever a special area is created in the form of a health resort. It is an important source of budgetary revenues in many health resorts, often even more efficient than the other sources of income (e.g. the tax on means of transport or the tax on civil law transactions). It can therefore be concluded that these are mainly economic considerations which oblige municipal councils to choose

an option related to charging public tax on individuals residing more than a day for health, tourism, leisure or training purposes in the towns located in areas that have been granted the status of a health resort.

In the scope of determining the amount of the resort tax, the limits of the municipal council's discretion are limited by the legislator. The hypothesis has been verified that exercising their rights by municipal councils may lead to a significant variation in the amount of the resort tax charged, however this is justified by different conditions offered by individual resorts. The solutions adopted in the Act of Local Taxes and Fees not only allow to execute certain elements of the power to levy by the commune or municipality, but also provide flexibility in adjusting the burden of the resort tax to the conditions of functioning of a particular resort.

The amount of this public levy depends primarily on the applicable rates and exemptions. The legislator limits the municipal council's discretion in each of these elements of the legal construction. The Act on Taxes and Local Fees sets the maximum daily rates for this tax. The municipal council is entitled to determine, by way of a resolution, the daily rates applied in locations holding the legal status of a health resort. These rates, however, may not be higher than the currently applicable statutory maximum rates. Therefore, the freedom of action of the municipal council refers to determining the rates of a resort tax at a level equivalent to the maximum or at a lower level.

It is relatively rare for the municipal councils to use the competence to introduce exemptions from the resort tax other than those stipulated in the Act and thus determine the amount of this public levy. On the other hand, the relatively frequent excess of statutory authorization by municipal councils is a characteristic phenomenon, occurring when this competence is exercised. The exemptions from this fee, introduced by municipal councils, are often not objective but subjective in nature, which is not permissible in the light of the provisions of the Act on Local Taxes and Fees.

The supervision of the RACs serves to verify the correctness of the municipal council's activities in relation to the power to levy exercised in the area of the resort tax. It is exercised taking into account the criterion of legality, i.e. compliance of the municipal council's activities with the applicable law. A number of infringements found in this area, in particular consisting in a significant violation of the law resulting in a decision on the invalidity of the municipal council's resolution in part or in whole, proves the need for supervision carried out by the RAC, as well as the need to strengthen the legal service of municipalities in order to improve the standard of legislative procedures implemented in municipalities.

General conclusions can be made based on the findings regarding the application of the valid legal regulations on the resort tax. First of all, further research providing deep insight should be conducted with reference to the legal status of these taxes. It is also indispensable to identify and classify the characteristic features differentiating these taxes

from the other public legal fees. Consequently, the scientific findings may lead to drawing a statutory definition of the resort taxes and explicit regulation of the basic elements of their legal structure.

## References

- Dobek, T. et al.: Sprawozdanie z działalności regionalnych izb obrachunkowych i wykonania budżetu przez jednostki samorządu terytorialnego w 2016 r. (Report on the activities of regional chambers of auditors and budget implementation by local government units in 2016), Warszawa: Wydawca Krajowa Rada RIO, 2017.
- Dowgier, R.: Wybrane problemy związane ze stosowaniem przepisów dotyczących opłaty miejscowej i uzdrowiskowej (Selected problems related to the application of local and resort fees), in: Liszewski, G.: Opłaty samorządowe w Polsce – problemy praktyczne (Local government fees in Poland - practical problems), Białystok: Wyd. Temida2, 2010.
- Dowgier, R.: Zakres władztwa podatkowego gmin w prawie Rzeczypospolitej Polskiej w świetle standardów wynikających z Europejskiej Karty Samorządu Lokalnego (The scope of tax authorities' powers in the law of the Republic of Poland in the light of standards resulting from the European Charter of Local Self-government), in: Ofiarska, M.: Europejska Karta Samorządu Lokalnego a prawo samorządu terytorialnego (European Local Self-Government Card and local self-government law), Szczecin: Wydawca Wydział Prawa i Administracji Uniwersytetu Szczecińskiego, 2015.
- Etel, L., Dowgier, R.: Podatki i opłaty lokalne. Czas na zmiany (Local taxes and fees. Time for changes), Białystok: Wyd. Temida2, 2013.
- Gliniecka, J.: Rola opłaty uzdrowiskowej w systemie dochodów budżetowych (The role of resort fee in the system of budget revenues), *Finanse Komunalne (Municipal Finance)* no. 4 (2007).
- Kotulski, M.: Uchwały podatkowe jako akty prawa miejscowego stanowiące przez samorząd terytorialny (Tax resolutions as acts of local law constituted by the territorial self-government), *Finanse Komunalne (Municipal Finance)* no. 2 (2001).
- Ofiarska, M.: Status prawny uzdrowiska i obszaru ochrony uzdrowiskowej (Legal status of the spa and the resort protection area), in: Koniuszewska, E.: Szczególny status gminy uzdrowiskowej - z perspektywy 10 lat obowiązywania ustawy o lecznictwie uzdrowiskowym, uzdrowiskach i obszarach ochrony uzdrowiskowej oraz o gminach uzdrowiskowych (Special status of the resort commune - from the perspective of 10 years of validity of the act on resort treatment, health resorts and resort protection

areas, and on resort communes), Szczecin: Wydawca Wydział Prawa i Administracji Uniwersytetu Szczecińskiego, 2016.

Ofiarski, Z., Ofiarska, M.: Gmina uzdrowiskowa - aspekty administracyjnoprawne i finansowoprawne (The resort commune - administrative and legal aspects and financial aspects), in: Patrzalek, L.: *Finanse samorządu terytorialnego, Zeszyty Naukowe WSB we Wrocławiu* (Local government finances, WSB University Zeszyty Naukowe in Wrocław) no. 21 (2011).

Ofiarski, Z.: *Ogólne prawo podatkowe. Zagadnienia materialnoprawne i proceduralne* (General tax law. Material and procedural issues), Warszawa: LexisNexis, 2010.

Pahl, B.: *Podatki i opłaty lokalne. Teoria i praktyka* (Local taxes and fees. Theory and practice), Warszawa: Wyd. Wolters Kluwer, 2017.

Zawora, J.: *Samodzielność finansowa gmin w świetle uwarunkowań prawnych i samorządowych wydatków inwestycyjnych* (Financial autonomy of communes in the light of legal and self-governmental investment expenditures), *Finanse Komunalne* (Municipal Finance) no. 10 (2014).

Zdebel, M.: *Oplata uzdrowiskowa jako źródło dochodów gminy - wybrane zagadnienia prawnofinansowe* (Resort tax as a source of commune income - selected legal and financial issues), in: Patrzalek, L.: *Finanse lokalne - wybrane zagadnienia* (Local finance - selected issues), Poznań: Wyd. Wyższej Szkoły Bankowej, 2009.

## Legal Acts

Constitution of the Republic of Poland of April 2, 1997, as amended.

Act of August 29, 1997 Tax Law, as amended.

Act of January 12, 1991, On Promulgation of Normative Acts and Certain Other Legal Acts, as amended.

Act of January 12, 1991, On Taxes and Local Fees, as amended.

Act of July 28, 2005, On Health Resort Medical Care, Health Resorts, Health Resort Protection Areas and Health Resort Communes, as amended.

Act of March 8, 1990, On Municipal Local Government, as amended.

Act of November 13, 2003, On the Income of Local Government Units, as amended.

Act of October 7, 1992, On Regional Chambers of Audit.

Act no. VIII/452/17, Resolution of the Town Council of Rymanowa of October 27, 2016 on adopting the budget.



Act no. XLIII.307.2017, Resolution of the Town Council of Krynica-Zdrój of December 27, 2017 - Budgetary resolution for 2018.

Act no. XXXIV.427.2017, Resolution of the Municipality Council of Ustka of October 27, 2016 on establishing the rates of the resort charge in Ustka Municipality, payment date and method of collection.

Act no. XLII/295/2017, Resolution of Town Council of Szczawnica.

Act no. 257/P214/P/13, Resolution of RAC in Gdańsk of November 28, 2013.

Act no. IX.80.K.2013, Resolution of RAC in Szczecin of April 30, 2013.

Act no. XXVII.208.S.2013, Resolution of RAC in Szczecin of December 18, 2013.

Act no. XXV.193.K.2013, Resolution of RAC in Szczecin of November 26, 2013.

Act no. XXVIII/161/K/2012, Resolution of RAC in Szczecin of November 28, 2012.

Act no. 2/21/2016, Resolution of RAC in Warsaw of January 26, 2016.

Act no. 104/2009, Resolution of RAC in Wrocław of December 23, 2009.

Act no. 19/2013, Resolution of RAC in Wrocław of February 20, 2013.

Act no. 61/2016, Resolution of RAC in Zielona Góra of February 24, 2016.

Act no. 196/2017, Resolution of RAC in Zielona Góra of July 31, 2017.

Act no. 2/13, Resolution of the RAC in Białystok of January 4, 2013.

Supreme Administrative Court: I FSK 1192/06.

Voivodeship Administrative Court: II SA/OI 79/15.

Voivodeship Administrative Court in Opole: II SA/Op 452/12.

Voivodeship Administrative Court in Warsaw: V SA/Wa 1249/08.

---

# SCOPE OF DISCRETION OF TAX AUTHORITIES IN APPLYING PUNITIVE RATE IN THE TAX ON CIVIL LAW TRANSACTIONS

*Zbigniew Ofiarski*<sup>1</sup>

## **Abstract**

It has been proved in the paper that the tax authority has limited discretion in applying punitive rate, i.e. 20% of the tax rate assessment procedure of the tax on civil law transactions. Statutory premises of objective and subjective nature set the limits of independence of tax authorities. The scope of competence of tax authorities in applying punitive rate in the tax on civil law transactions was examined using the legal doctrine method and empirical method. Punitive rate may only be applied for the taxation purposes in three civil law transactions not disclosed by taxpayer in the regular scope of tax assessment procedure (loan agreement, improper deposit agreement or irregular usufruct). Taxpayer's reference to the conclusion of such contracts only in the course of the verification procedures already instigated by the tax authority (inspection, tax control, tax proceedings or customs and tax control) allows for application of extraordinary solution, such as renewal of tax liability and charging the tax that is tenfold the tax levied according to the basic rate. The aim of the paper has thus been achieved.

The material examined includes current normative material and fiscal legislation as well as the decisions by administrative courts. The following hypothesis has been verified: the scope of activity of tax authorities in the case of punitive rate application is shaped by statutory premises of a mixed nature, i.e. subjective and objective, but instigation of this special assessment procedure of the tax on civil law transactions depends on the initiative of the taxpayer in the form of a reference to the fact of performing a specific civil law activity in the past.

## **Key words**

Tax on civil law transactions, tax authority, punitive tax, tax avoidance.

**JEL Classification:** H2, H71

## **1 Introduction**

Tax on civil law transactions, applicable in Poland since January 1, 2001, covers the events related to trading in different assets (Kosikowski, Ruśkowski, 2008: 527), including loan

---

<sup>1</sup> Professor of finance law, Head of the Department of Finance Law, Faculty of Law and Administration, University of Szczecin, Poland. Author of over 550 publications, including 38 books (monographs, student's books, and commentaries), articles, studies in joint works, and electronic publications. Specialises in tax law, local government finance law, and banking law. He is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. ORCID: 0000-0003-1675-933X. Contact email: zbigniew.ofiarski@usz.edu.pl

agreement, improper deposit agreement or amendments to such agreements. Entering into these agreements or introducing any amendments results in increased tax base which should be disclosed to tax authorities by taxpayers for taxation purposes. If such agreements are reported correctly, tax rates of 2% of the tax base shall be applied, however in the event of non-compliance with tax procedures applicable in this area, the taxpayer is obliged to pay tax at a 20% rate, i.e. at the tax rate of punitive nature (Liszewski, 2008: 285).

The aim of this paper is to review and evaluate, based on the applicable law and fiscal legislation, as well as the judicial decisions, the premises to apply punitive rate of the tax on civil law transactions. The provisions of the Tax Law applicable in this regard set out the limits of discretion in the operations by tax authorities. The hypothesis has been verified that the scope of operations by tax authorities specified by the legislator in the application of the punitive rate was shaped by statutory provisions of mixed nature, i.e. subjective-objective, however instigation of this specific assessment procedure of the tax on civil law transactions depends on the taxpayer's initiative.

Following application of legal doctrine method and empirical method, including the analysis of the selected judicial decision, the limits of discretion of tax authorities in applying punitive rate in the tax on civil law transactions have been established. Application of a punitive tax rate has only been made possible on January 1, 2007, following the amendment of tax law (the Act on amending the Act on tax on inheritances and bequests and the Act on tax on civil law transactions). The punitive nature of this rate refers not only to its amount – tenfold the base rate – but also the conditions of its application (Chustecka, 2010: 291), which may be considered extraordinary.

Introducing a tax rate which is tenfold the base rate has been preceded by indicating the aim of this regulation and the appropriate axiological foundation, without the existence of which the application of such repressive legal regulation could not have been justified, in the constitutional aspect either. Such sanction is aimed at the so-called “dishonest taxpayer” (Voivodeship Administrative Court in Olsztyn: I SA/OI 521/09). It is recognized that the purpose of this regulation is to prevent situations when a person referring before the tax authority to the fact of entering into a loan or an improper deposit agreement indicated such sources of additional income and thus they were able to effectively avoid any tax sanction, including income tax calculated at the 75% rate on the revenues from undisclosed sources (Nierobisz, Waclawczyk, 2011: 210-211). Introducing punitive tax rate on civil law transactions will not completely eliminate the phenomenon of evading tax law in the scope of revenues from undisclosed sources, however it may help to minimize this phenomenon to a certain extent (Voivodeship Administrative Court in Olsztyn: I SA/OI 520/09).

Application of punitive rate of the tax on civil law transactions has been evaluated negatively, as it has been indicated that it facilitates the growth of opportunistic approach towards the state due to the fact that it is an attractive alternative for taxpayers evading 75% rate of tax charged on the revenues from undisclosed sources (Dzwonkowski, 2011: 16).

## 2 General characteristics of premises allowing punitive tax rate

In the objective terms, a punitive rate (Kolaczyk, 2007: 12) may only be applied for the taxation purposes in three civil law transactions, i.e. loan agreement, improper deposit agreement or irregular usufruct. Application of a punitive rate is not allowed with reference to other civil law transactions subject to this tax (e.g. sales agreement, exchange agreement, articles of association) even in the event of gross violation of the tax law by the parties to these agreements.

Due to the special nature of the provisions determining the application of this sanction, the indications resulting from the teleological interpretation – respecting the function of this provision and system interpretation – assuming the relationship between these provisions and other tax law regulations are also significant in their interpretation, apart from the linguistic aspect (Supreme Administrative Court: II GSK 686/15). Provision of Article 7 section 5 of the Act on Civil Law Transactions (hereinafter ACLT) establishing increased (punitive) tax rate is *lex specialis* with reference to the provisions specifying the basic rate of this tax. Thus, it should be strictly interpreted, as it is in the case of any exception in law. Such interpretation is especially justified in the case of repressive (criminal and tribute) law, where the restrictive interpretation is the only constitutionally acceptable interpretation of provisions imposing obligations on entities. On the other hand, broad interpretation is generally unacceptable (Voivodeship Administrative Court in Gliwice: I SA/OI 143/14).

The contents of Article 7 section 5 ACLT indicates that the legislator's discretion in establishing sanctions for failure to meet taxpayer's obligations is limited by constitutional norms that require respect for the taxpayer's rights and respect for the principle of trust in the state and the law it legislates. It is necessary for the legislator to guarantee the recipients of tax law regulations the maximum predictability of decisions regarding taxpayers made by tax authorities (Chojnacka, 2011: 69).

Application of punitive rate is only allowed when in the course of the verification procedures (inspection, tax control, tax proceedings or customs and tax control):

- 1) the taxpayer refers to the conclusion of loan agreement, improper deposit agreement or irregular usufruct or their amendments and the tax on these transactions has still not been paid;
- 2) a borrower taking a loan in the pecuniary form (spouse, descendant, ascendant, stepson, brother, sister, stepfather or stepmother of the lender) in the amount exceeding PLN 9,637 refers to the conclusion of the loan agreement while not meeting the condition of documenting the receipt of money to the bank account or their account kept by a savings and credit union or by postal order.

The above (punitive) taxation may be applied only within the framework of specific verification of fiscal procedures (inspection, tax control, tax proceedings or customs and

tax control) and in two different situations (Ofiarski, 2009: 400). The first refers to the taxpayer's reference to the conclusion of loan agreement, improper deposit agreement or irregular usufruct (or the amendments thereof) and the tax thereon has not been paid. Thus, in the course of these proceedings, the taxpayer discloses the event they have not disclosed on the proper day. This may apply to various types of loan agreements, both pecuniary and others. The premises specified in Article 7 section 5 point 1 ACLT must be fulfilled collectively in order for that punitive tax rate to be applied (Voivodeship Administrative Court in Łódź: I SA/Łd 978/12). The condition of the collective fulfilment of the premises of "reference by the taxpayer" and "non-payment of tax" on the loan agreement, improper deposit agreement or irregular usufruct determines the use of the phrase: "the taxpayer refers to the fact of concluding the contract, and the tax due on this activity has not been paid" in the contents of the provision.

The other case refers only to pecuniary loan agreements between the closest relatives in the event of reference to the fact of concluding the loan agreement while not meeting the condition of documenting the receipt of money to the bank account or their account kept by a savings and credit union or by postal order. The manner of formulating this provision could suggest that the absence of proper documentation in case of the borrower's reference to the fact of receiving pecuniary loan before tax authority in the course of inspection, tax control, tax proceedings or customs and tax control would be sufficient evidence to apply 20% tax base punitive tax rate. This provision, however, should be applied collectively with Article 9 point 10 item b) TCLA, regulating tax exemption on the pecuniary loans concluded pursuant to the agreement between the closest relatives in the amount exceeding PLN 9,637, under the following condition:

- 1) submitting declaration regarding tax on civil law transactions to the proper tax authority within 14 days from the date of performing this activity;
- 2) documenting the receipt of money to the bank account or their account kept by a savings and credit union or by postal order.

The repressive nature of Article 7 section 5 point 2 ACLT should apply only to the borrower, specified in Article 9 point 10 item b TCLA, i.e. a person being one of the close relatives indicated in Article 4a TIB. The obligation to submit a declaration on the tax on civil law transactions to the competent tax authority within 14 days from the date of performing the act, being a condition for obtaining a tax exemption from Article 9 point 10 item b TCLA, is not, however, a condition for the application of Article 7 section 5 point 2 TCLA (Supreme Administrative Court: II FSK 1901/13). Reference to Article 9, point 10, item b TCLA regarding "the borrower" is purely of subjective nature. Failure to document the receipt of money to the proper account or by postal order constitutes a prerequisite of applying Article 7 section 5 point 2 TCLA. The aim of this regulation is "tightening" the tax system. It is a technical standard, necessary to document the loan. Documentation requirements serve the indication of the actual realization of the loan

agreement or obtaining certain sum of money under the loan agreement (Voivodeship Administrative Court in Szczecin: I SA/Sz 278/15). Transferring money from parents to children is a transfer between different assets and thus tax authorities should be informed of this fact. Failure to submit such information results in levying 20% tax on civil law transactions (Supreme Administrative Court: II FSK 2109/15).

Pecuniary loans between the closest relatives in the amount not exceeding PLN 9,637 do not have to be documented, neither by submitting tax declaration, nor transferring it to a proper bank account of the borrower. Borrower's reference to the fact of receiving pecuniary loan before tax authority in the course of inspection, tax control, tax proceedings or customs and tax control regarding such a small loan would not be sufficient to apply punitive tax rate in the amount of 20% tax base. Under the Act on tax on civil law transactions, small amount loans are exempt from taxation, thus their subsequent taxation at a 20% rate is not acceptable due to the fact they were not originally included in the scope of taxation. A 20% tax rate may only be applied if the taxpayer – referring to the fact of receiving pecuniary loan in the course of inspection, tax control, tax proceedings or customs and tax control – has not paid due tax before while being obliged to do so (Kołaczyk, 2007: 12).

### **3 The meaning of the premise “reference by the taxpayer”**

Application of punitive tax rate is possible at any time since the moment of concluding the loan agreement, improper deposit or establishing improper usufruct or the moment of amending these agreements (Voivodeship Administrative Court in Kraków: I SA/Kr 1638/13). The determinant for instigating this repressive procedure is “reference” by the taxpayer to the fact of concluding such agreement before tax authority. The statutory term “reference” should be understood as taxpayer's reference to a particular past event, indicating this event related to certain circumstances (Supreme Administrative Court: II FSK 984/15; Supreme Administrative Court: II FSK 1001/15). No person acting rationally would refer to the fact of concluding the particular agreement solely for the purpose of increasing own fiscal burden, i.e. to pay tax at a higher rate (Voivodeship Administrative Court in Olsztyn: I SA/OI 9/17).

Taxpayer's reference to the fact of concluding the agreement under which the due tax has not been paid may also occur in the reservations or explanations to inspection report (Supreme Administrative Court: II FSK 1161/15). To conclude, the statutory term “reference” should be understood as any action by the taxpayer resulting in disclosing the agreement, regardless their form or nature (Supreme Administrative Court: II FSK 1875/16). The fact that the taxpayer will refer to the agreement while being questioned as a party to personal income tax on individuals does not exclude the application of Article 7 section 5 point 1 ATCLT and admissibility of establishing the 20% tax rate on civil law transactions (Supreme Administrative Court: II FSK 573/13).

The punitive tax rate should not, however, apply to contracts concluded before 1 January 2007, i.e. prior to the Act amending the Act on tax on civil law transactions entering into force. Legal provisions increasing the scope of tax burdens may not be applied retroactively.

There are two types of legal consequences to the taxpayer's reference to the fact of performing civil law transaction which have not been submitted for taxation after the lapse of 5 years from the end of the calendar year in which the tax payment deadline expired. First of all, it creates a new tax obligation referred to in Article 3 section 1 point 4 of the Civil Code; secondly, it requires application of a punitive tax rate. Implementation of this new obligation – following its transformation into a tax liability – consists in paying a tax in the amount of 20% of the value of a specific civil law transaction statutorily associated with the tax obligation (Supreme Administrative Court: II FSK 1550/14). The decision establishing the amount of liability in the tax on civil law transactions, issued taking into account the tax rate specified in Article 7 section 5 point 1 ATCLT, is constitutive in nature and this obligation arises on the day of servicing the decision, thus the interest on late payment may be accrued only after this date (Supreme Administrative Court: II FSK 861/14; Voivodeship Administrative Court in Bydgoszcz: I SA/Bd 156/13).

The conditions justifying the application of punitive tax rate are of exceptional nature (Supreme Administrative Court: II FSK 2515/12). Payment obligation arises again (novation) even if the tax liability has expired, as the taxpayer has not filed a tax return and 5 years have passed since the end of the year in which the original payment was due. The uniqueness of this regulation is expressed in the fact that the prescribed (due to the expiry of the prescription period) tax obligation is renewed (novation) due to the occurrence of another event (reference to the fact of performing the act). This is not a retrospective reactivation of an earlier tax obligation, thus the actual moment of performing the outstanding transaction is irrelevant. It is a mechanism for replacing the old tax obligation with a new one, including, however, only the taxpayer who refers to the previously performed act (Administrative Court in Warsaw: III SA/Wa 152/16). Implementation of this new obligation – following its transformation into a tax liability – consists in paying tax in the amount of 20% of the value of a specific civil law transaction (Supreme Administrative Court: II FSK 1550/14).

#### **4 The significance of the premise “the tax has not been paid”**

Answering the question whether the 20% rate may be applied to the agreement disclosed in the course of the proceedings requires – first of all – a reference to the transitional provisions and the provisions specifying the moment of the occurrence of tax liability. A 20% tax rate may only be applied if, in the course of the proceedings, the taxpayer refers before tax authority to the fact of receiving pecuniary loan on which the due tax has still

not been paid. However, if the tax was paid – even immediately before making reference to the loan agreement, improper deposit or irregular usufruct (e.g. on the same day), there are no grounds to apply the provision of Article 7, section 5 ATCLT, and thus there are no grounds for application of the punitive tax rate (Strzelec, 2007: 15).

Exceeding the statutory tax payment term alone is not enough for application of punitive rate. The phrase “due tax was not paid” contained in Article 7 section 5 point 1 ATCLT should not be read to mean that the above condition is already met in a situation when the tax due was not paid within the statutory period arising from Article 10 section 1 ATCLT, i.e. 14 days from the date when the tax obligation arises. It is also necessary to determine in the circumstances of a particular case that the payment had not been made until the instigation of the tax proceedings (tax inspection) in which the taxpayer referred to the fact of concluding the loan agreement, improper deposit or irregular usufruct (Administrative Court in Gliwice: I SA/GI 383/17). Submission of a tax declaration by the taxpayer regarding civil law transactions during the period of the already instigated verification activities, tax inspection, tax proceedings or customs and tax control is ineffective and the potential payment of overdue tax during this period does not deprive the tax authority of the right to apply a punitive tax rate (Goettel, 2014: 50).

Even the payment of the tax on civil law transactions at the basic rate of 2% does not exempt application of the punitive rate in a situation where the tax did not result from an effectively filed tax declaration (i.e. prior to instigation of tax proceedings, tax inspection, customs and tax inspection or inspection activities), and even more so when the original commitment expired prior to instigation of the proceedings. Payment of the amount equivalent to the tax due under the concluded agreement may not be considered as payment of “due tax” in such conditions. Thus, in the event of fulfilling the premises of applying Article 7 section 5 point 1 ATCLT, it is unlawful to conclude that when the tax obligation arises in accordance with Article 3 section 1 point 1 ATCLT, tax liability arises simultaneously in the amount calculated applying the punitive tax rate. Upon fulfilment of the premises of Article 7 section 5 point 1 ATCLT, tax obligation arising from Article 3 section 1 point 1 ATCLT ceases to exist, unless it has expired before, due to prescription (Supreme Administrative Court: II FSK 3069/15; Supreme Administrative Court: II FSK 1684/15). Taxpayer’s reference to the conclusion of loan agreement, improper deposit agreement or irregular usufruct (not taxed so far) leads to transformation of the tax-law ratio in the scope of the tax rate by multiplication thereof (Goettel, 2012: 46).

Taxpayers may not calculate and pay the tax applying the increased 20% tax rate on their own. Only a tax authority is entitled to do so by issuing a decision following verification of the fulfilment of all premises provided for in the act (Supreme Administrative Court: II FSK 2391/15).



## 5 The premise of “failure to document receipt of money”

The premise of “not documenting the receipt of money” formulated in Article 7 section 5 point 2 ATCLT, as a necessary condition for the application of a punitive tax rate, applies only to one contract, i.e. a loan agreement. This provision does not apply to improper deposit and improper use agreements. Punitive tax rate should be applied when in the course of verification activities, tax inspection, tax proceedings or customs and tax control before the tax authority, the borrower refers to the fact of concluding the loan agreement but has not met the condition of documenting the receipt of the money to the bank account or their account maintained by a savings and credit union or by postal order.

This regulation applies only to the borrower who is a close relative of the lender (Supreme Administrative Court: II FSK 1901/13). The aim of this regulation is to document the money transfer between the closest relatives. In the opinion of the court, the above regulation is of technical nature, i.e. defines the manner of disclosing the actual realization of the loan agreement (receipt of money by the borrower; Voivodeship Administrative Court in Szczecin: I SA/Sz 278/15).

Three acceptable options for documenting the receipt of money by the borrower have been specified in Article 7 section 5 point 2 ATCLT. The first option is transferring the money to a bank account. The legislator has not specified in detail if the borrower should transfer the money from their account to the bank account of the borrower, or make a cash payment at the bank to the bank account of the borrower. Neither has any limitation been introduced as regards the type of the bank account of the borrower where the money received by the borrower under the pecuniary loan should be transferred. The sum of the pecuniary loan for the borrower may be transferred to any type of the borrower’s bank account or the account belonging to other person, e.g. savings account, savings and settlement account or a joint account of the borrower and other person.

The other option consists in transferring the money to the account kept by a savings and credit union. It has been clearly indicated that this type of account should belong to the borrower (a phrase: “their account” has been used). The third option of receiving the pecuniary loan is related to the use of postal order. Pursuant to Article 3 point 16 Act of November 23, 2012 Postal Law Act, a postal order is an order to deliver a certain sum money via a postal operator to the addressee. Pursuant to Article 17 thereof, postal order confirmation issued by the post office of the designated operator is as valid as an authentic instrument. The designated operator is a postal operator obliged to render services to the public.

Failure to document the receipt of the pecuniary loan in the aforementioned manner meets the condition specified in Article 7 section 5 point 2 ATCLT, resulting in applying punitive tax rate towards the borrower.

## 6 Conclusion

The aim of the paper specified in the introduction has been achieved as it has been proved that the premises justifying application of increased (punitive) tax rate formulated in the Act on the tax on civil law transactions set the limits of discretion in the operations of tax authorities performing assessment of this tax. Subjective limits of discretion in the operations of tax authorities have been specified by listing only three types of civil law transactions which in the event of non-disclosure by the taxpayer within the course of regular tax assessment procedure result in application of punitive tax rate in the amount of 20% base tax rate. Those limits are established by the following civil law transactions: loan agreement, improper deposit agreement or irregular usufruct. Moreover, the specific verification procedures constitute objective grounds for the disclosure of civil law transactions that have not yet been submitted for taxation, i.e. in the course of verification activities, tax control, tax proceedings or customs and tax control.

The subjective premises allowing application of the increased tax rate consist in specific actions by the taxpayer, i.e. reference to the past performance of one of the above-mentioned civil-law transactions, failure to report it for taxation purposes, failure to pay due tax on civil law transactions or failure to accept of the borrowed amount to the bank account, or an account maintained by a cooperative savings and credit union or by using a postal order.

The adopted hypothesis has also been positively verified. The conducted analysis of the existing legislation, doctrine and judicial decisions has indicated that tax authority may apply increased tax rate only after the taxpayer has demonstrated specific initiative. This activity by the taxpayer may take the form of their reference before the tax authority to the fact of performing one of the above-mentioned civil law transactions. The absence of such an initiative on the part of the taxpayer prevents the tax authority from operating *ex officio*, and thus constitutes an effective obstacle in the application of the increased tax rate in the amount of 20% of the tax base. The taxpayer's initiative (reference) should be implemented in a timely manner, i.e. in the course of verification procedures already instigated by the tax authority (i.e. verification activities, tax control, tax proceedings or customs and tax control).

Fulfilment of statutory requirements obliges tax authority to apply a punitive tax rate, and thus the tax authority loses any freedom of action in such a situation. Interpretation of Article 7 section 5 ATCLT leaves no doubt in this regard, as the first sentence of this provision stipulates "20% tax rate". Once the circumstances specified in this provision arise, the tax authority is obliged to levy the tax on civil law transactions at the highest rate. Should the legislator wish to leave any choice to the tax authority, the phrase used would be, for example, "may levy the tax at 20% rate".

A very high punitive tax rate, compared with other tax rates set forth in the Act on the tax on civil law transactions, should not be treated solely as a specific repression towards

the taxpayer. The problem should be analysed in a complex manner, as the tax – even relatively high – is not a form of punishment. On the one hand, introducing punitive rate in the tax on civil law transactions is an expression of the legislator's freedom of action, however, on the other hand, it may be considered a tool aimed at taxpayers respect the introduced orders for specific conduct particularly an order to disclose taxable events in the regular course.

An increased (punitive) tax rate is applied in extraordinary circumstances, the extraordinary nature of which results from the prerequisites for its application. The rate was established in order to counteract the evasion by individuals, who, in the course of the proceedings instigated regarding their undisclosed revenues, refer to performance of a civil law transaction (first of all to the fact of concluding a loan agreement) in order to avoid application of a 75% rate to undisclosed revenues. The punitive rate in the tax on civil law transactions is therefore a structural element of a comprehensive solution serving the following functions: restitutive (conditions for the reopening of tax obligation), compensatory (introducing the obligation to pay tax), repressive (a relatively high financial penalty included in the increased tax) and preventive (may curb the actions of other taxpayers aimed at evading taxation of civil law transactions).

## References

- Chojnacka, I.: Sprawiedliwość proceduralna w postępowaniu podatkowym (Procedural justice in tax proceedings). Remarks regarding the decision of the Supreme Administrative Court of April 8, 2011, ref. no. II FSK 2103/09, ZNSA no. 5 (2011).
- Chustecka, K.: Podatek od czynności cywilnoprawnych. Praktyka i orzecznictwo (Tax on civil law transactions. Practice and case law), Warszawa: Wyd. Difin, 2010.
- Dzwonkowski, H.: Sankcja w podatku od czynności cywilnoprawnych (Sanction in tax on civil law transactions), Prawo i Podatki (Law and Taxes) no. 7 (2011).
- Goettel, A.: Uprawnienie organu podatkowego do zastosowania tzw. sankcyjnej stawki w podatku od czynności cywilnoprawnych w czasie trwania kontroli podatkowej lub skarbowej (Entitlement of the tax authority to apply the so-called sanction tax rate on civil law transactions during the tax or fiscal audit), Monitor Podatkowy (Tax Monitor) no. 10 (2014).
- Goettel, A.: Zastosowanie tzw. sankcyjnej stawki w podatku od czynności cywilnoprawnych (Application of the so-called sanction rate in the tax on civil law transactions). Commentary to the decision by Supreme Administrative Court of April 8, 2011, II FSK 2104/09, Przegląd Podatkowy (Tax review) no. 5 (2012).
- Kołaczyk, T.: Przegląd zmian w zakresie zasad opodatkowania pożyczek znowelizowanym podatkiem od czynności cywilnoprawnych (Review of changes in the rules of taxation

- of loans with the amended tax on civil law transactions), Doradztwo Podatkowe (Tax consultancy) no. 2 (2007).
- Kosikowski, C., Ruśkowski, E. (eds.): *Finanse publiczne i prawo finansowe* (Public finances and financial law), Warsaw: Wyd. Wolters Kluwer, 2008.
- Liszewski, G.: *Odpowiedzialność za przestępstwa i wkrócenia podatkowe. Sankcje podatkowe* (Responsibility for tax crimes and incursions. Tax sanctions), in: Etel, L. (ed.): *Prawo podatkowe*, Warszawa: Wyd. Difin, 2008.
- Nierobisz, T., Waławczyk, A.: *Podatek od czynności cywilnoprawnych. Komentarz praktyczny* (Tax on civil law transactions. Practical commentary), Warszawa: Wyd. C.H. Beck, 2011.
- Ofiarski, Z.: *Ustawy o opłacie skarbowej oraz o podatku od czynności cywilnoprawnych. Komentarz praktyczny* (Act on stamp duty and tax on civil law transactions. Practical commentary), Warszawa: Wyd. Wolters Kluwer, 2009.
- Strzelec, D.: *Powołanie się na fakt zawarcia umowy pożyczki w toku postępowania podatkowego (kontroli podatkowej) – wątpliwości wokół stawki w podatku od czynności cywilnoprawnych* (The reference to the fact of concluding a loan agreement during the tax proceedings (tax audit) - doubts about the tax rate on civil law transactions), *Monitor Podatkowy* (Tax Monitor) no. 9 (2007).

## Legal Acts

Act of July 28, 1983, On the Tax on inheritances and bequests, as amended.

Act of September 9, 2000, On the Tax on civil law transactions.

Act of November 16, 2006, On Amending the tax on inheritances and bequests and the tax on civil law transactions, as amended.

Act of November 23, 2012, Postal Law Act, as amended.

Supreme Administrative Court: II FSK 2515/12.

Supreme Administrative Court: II FSK 573/13.

Supreme Administrative Court: II FSK 1901/13.

Supreme Administrative Court: II FSK 861/14.

Supreme Administrative Court: II FSK 1550/14.

Supreme Administrative Court: II FSK 1875/16.

Supreme Administrative Court: II FSK 686/15.

Supreme Administrative Court: II FSK 1001/15.

Supreme Administrative Court: II FSK 984/15.

Supreme Administrative Court: II FSK 1161/15.

Supreme Administrative Court: II FSK 1684/15.

Supreme Administrative Court: II FSK 3069/15.

Supreme Administrative Court: II FSK 2109/15.

Supreme Administrative Court: II FSK 2391/15.

Voivodeship Administrative Court in Lublin: II SA/Lu 156/13.

Voivodeship Administrative Court in Gliwice: I SA/GI 143/14.

Voivodeship Administrative Court in Gliwice: I SA/GI 383/17.

Voivodeship Administrative Court in Kraków: I SA/GI 1638/13.

Voivodeship Administrative Court in Łódź: I SA/Łd 978/12.

Voivodeship Administrative Court in Olsztyn: II SA/OI 9/17.

Voivodeship Administrative Court in Olsztyn: I SA/OI 520/09.

Voivodeship Administrative Court in Olsztyn: I SA/OI 521/09.

Voivodeship Administrative Court in Szczecin: I SA/Sz 278/15.

Voivodeship Administrative Court in Warsaw: III SA/Wa 152/16.

---

# ELECTRONIC REVENUE REGISTRY AS A TOOL FOR FAIR TAX PAYMENTS

*Michal Radvan*<sup>1</sup>

## **Abstract**

After a long-term debate and almost two years of legislative work, the Revenue Registry Act was adopted in the Czech Republic. The first and main reason for introducing the revenue registry was the lack of instruments of the Tax Administration to fight tax evasions. The second reason was the elimination of unfair competition based on gain of undue advantage by not paying the value added tax (VAT) and the income tax. The system of the revenue registry in the Czech Republic is founded on several principles that distinguish it from other systems based on a cash register or other systems of electronic evidence. The revenue registry is based on the principles of electronisation, on-line access of tax administrator to information, the possibility of voluntary public involvement into oversight and open hardware and software solution. Unfortunately, shortly after the adoption by the Parliament, the group of legislators started a case at the Constitutional Court, demanding the abolition of the Revenue Registry Act or at least some parts of the Act because of its unconstitutionality. They were partially successful and now the Ministry of Finance has been tasked with the preparation of an amendment to the Act. The goal of this contribution is to briefly introduce and describe the Revenue Registry Act, critically analyse the fundamental provisions of the Act, summarize pros and cons of the regulation, critically analyse the decision of the Constitutional Court and introduce the Ministry's proposal of amendments. The hypothesis that the electronic revenue registry is an effective tool for fair tax payments was neither confirmed nor disproved: The electronic revenue registry might be an effective tool for fair tax payments, but only in case of unified rules for all businessmen. The higher the number of exemptions is, the less effective tool the revenue registry is.

## **Key words**

Electronic revenue registry; sales revenue registry; tax law; tax; income tax; Czech Republic.

**JEL Classification:** K34

## **1 Introduction**

After a long-term debate and almost two years of legislative work the Revenue Registry Act (Act no. 112/2016 Sb.) was adopted in the Czech Republic. The first and the main reason for introducing the revenue registry (translated by some authors as sales registry)

---

<sup>1</sup> Michal Radvan is vice-dean for foreign and external affairs at the Faculty of Law, Masaryk University, Czech Republic, and Associate Professor of Financial Law at the Department of Financial Law and Economics. He specializes in tax law. He is the author of 5 books and the coauthor of almost 45 books. He presented his scientific research in approx. 80 reviewed articles in prestigious journals and conference proceedings. He is a member of the European Association of Tax Law Professors and the Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. ORCID: 0000-0002-9858-4555. E-mail: [michal.radvan@law.muni.cz](mailto:michal.radvan@law.muni.cz)

was the lack of instruments of the Tax Administration to fight tax evasions. The Ministry of Finance assumes that in 2012 income worth of 162 billion CZK was not reported (Chamber of Deputies, 2015 *Závěrečná...*). The second reason was the elimination of unfair competition based on gain of undue advantage by not paying the value added tax (VAT) and the income tax. The third reason was restricting the grey economy and the last reason was making tax collection more efficient (Chamber of Deputies, 2015 *Návrh zákona...*). The system of revenue registry in the Czech Republic is founded on several principles which distinguish it from other systems based on cash registers or other systems of electronic evidence. The revenue registry is based on principles of electronisation, on-line accessing information by the tax administrator, the possibility of voluntary public involvement into oversight and open hardware and software solution (Chamber of Deputies, 2015 *Návrh zákona...*: 15).

Unfortunately, shortly after the adoption by the Parliament, a group of legislators started a case at the Constitutional Court demanding the abolition of the Revenue Registry Act or at least some parts of the Act, because of its unconstitutionality. They were partially successful and now the Ministry of Finance has been tasked with the preparation of an amendment to the Act.

The goal of this contribution is to briefly introduce and describe the Revenue Registry Act, critically analyse fundamental provisions of the Act, summarize pros and cons of the regulation, critically analyse the decision of the Constitutional Court and introduce the Ministry's proposal of the amendment. The hypothesis to be either confirmed or disproved, using the synthesis, is that the electronic revenue registry is an effective tool for fair tax payments. Some parts of the text follow up on Radvan's article (Radvan, 2013), which deals with an obligation to issue a receipt, and Radvan's and Kappel's article (Radvan, Kappel, 2015) introducing the system of revenue registry planned to be applied in the Czech Republic.

## **2 Historical Legal Background of Issuing Receipts**

For many years customers not only in the Czech Republic are asked a question during their purchase of goods or provisions of services whether they wish to be issued a receipt. A negative answer usually means that the goods or services are cheaper because the business entity will not pay the income tax, and if it is a VAT payer then neither VAT (Radvan, 2013).

The general obligation to automatically issue the document about the purchase of goods or provision of service to the customer did not exist before the Revenue Registry Act. There was such an obligation of business entity to issue a document about purchase of goods or a service governed by the Trade Licensing Act, however the obligation did not apply automatically, but only when the customer asked for a receipt. This benevolent legal regulation did not always apply in the past. During the summer of 2005, particularly from July 1<sup>st</sup> to September 18<sup>th</sup> business entities were obligated to issue a document about the purchase

of goods or provision of service every time the price was higher than 50 CZK (about 2 EUR). This obligation was cancelled by Act no. 358/2005 Sb., on providing state's guarantee for the security of a loan provided by the company EUROFIMA. It was a typical rider to the bill that was proposed by the Committee for economy, agriculture and transportation of the Czech Senate. Similarly according to the Consumer Protection Act the seller was obligated to issue a receipt only at the customer's request (Radvan, Kappel, 2015: 140-142)

There are two other acts dealing with the tax or similar documents. The Accounting Act deals not with tax documents but with accounting documents. The regulation of tax documents is customized by the VAT Act; the taxpayer is obligated to issue a tax document in 15 days from the day of taxable supply. The tax documents are in particular regular tax documents, simplified tax documents, summary tax documents, repayment schedules, payment schedules etc. The obligation to issue a tax document, payment receipt, payment schedule etc. is general, meanwhile the obligation to issue a simplified tax document is the taxpayer obligated upon request at the moment of taxable supply or immediately after accepting the payment, if the payment precedes the moment of taxable supply. The issuing of simplified tax documents is very common and goes on de facto whenever the taxpayer carries out the taxable supply by cash remuneration, by card or cheque. The tax documents are also issued when the taxpayer provides services through electronic instruments and the provision is conditioned by payment and when the payment is made by bank transfer. The only condition is the maximum amount for taxable transactions which, including value added tax, does not exceed 10,000 CZK (about 400 EUR). Simplified tax receipt cannot be issued for the sale of goods which are subjected to excise duty on alcohol and tobacco products, but at other than fixed prices for the final consumer. So that even in case of purchasing tobacco products at the price shown on the duty stamp or the purchase of alcohol in retail, a simplified tax document can be issued (Radvan, Kappel, 2015: 142-143).

### 3 Revenue Registry Act

The main goal of the revenue registry is the improvement in acquiring information used in tax collection. Other goals are the reduction of grey economy, more effective tax collection and balancing current market inequalities (Chamber of Deputies, 2015, Návrh zákona...: 15). Drafters of the Revenue Registry Act were almost exclusively inspired by the Republic of Croatia and its Cash Transaction Fiscalization Act (also Fiscal law) which is in force since 2013 (Radvan, Kappel, 2015: 145-146).

The Revenue Registry Act defines the subject of revenue registry as both the personal and corporate income taxpayers. The object of revenue registry is a cash transaction of a taxpayer which meets three following legal characteristics (Radvan, Kappel, 2015: 147):

- Subjective characteristic means that the payment is an income of income taxpayer (both legal and natural entities);



- Formal characteristic requires that the cash transaction is made by banknotes or coins, cards, cheques, bills of exchange, vouchers, alternative currencies etc.; payments via bank transfers, collections, letters of credit or any similar payment methods are not subjects to revenue registry;
- Material characteristic is fulfilled if the qualified income originates from business, it is not sporadic or subjected to flat-rate tax and the recipient is an income taxpayer.

The law specifies several absolute exceptions which are founded on the more stringent regulations and obligations that certain subjects are required to comply with. Other exemptions are based on the absence of need to impose obligations to fulfil the purpose of the law. The first mentioned exemption deals with public licences, e.g. on financial and energy market. The second listed exemption deals with income of public service, government and similar corporations that have no reason to breach their reporting obligations. Government also has the authority to issue an ordinance which may contain other exemptions justified by disabling or hindering effective or efficient execution of business activities if obligations are imposed, providing that these exemptions do not threaten the purpose of the revenue registry (Radvan, Kappel, 2015: 148).

A subject who performs a registered transaction in standard procedure has two major obligations. Firstly, he is required to send an electronic XML message with the prescribed particulars. This obligation is to be fulfilled automatically by the software of his cash register or computer. The second major obligation is to issue a receipt for a customer who is not obligated to take it, however. Therefore, the term “issue” has to be interpreted as giving the customer the opportunity of taking the receipt; however there is no obligation of the buyer to take and keep the issued receipt after leaving the business premises (Radvan, Kappel, 2015: 149).

Procedural exception from the standard is a simplified procedure which allows subjects to issue a receipt without fiscal identification code and register the transaction in five following days. This could be considered as one of the most important advantages of the Czech draft, because even simplified procedure is concluded electronically (Radvan, Kappel, 2015: 150).

The maximum fine for those breaking the law regulated by the Revenue Registry Act (incl. those businessmen not issuing a receipt) is 500,000 CZK (approx. 20,000 EUR).

The most important change of the Revenue Registry Act was undertaken by the Chamber of Deputies; deputies postponed the legal effect of the regulation for several industries stating four phases of revenue registry. The first phase effective only for catering services and those who provide accommodation, started on December 1, 2016. On March 1, 2017, retail and wholesale were included. After another year (March 1, 2018) the revenue registry was prescribed for the rest of businesses apart from traditional crafts and, for example, wood, textile, paper or cosmetic industry, because to those the Act applies after another three months (June 1, 2018).

## 4 Constitutional Court's Finding

Only the first two phases of the revenue registry really started. Shortly after the adoption by the Parliament, a group of legislators started a case at the Constitutional Court demanding either the entire abolition of the Revenue Registry Act or at least some parts of the Act because of its unconstitutionality. They were only partially successful. The Constitutional Court (2017) stated that there were several procedural mistakes in the process of the adoption of the draft act, but the intensity of those mistakes did not lead to the unconstitutionality of the Revenue Registry Act. The Constitutional Court investigated the system of the revenue registry and its compliance with the basic rights (protection of ownership, right to run a business, etc.) and stated that the Revenue Registry Act itself was not unconstitutional. However, some parts of the Revenue Registry Act were found unconstitutional and the Courts abolished those regulations.

Even though the Court agreed that the aim of the Revenue Registry Act is the possibility to get information about payments (both cash and electronic), it cancelled the duty to register non-cash payments (payments by card). The Court argued that there were other ways how to get information about such a payment. I strongly disagree. Even the tax administrator has a right to get the information, there are 581 billion card transactions yearly (Boháč, 2018), with different types of cards, by different providers and banks. Taking into account the principles of proportionality (anyway used by the Court), it would be much more effective to leave non-cash payments in the revenue registry.

The Court cancelled the duty to show tax ID on the bill if it is a natural person, because the ID of a natural person creates a substantive part of the tax ID. Because of the previous findings of the Court, and because of the GDPR, this was not a great surprise and I agree with the argumentation of the Court.

The Revenue Registry Act included three possibilities for the government to issue bylaws: to specify revenues registered in the simplified procedure, to exclude some types of revenues (which was implemented for blind persons), and to add some revenues into the list of temporary excluded revenues (which was implemented for the Christmas carp sales). In case of the last bylaw there were neither limitations nor conditions, I agree with the Constitutional Court only in this case. As for the other two situations, it is very common that there is a general regulation in the act and conditions to adopt an ordinance and the government has the right to do that, respecting these general rules and legal limitations. Of course it is crucial to respect that only an act can impose a duty.

The most surprising for me was the abolishment of the third and fourth phase of the revenue registry. The Court argued that the legislator did not take into account possible impacts on businessmen. Such an argument is really weak, especially if the impact on business was taken into account just by the phasing of the revenue registry. Moreover, the constitutional complaint of the group of legislators did not include the demand to cancel any phases of the revenue registry. The Constitutional Court took its decision without any basis and I find the decision of the Constitutional Court unconstitutional.

The same (even though not so strict conclusion) is published in *votum separatum* by two constitutional judges Tomková and Fiala.

Another *votum separatum* was published by five constitutional judges; they wanted to completely abolish the revenue registry because of its inconsistencies with basic rights (protection of ownership, right to run a business, etc.) (Boháč, 2018).

The final conclusion of the Constitutional Court is an advice to amend the Revenue Registry Act: to specify businessmen excluded from the revenue registry, to think about voluntary revenue registry (*sic*), to think about a long *vacatio legis* (*sic*, as the Court decided only three months before the start of the third phase).

## 5 Conclusions de lege ferenda

After the decision of the Constitutional Court abolishing several technical aspects of the revenue registry and especially its third and fourth phase, the Ministry of Finance has to prepare an amendment to the Act as quickly as possible. It is obvious that nowadays there are groups of taxpayers with and without the revenue registry, which creates inequalities at the market. The obstacle for the effective tax administration is the lack of information on card transactions.

The approaches might be different. A group of deputies wanted to completely abolish the revenue registry; they were not successful in January 2018. The other group of senators wanted to make an exemption from the revenue registry for social service providers and doctors and hospitals. Their proposal did not get enough votes in March 2018.

The Ministry of Finance prepared a complex amendment, discussed with academia, businessmen and their associations and other stakeholders. There are several substantive changes. For example, due to the complications of Czech tax residents abroad, only revenues from the territory of the Czech Republic are to be registered. Payments using the so-called prepaid cards are the object of the revenue registry. The tax ID must be a part of the bill, only if the personal ID is not a part of the tax ID. Unfortunately, in at least two issues, the Ministry of Finance has resigned from the effort of unified revenue registry. The first group consists of non-cash payments, i.e. payments by cards are not to be registered. The second issue is the reaction to the finding of the Constitutional Court (incl. *votum separatum*), dealing with the basic characteristics and phases of the revenue registry. The Ministry of Finance has prepared an alternative possibility for small businessmen: a special regime is available on request for a natural person, who is not a VAT payer, has a maximum of one employee, his revenues did not exceed 200,000 CZ (approx. 8,000 EUR) in the past year and planned revenues do not exceed the same amount the next year and the number of payments does not exceed 1,000 in the past year and the next year it will not exceed the same limit. The businessman using the special regime will get blocks of bills from the tax administrator to use the bills for his customers. He will have to keep the evidence of daily revenues and he will have to

announce monthly revenues to the tax administrator, no later than the twentieth day of the next month. With this special regime, the third and the fourth phases are to be started on the first day of the third month following the adoption of the act.

Well, I would be stricter and I would not respect the decision of the Constitutional Court. However, the Ministry of Finance is not in the same position as me on the academic level. The Ministry is trying to find a way to respect the Court's decision, on one hand, and the principles of revenue registry, on the other hand. And I can understand it is quite difficult to stay balanced. The draft of the amendment might be changed in the Parliament, probably it will be opened again by unsuccessful deputies or senators at the Constitutional Court.

The electronic revenue registry might be an effective tool for fair tax payments (so that the hypothesis stated at the beginning might be confirmed), but only in case of unified rules for all businessmen. The higher the number of exemptions is, the less effective tool the revenue registry is. And I have omitted the most crucial question: Why do we need the revenue registry? The answer is: To get the information about the revenue (because some businessmen do not issue the bills and they pay taxes on lower revenues). But should a special regime be a way of getting information about the real revenues?

## References

- Boháč, R.: Evidence tržeb v České republice s ohledem na rozhodnutí Ústavního soudu (Evidence of sales in the Czech Republic in the light of the Constitutional Court's decision), in: Bratislavské právnické dny, Bratislava: Univerzita Komenského, 2018 (in print).
- Radvan, M.: S dokladem, nebo bez? (With proof, or without?), in: Dny práva 2012 – Days of Law 2012. Část X. Veřejná finanční činnost - právní a ekonomické aspekty, Brno: Masaryk university, 2013.
- Radvan, M., Kappel, J.: Electronic Revenue Registry in the Czech Republic, *LeXonomica - Revija za pravo in ekonomijo*, Journal of Law and Economics no. 2 (2015).

## Legal Acts

- Chamber of Deputies of the Parliament of the Czech Republic (2015) Závěrečná zpráva hodnocení dopadů regulace. <http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=513&CT1=0> (Prague: Parliament of the Czech Republic).
- Chamber of Deputies of the Parliament of the Czech Republic (2015) Návrh zákona včetně důvodové zprávy. <http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=513&CT1=0> (Prague: Parliament of the Czech Republic).
- CZ: Constitutional Court (2017). Finding no. Pl.ÚS 26/16 (12. 12. 2017).

---

# EFFICIENCY AND EFFECTIVENESS OF TAX ADMINISTRATION AND THE RIGHTS OF TAXPAYERS IN THE LIGHT OF THE FIRST EXPERIENCE OF THE FUNCTIONING OF THE REFORM OF THE NATIONAL REVENUE ADMINISTRATION IN POLAND

*Eugeniusz Ruśkowski<sup>1</sup>, Piotr Woltanowski<sup>2</sup>*

## Abstract

The reform of the NRA entered into force on 1 March 2017. Its aim was to increase the efficiency and effectiveness of the tax administration with additional security of the rights of honest taxpayers and citizens. The first experience of the reform indicates several positive results, with the appearance of certain tensions and problems in the case of other issues. The article presents the assumptions of the reform, its objectives and general principles, and the first results of their application, assuming that a full assessment requires time and independent, multi-faceted research.

## Key words

NRA, efficiency, effectiveness, taxpayers' rights, employee rights.

**JEL Classification:** K34, K31, K38, H21

## 1 Introduction

The Act of November 16, 2016 on National Revenue Administration (Act no. 1947/2016) and the Regulations introducing the Act on the National Tax Administration (Act no. 1948/2016) established the legal grounds for the reform of the NRA, which entered into force on March 1, 2017. It was aimed at improving the efficiency and effectiveness of tax services, assuming the preservation of all citizens' rights and even their improvement in some areas. With a focus on the relentless fight against tax crime, it was pointed out that it was conducted in the interest of honest citizens

---

<sup>1</sup> Full Professor; Head of the Department of Public Finance and Financial Law at the Faculty of Law, University of Białystok and the Information and Research Center of Public Finance and Tax Law of Central and Eastern European Countries. Author of 350 publications on public finance and financial law, several dozen of which are in foreign languages. Contact email: eugen@list.pl

<sup>2</sup> Doctor of Legal Sciences, Secretary of the Board of the Center for Information and Organization of Public Finance and Taxation in Central and Eastern Europe and its founding member. Lecturer at the University of Białystok. Author of over 60 publications in the field of public finance, tax administration, health care and social security finances. Permanent mediator of the District Court in Warsaw in commercial cases. Contact email: piotrwoltanowski@gmail.com

and entrepreneurs. After several months of the functioning of the reform, society is receiving both positive assessments of its results, reported in particular by the management of the NRA, and information about irregularities and threats, formulated by some professionals, constitutional authorities and some employees of the tax administration. In the opinion of the authors of this article, the maintenance of the right proportions between improving the efficiency and effectiveness of the tax administration and respecting the rights of taxpayers will be very important for the final evaluation of the NRA reform. The potential diversity of assessments in this field should be eliminated by the results of in-depth scientific studies.

## 2 Assumptions of the reform

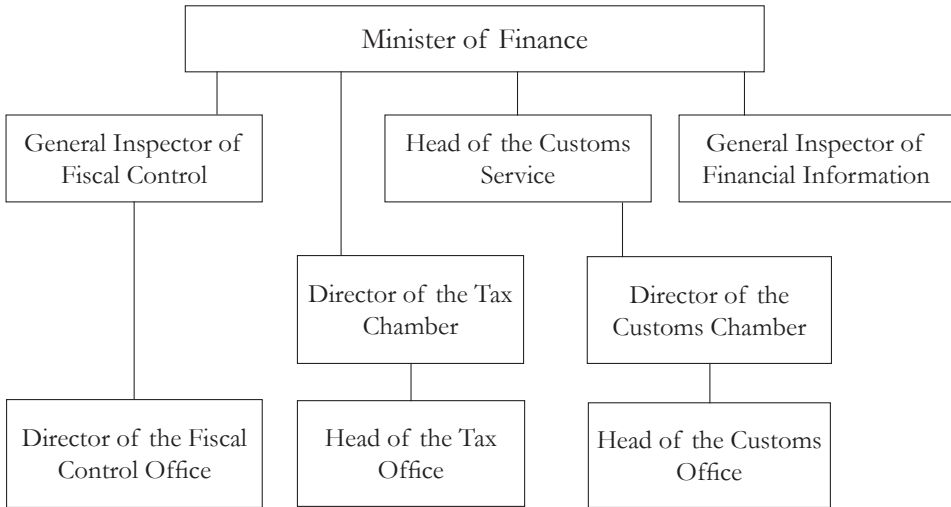
Attention is drawn to the fact that both the doctrine and practice as well as representatives of international bodies and institutions have long had a critical attitude towards the structure and results of the activities of the tax administration in Poland at the central level. In the doctrine, it was postulated, among others, to increase the efficiency of tax proceedings and tax administration through their reform (Staniszewski, 2007: 312-315), to organize relations between tax administration and tax inspection (Etel, Kosikowski, and Ruśkowski, 2006: 90-99; Stachurski, 2006), to base the activity of tax administration on the principle of linking the structure of organs with the functions they perform (Kulicki, 2014: 583), to organize and harmonize employee relations (Ruśkowski, 2007: 61-65, Kosikowski, 2007), to simplify the structures of tax administration and improve the coordination of their activities (Teszner, 2012: 328), and also to implement reform at the local government level (Smoleń, 2009: 239, Burzec, Smoleń, 2016: 305-306). From the point of view of scientific honesty, it should be stressed that some of the proposed solutions were mutually exclusive.

In the 21st century, numerous draft reforms of public tax administration were developed at the central level, which took the form of reports (such as the Strategy for modernization of the Polish tax administration by 2004), unenacted draft acts (draft Act of August 10, 2007 on the National Revenue Administration), and even acts (Act of July 10, 2015 on tax administration (Act no. 1269/2015), which in practice never came into force. In the opinion of the OECD, the IMF and the European Commission, the Polish tax administration was ineffective and not modern (International Monetary Fund, Fiscal Affairs Department, 2015, OECD, 2015).

In the conclusion of these considerations, it can be stated that individual elements of the public tax administration at the central level in Poland were established in different periods and were regulated by separate laws (Act on Tax Audit, Act on Tax Offices and Tax Chambers, Act on the Customs Service), creating in 2016 a complicated, non-transparent structure, partly duplicated, with a non-uniform employee status and various remuneration systems, whose segments often competed with each other, and which was

therefore not very effective and cost-intensive.<sup>3</sup> The diagram of its organs is presented in the figure below.

Figure 1: Organs of public tax administration in Poland in 2016 (before the introduction of the NRA reform)



Source: own elaboration

### 3 Objectives and basic solutions of the NRA reform

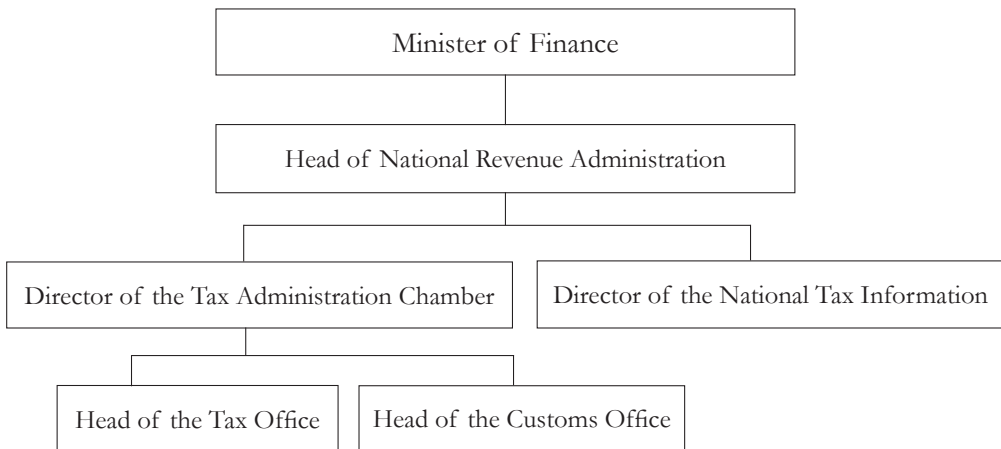
The NRA reform enacted in 2016 declares that all the existing problems of public tax administration in Poland will be resolved, as can be seen both in the preamble to the Act on NRA and in the excerpts of the justification of the draft act. There are many new solutions introduced by the Act on NRA and the law introducing it. I will focus below on the most important of them, referring them to the above-mentioned goals of the reform.

According to art. 11 of the Act of November 16, 2016 on National Revenue Administration, the NRA authorities are the minister responsible for public finance, the Head of the National Revenue Administration, the Director of the National Tax Information, the Director of the Tax Administration Chamber, the Head of the Tax Office and the Head of the Customs Office. According to art. 36 et seq., the Act provides that the organizational

<sup>3</sup> E. Ruśkowski first included point 1 and fragments of point 2 in the work: *Reforma Krajowej Administracji Skarbowej – szanse i zagrożenia* [Reform of the National Revenue Administration opportunities and threats], w: J. Gliniecka, A. Drywa, E. Juchniewicz, T. Sowiński (eds.), *Praktyczne i teoretyczne problemy prawa finansowego wobec wyzwań XXI wieku* [Practical and theoretical problems of financial law in the face of the challenges of the 21st century], CeDeWu, Gdańsk 2017.

units of the NRA are the organizational units of the office servicing the minister, the National Tax Information, tax administration chambers, tax offices, customs offices along with subordinate customs departments, the Tax and Customs Academy and the NRA IT Centre. The diagram of the new structure of the NRA authorities is shown in Figure 2. Comparing it with the previous structure of the central tax administration (Figure 1), one can conclude that it has been significantly simplified and considerably consolidated. This creates objective conditions for more efficient management of tax administration as a whole, improving the situation in terms of simplification of procedures, exchange of information and increased operational efficiency. The authors of the new acts on the NRA adopt a simplified assumption that the reform eliminates the hitherto tripartism of structures and procedures (separated organizationally and by legislation), replacing them with a uniform system. Indeed, the tripartite nature has been replaced by bipartisan structures and procedures (the tax element and customs element), with not entirely separated structures, which may naturally create difficulties in their application.

Figure 2: Structure of NRA organs



Source: own elaboration

The apparent results of the unification of the structures of the central tax administration also include the liquidation of tax control as a separate institution, which in addition, was perceived badly by society. Under the NRA, tax control does not formally exist, but its functions are taken over by customs control. As so-called hard control, it has much greater possibilities of action (both competence, personnel and material) than the current tax control. The NRA reform does not eliminate most of the shortcomings of the previous tax control (e.g. certain arbitrariness in tax or customs control), but introduces a series of new, controversial solutions (e.g. appeal to the authority issuing the initial decision).



One of the main postulates of the reform of the central tax administration was the need to organize personnel issues. This is because the implementation of all the objectives of the reform, the element of which is “the development of professional staff”, depends on them. Therefore, the undoubted success of the Act on NRA is the establishment of the Tax and Customs Academy. The development of professional staff, with high morale, is a long-term task. When implementing this, specific long-term principles must be observed and it is necessary to avoid extreme HR solutions, first and foremost the so-called “0” option! Despite numerous objections of the doctrine (Ruśkowski, 2007: 67), the authors of the act on NRA decided on this solution.

#### **4 Improvement of the efficiency and effectiveness of the tax administration**

These considerations should start with a methodological remark that the assessment of the efficiency and effectiveness of the tax administration (and also the degree of its improvement) requires the construction of a broad concept of efficiency and effectiveness and a complex measure that has not been applied so far. As it is widely understood by the authors of the Act on NRA, who in one of the justifications for the draft act point out that this is about: “effective tax collection, streamlining taxpayer service, effective administrative enforcement of monetary claims, reducing the tax gap, improving the effectiveness and efficiency in combating tax fraud and tax and customs arrears, improving taxpayer service and support, including entrepreneurs in the proper performance of tax and customs duties, clarifying the responsibility of persons managing tax administration, uniform case law on tax and customs matters throughout the country, effective, i.e. reliable and quick verification, of data provided by taxpayers in tax declarations and customs documents, increasing the efficiency and effectiveness of taxpayers’ compliance with tax obligations, the efficient flow of information, better cooperation between all tax administration authorities, improving the staff selection system, training and motivation of staff, creating a system for collecting and analysing data, improving the system ensuring the financial security of the state, the proper organization of customs protection of the eastern border of Poland, which is also the eastern border of the European Union, and improving the image of the tax administration.”

The costs account of the tax administration has a direct influence over the measurement of the effectiveness of the NRA (and its improvement). According to the assessment of experts, this is an intuitive category for now, not based on serious research and calculations. One should agree in this respect with J. Kulicki that minimizing tax collection costs cannot lead to a collapse of the tax administration, because then the state will bear the costs of its negligence, and not its actions, and the first are always higher than the costs of action (Kulicki, 2016: 25).

The improvement of the efficiency and effectiveness of the tax administration is also associated with the introduction of new solutions and instruments, partly independent of the NRA reform, but designed to serve the new administration. These include changes to the Penal Code (e.g. invoice offences, extended confiscation) as well as changes in the tax structure (e.g. split-payment) and accounting (JPK, STIR). Therefore, it is correct to state that they could have been introduced without the NRA reform. Currently, however, they must affect the functioning of the NRA, and the extent of this impact cannot be determined as a percentage. Several months after the entry into force of the Act on NRA, it is possible to speak at most about the fragmented (selected) effects of the reform, which demonstrate the improved efficiency and effectiveness of the tax administration. This can be demonstrated mainly by an increase in VAT revenues and total tax revenues of the state budget (Banaś, 2017: B2).<sup>4</sup> The number of preparatory proceedings instituted by the NRA and the percentage of convictions in these cases is also higher (Szulc, 2017(1): 8). The data from reports published by PwC and the CASE foundation regarding the VAT gap are also optimistic. In their opinion, this gap, amounting to 2.9% of GDP in 2016, will drop to 2.0% in 2017, and in 2018 it will reach 13% of potential income from this tax, i.e. a level close to Germany and the UK. Despite the significant tax gap in VAT, the rate of its reduction in Poland is the highest in Europe (Szulc, 2017(2): 3). The improved effectiveness and efficiency of the functioning of the tax administration is also supposed to be confirmed by the smaller number of controls of entrepreneurs, which are, however, better prepared and give greater effects. While in the first half of 2015 there were about 30,000 controls and irregularities were found amounting to approximately PLN 400 million, in the first half of 2017 there were only 14,000 controls, while irregularities were found amounting to more than PLN 1 billion (Banaś, 2017: B2). However, it should be noted that the excise duty was implemented in 2017 below the planned level, taxpayers do not notice an improvement in their service, and the reform has caused numerous staff and organizational problems (Godusławski, Chądzyński, 2017: 3). However, while waiting for more extensive data on the functioning of the NRA, one should agree with the head of the NRA that the reform has created the basis for better information flow in the tax services and allows action to be taken quickly, often pre-empting the actions of tax offenders (Banaś, 2017: B2).

## 5 Employee rights in the NRA reform

One of the main demands of the repair of the central tax administration was the need to put personnel matters in order. As already mentioned, the authors of the Act on NRA decided to introduce the “0” option. Generally, the employment relations and duties of persons employed at the NRA expired on August 31, if these persons did not receive a

<sup>4</sup> In the period: January-August 2017 income from VAT was 23.5% higher than income in the same period in 2016, while tax income was 15.5% higher.

written proposal specifying the new terms of employment or service by May 31, 2017, or after three months from the month following the month in which the employee or officer submitted a declaration of refusal to accept the offer, but no later than 31 August 2017.<sup>5</sup> As a result of this operation, 3,176 people left out of approx. 65,000 employees, of whom 1,313 retired and 153 were collaborators of the communist secret police. 3,839 people lost the status of customs officer in connection with the reform, and 635 civilian employees gained the status of officer (Szulc, 2017 (3): 7). In general, the staff level of the tax administration compared to the level before the reform decreased by approx. 3,000 people, mainly at the expense of the number of full-time jobs for the officers of the Customs and Tax Service. Although the authors of the NRA reform consider the implementation of the presented solutions as a success, it led at least some NRA employees to believe that it was a “violation of citizens’ trust in the state”, because the state changed the rules of employing employees, not only departing from the statutory rules, but also in relation to some of them, from the guarantees established in the Constitution of the Republic of Poland. Disputes in this respect will be resolved by the Constitutional Tribunal (Wiktorowska, 2017: 3) and courts.

## **6 Protection of advocate’s and legal counsel’s confidentiality in the context of the provisions of art. 72 para. 3 of the Act on NRA**

Article 72 para. 3 of the Act on NRA stipulates that persons authorized to represent or conduct the case of the controlled party are obliged to provide explanations regarding the subject of the customs and tax control, resulting from the scope of activities or tasks performed. This provision is worrisome, because it should be assumed that according to its current practice, the NRA authorities will apply – also in this case – a literal interpretation only (Kosińska, Woltanowski, 2007: 211), according to which such a provision also imposes these obligations on attorneys, legal counsels and tax advisors representing the controlled party. Meanwhile, it is necessary to strongly stress the need to interpret the systemic provision of Article 72 para. 3 of the Act on NRA taking into account constitutionally and legally guaranteed protection of the professional confidentiality of advocates, legal counsels and tax advisors (Commissioner for Human Rights: V.711.6.2017.KB). These provisions (in their current form and using literal interpretation) affect the very essence of these professions and may lead to a gross violation of one of the fundamental rights of an individual in a state governed by the rule of law, which is the right to defence (Commissioner for Human Rights: II.501.4.2017.MH). Although the Constitution does not contain a provision that would directly protect professional confidentiality in matters covered by customs and tax control, such protection is an important element of the rule of law, “whose requirement is the existence of a legal aid system independent of the public authorities (Article 2 of the Constitution of the Republic of Poland)” (Commissioner

---

<sup>5</sup> The above rules do not apply to civil servants, to whom the provisions apply of chapter 5 of the Act of November 21, 2008 on the civil service (Journal of Laws of 2016, item 1345, as amended).

for Human Rights: V.711.6.2017.KB). In addition, the appropriate level of protection of professional secrecy in this area is *condicio sine qua non* of the rights of defence expressed in art. 42 para. 2 of the Constitution, which is not limited to the secrecy of a defence lawyer in criminal proceedings) (Commissioner for Human Rights: V.711.6.2017.KB). According to the Constitutional Tribunal, “the provision of legal assistance by a legal counsel in the context of the performance of a profession of public trust is covered by strengthened constitutional guarantees as a form of an institutionalized legal aid system” (Constitutional Tribunal: Ts 263/13).

Pursuant to art. 31 para. 3 of the Constitution, which is key to the constitutional principle of proportionality, restrictions on the use of constitutional freedoms and rights may be established only in statute and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the rights and freedoms of others and at the same time these restrictions cannot violate the essence of freedoms and rights. In this context, the provisions of art. 72 para. 3 of the Act on NRA can be regarded as justified by the need to ensure the state budget revenues at an appropriate level – this is a protected constitutional value constituting an element of state security recognized in the previous rulings of the Constitutional Tribunal (Woltanowski, Kosińska, 2013: 208). However, it is difficult to accept that they do not violate the substance of professional secrecy of advocates, legal counsels and tax advisors. There is not even concern here for such minimum protections as in art. 180 of the Act of June 6, 1997 – Code of Criminal Procedure. It should be emphasized here that pursuant to art. 83 § 2 of the Act of June 14, 1960 Code of Administrative Procedure and art. 196 § 2 of the Act of August 29, 1997 – Tax Ordinance here is no possibility of violating the professional secrecy of an advocate, legal counsel or tax advisor comparable to those provided for in the Act on NRA. It seems that the legislator should consider removing this provision, which raises serious doubts as to its constitutionality, and until that time, the provisions establishing professional secrecy of advocates, legal counsels and tax advisors should be recognized as *lex specialis* in relation to the provisions of art. 72 par. 3 of the Act on NRA.

In this context, it is necessary to mention the discussions regarding the provisions, which the Ministry of Finance is working on, establishing obligations on advocates, legal counsels and tax advisors in the scope of providing the NRA with information about suspicious optimization schemes of their clients. (Interpellation no. 17664/2017). This work is related to the draft directive presented by the Commission on June 22, 2017 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements COM(2017)335 and aims to seal the system and introduce tools that will secure proper budgetary revenues in EU countries (Commissioner for Human Rights: V.711.6.2017.KB). It is all the more interesting that the Ministry’s argument in this matter could also apply in the eventual matter of the constitutionality of the provisions of art. 72 par. 3 of the Act on NRA. In response to the interpellation, the representative of the Ministry indicated that the scope

of application of professional secrecy had already been reduced, for example, under the provisions of the Act of November 16, 2000 on counteracting money laundering and terrorism financing, which does not seem to be a valid argument due to restrictions in this respect resulting, among others from the content of art. 11 para. 5 of this Act and the uniqueness of the subject regulated by this act. Interestingly, the Ministry decided that it is necessary to separate cases in which the breach of confidentiality “*violates the essence of trust between the party performing the regulated profession and its client*” – and these are, among others, personal, family, civil, criminal, and penal fiscal matters and matters related to the defence of the client’s interests in administrative, tax or court-administrative proceedings, and the second group – the issues of “*tax advice aimed at circumventing tax law cannot be treated as a private matter.*” (Reply to interpellation no. 17664/2017). Such an approach to the case is striking by its arbitrariness, but it should be stressed that the Ministry in the reply to the interpellation accepted that all tax matters (apart from activities *aimed at circumventing tax law*) should be covered by the protection of professional secrecy.

## **7 The local jurisdiction of customs and tax authorities resulting from art. 61 of the Act on NRA, and access to the case file and the right to court**

According to the provisions of art. 61 of the Act on NRA, the head of the customs and tax office may perform a control over the entire territory of the Republic of Poland. In the justification to the Act on NRA, we read that it is supposed to have “a direct impact on streamlining and accelerating the conducted control,” dictated by, “the need to use the potential of the NRA more effectively,” and eliminate, “problems occurring in certain situations related to determining the authority competent to carry out controls as well as the obstruction of the control by changing the registered office, place of residence or place of business.” In practice, this solution has increased the efficiency of the tax administration’s work, but it has not been taken into account that such a broadly defined local jurisdiction will also mean a significant limitation of the controlled party’s access to the case file. This can only be partially compensated for by the postulate in the literature for a particular meticulousness in such times in the field of information about documents that enter into the case file and all action undertaken in the case by the controlling authority (Melezini, Teszner, 2018: 280); however, the restriction of the controlled party’s access to the case file remains a phenomenon difficult to explain on the grounds of the constitutional principle of equality.

These solutions seem questionable from the point of view of their compliance with the Constitution also on the grounds of retaining the right to court. Since the competent court to hear the case is the regional court on whose jurisdiction the public administration body whose activity has been contested is located, the seat of the customs and tax control authority determines indirectly (after transforming the customs and tax control into tax

proceedings) the local jurisdiction of the provincial administrative court. Therefore, not only tax control and proceedings, but also court and administrative proceedings may take place in a geographically remote location from the registered office, which may to a certain extent limit the right to court (Melezini, Teszner, 2018: 280).

## 8 Principles of search and personal control

The provisions on search and personal control contained in art. 133 para. 1 point 1 in connection with art. 64 para. 1 point 6 and art. 64 para. 2 point 2 of the Act on NRA are a repeat of the serious doubts regarding compliance with the Constitution of the provisions of art. 11a para. 1 point 3 and art. 11c para. 1 of the Act of September 28, 1991 on Tax Audit. The said regulations give officers wide authority to conduct searches of persons and premises (including residential premises), without, however, correctly determining the scope of these activities. Analogous entries contained, among others in the Code of Criminal Procedure, in the Act on the Police, in the Act on the Internal Security Agency and the Foreign Intelligence Agency, in the Act on the Central Anti-corruption Bureau and in the Act on Military Police and military law enforcement bodies have already been the subject of a ruling of the Constitutional Tribunal, which in a judgment of December 14, 2017 (reference number K 17/14) found that to the extent that they provide for a search or a personal control without defining their limits and do not provide for a judicial review of the legality of the activities of authorised officers, they are inconsistent with art. 41 par. 1 and art. 47 in connection with art. 31 para. 3 of the Constitution.

One should agree with the Commissioner for Human Rights, according to whom the provisions of art. 133 para. 2 of the Act on NRA, which provide for the possibility to lodge a complaint to the prosecutor on the manner of conducting searches and personal controls during customs and tax control, do not ensure a sufficient level of judicial protection of the rights of the controlled party (article 54 para. 1 and article 77 para. 2 of the Constitution of the Republic of Poland), and so should be eliminated from the legal system (Commissioner for Human Rights: II.501.4.2017.MH). Similarly, the Commissioner for Human Rights raised serious doubts about the provisions regulating the search of people, premises, rooms and other places, luggage, cargo and means of transport as well as retention of property in the Regulation of the Council of Ministers of February 22, 2017 on the performance of certain activities by customs officers and the cooperation of the Customs and Tax Service with the Police and the Border Guard. The Commissioner for Human Rights – himself unfortunately not equipped with legislative initiative – turned to the Minister of Finance Teresa Czerwińska in an address in which he indicated the need to initiate legislative work aimed at removing the unconstitutional provisions of the Act on National Revenue Administration and the implementing regulation.

## **9 Problems of unconstitutional pro-efficiency solutions adopted during operational control conducted by the National Revenue Administration**

Serious doubts about constitutionality are raised regarding some of the solutions adopted by the operational control exercised by the NRA – on September 5, 2017, the Commissioner for Human Rights filed an application to the Constitutional Tribunal regarding the compliance with the Constitution of the provisions of art. 114, art. 114 par. 1 and art. 115 para. 1, art. 114 par. 3 in conjunction from art. 114 par. 2, art. 116, art. 118 para. 2, art. 118 para. 7, art. 118 para. 16 and art. 122 para. 4 of the Act on National Revenue Administration (Commissioner for Human Rights: II.501.4.2017.MH-K.11/17). The key issue here is the maintenance by the legislator of the principle of proportionality (already mentioned in the article) resulting from art. 31 of the Constitution. The authors of the draft Act on NRA referred to the principle of proportionality, stating in their justification that “the phenomenon of tax and customs crime and corruption, especially VAT fraud on a large scale, undoubtedly poses a significant threat to the financial security of the state and public order. For this reason, operational and reconnaissance activities should be considered, in the light of the norms of the Constitution, as a measure proportional to combating this type of crime.” It should be hoped that the provisions raising doubts as to their constitutionality will be permanently eliminated from the legal system and replaced with acceptable solutions, taking into account, above all, greater judicial control of the activities of the NRA bodies in this regard, as well as due protection of professional secrecy of advocates, legal counsels and professional advisors. As long as this does not happen, we hope that the NRA authorities will take into account the coherence of the legal system when applying the provisions in question, so that the legal norms reconstructed from these provisions will be as consistent as possible with regard to their content with the fundamental principles of the legal system expressed in the Constitution (interpretation of the Act in accordance with Constitution).

In the application, the Commissioner for Human Rights points to the unconstitutionality of the provision of art. 118 para. 2 of the Act on NRA ordering the transfer of selectively chosen materials – arbitrarily limited only to those justifying the need to administer the control – to the court which is to administer operational control. It should be stressed that this regulation does not give the court the opportunity to become acquainted with all the material collected in the case. The Commissioner for Human Rights shared the views of the doctrine (Onyszczuk, 2013: 2009) and the Helsinki Foundation for Human Rights that provisions constructed in such a way may violate the constitutional right to court in the scope of the right to an appropriate form of the judicial procedure, conforming to the requirements of justice (Commissioner for Human Rights: II.501.4. 2017.MH-K.11/17).

The Commissioner for Human Rights also takes the position that the lack of regulation regarding the possibility to appeal against an order regarding operational control by

the person subjected to it (after the control has ended) should be subject to review by the Constitutional Tribunal for compliance with art. 45 para. 1 and art. 78 of the Constitution as a legislative omission. The current editing of art. 118 para. 16 does not allow for an appeal by the party that is subject to the operational control once the operational control has been completed, thus limiting the constitutional right to appeal against decisions and the right to court (Pajak, 2010: 171). Such profound interference with civil rights and freedoms should be subject to adequate control in the form of the possibility to appeal by the person affected by this interference (General Inspector of Personal Data: DOLiS-033-254/16/KK). This issue is also connected with the obligation postulated by the Constitutional Tribunal (in relation to operational control by the Police) to inform persons subjected to operational activities about the ineffective, completed operational control, which is missing from the Act on NRA (Constitutional Tribunal: S 2/06). There are also doubts raised about the possibility of prolonging operational control, which violates the principle, resulting from a democratic state ruled by law, of citizens' trust in the state and the rule of law (Commissioner for Human Rights: II.501.4.2017.MH-K.11/17). The possibility of disproportionately long-term use of operational control violates the principle of a democratic state ruled by law, as well as the resulting principle of citizens' trust in the state and the rule of law.

Also regulations regarding the possibility to use materials containing information constituting secrets related to the performance of a profession or function, when it is necessary due to the good of justice, are questionable primarily because the court decides here not to waive professional secrecy, but about the "admissibility of using for the needs of criminal proceedings, certain messages already obtained as a result of a breach of professional secrecy" (Commissioner for Human Rights: II.501.4.2017.MH-K.11/17). This institution of a specific secondary legalization of surveillance of persons whose activity is covered by professional secrecy does not provide (contrary to Article 180 of the CCP) the possibility to appeal to the court. Its application in relation to advocates, legal counsels and tax advisors strikes at the very essence of professional secrecy and may seriously undermine the right to defence (Commissioner for Human Rights: II.501.4.2017.MH-K.11/17).

The application of the Commissioner for Human Rights also includes regulations on the collection and processing of data by the NRA. According to the Commissioner for Human Rights, too broad administrative powers in this respect lead to, "the possibility of using telecommunications, postal and internet data not only when it is really necessary to detect or prevent crime" (Commissioner for Human Rights: II.501.4.2017.MH-K.11/17). Access to such comprehensive data on individual citizens (General Inspector of Personal Data: DOLiS-033-254/16/KK) may give rise to the temptation to use them in matters not related to the subject of the activities of the NRA (Commissioner for Human Rights: II.501.4.2017.MH- K.11/17).



## 10 Conclusions

In the light of the material presented, it can be concluded that:

- 1) a thorough reform of the tax administration has been carried out in Poland, which entered into force in 2017;
- 2) this reform has improved tax collection (especially VAT) and contributed to reducing the tax gap, increasing the efficiency and effectiveness of the activities of the tax administration;
- 3) in preferring the implementation of the above objectives, some of the reform solutions are of a debatable nature, especially in the aspect of protecting taxpayers' interests, including compliance with constitutional standards in this area.

In striving to maintain a balance between the efficiency and effectiveness of the tax administration and the protection of taxpayers' rights, science and law enforcement bodies, especially the courts, should play a special role.

## References

- Banaś, M.: (Interview). Uczciwi podatnicy nie mają podstaw do obaw (Honest taxpayers have no grounds for fear), *Dziennik Gazeta Prawna* no. 179 (2017).
- Burzec, M., Smoleń, P. (eds.): *Tax authorities in the Visegrad Group Countries. Common experience after accession to the European Union*, Lublin: Wydawnictwo KUL, 2016.
- Etel, L., Kosikowski, C., Ruśkowski, E.: *Kontrola tworzenia i stosowania prawa podatkowego pod rządami Konstytucji RP (Control of the creation and application of tax law under the rule of the Constitution of the Republic of Poland)*, Warsaw: Wolters Kluwer Polska, 2006.
- Godusławski, B., Chądzyński, M.: *Nowa reforma reformy skarbowki (The new reform of the Treasury)*, *Dziennik Gazeta Prawna* no. 144 (2017).
- Kosikowski, C.: *Taxes. Podatki. Problem władzy publicznej i podatników (The problem of public authorities and taxpayers)*, Warsaw: Lexis Nexis, 2007.
- Kosińska, R., Woltanowski, P.: *Teoretyczny model stosowania prawa podatkowego przez organy podatkowe a jego realizacja w praktyce (The theoretical model of the application of tax law by tax authorities and its implementation in practice)*, in: Gilowska, Z., Izdebski, H., Raczkowski, K., (eds.), *Efektywna administracja skarbowa (Effective tax administration)*, Warsaw: Ministry of Finance, 2007.
- International Monetary Fund. Fiscal Affairs Department: *Poland. Tax administration – modernization challenges and strategic priorities*, 2015.

- Justification for the draft act on National Revenue Administration (Parliamentary Print no. 826).
- Kulicki, J.: *Administracja danin publicznych w Polsce* (Tax administration in Poland), Warsaw: Wydawnictwo Sejmowe, 2014.
- Kulicki, J.: *Koncepcja Krajowej Administracji Skarbowej w świetle problemów administracji danin publicznych w Polsce* (The concept of the National Revenue Administration in the light of the problems of tax administration in Poland), *Analizy i Studia CASP* no. 2 (2016).
- Melezini, A., Teszner, K.: *Krajowa Administracja Skarbowa* (National Tax Administration. Commentary), Warsaw: Wolters Kluwer Polska, 2018.
- Onyszczyk, J.: *Nadzór prokuratora nad kontrolą operacyjną* (Supervision of the prosecutor over operational control), *Prokuratura i Prawo* no. 7-8 (2013).
- Pająk, P.: *Kontrola operacyjna do kontroli konstytucyjnej* (Operational control subject to constitutional review), *Czasopismo Prawa Karnego i Nauk Penalnych* no. 2 (2010).
- Ruśkowski, E.: *Główne problemy reformy administracji skarbowej (z uwzględnieniem projektów ustawy o KAS i ustawy wprowadzającej)* (The main problems of the tax administration reform (taking into account the draft Act on the NRA and the Introductory Act)), in: Gilowska, Z., Izdebski, H., Raczkowski, K., (eds.), *Efektywna Administracja Skarbowa* [Effective tax administration], Warsaw: Ministry of Finance, 2007.
- Smoleń, P. (ed.): *System organów podatkowych w Polsce* (The system of tax authorities in Poland), Warsaw: Oficyna Prawa Polskiego, 2009.
- Stachurski, W.: *Prawny model kontroli skarbowej w Polsce* (The legal model of tax control in Poland), Białystok: University of Białystok, 2006.
- Staniszewski, M.: *Zasada efektywności opodatkowania w działalności administracji podatkowej w Polsce* (The principle of taxation efficiency in the activities of tax administration in Poland), Jarocin: Wielkopolska Higher School of Humanities and Economics in Jarocin, 2007.
- Szulc, M. (1): *Ciężkie czasy dla oszustów. KAS lepiej przygotowana* (Hard times for cheats. NRA better prepared), *Dziennik Gazeta Prawna* no. 180 (2017).
- Szulc, M. (2): *Luka nadal duża, ale w 2018 r. radykalnie się zmniejszy* (The gap is still large, but in 2018 it will decrease dramatically), *Dziennik Gazeta Prawna* no. 205 (2017).
- Szulc, M. (3): *Bez masowych zwolnień w Krajowej Administracji Skarbowej* (No mass redundancies in the National Revenue Administration), *Dziennik Gazeta Prawna* no. 148 (2017).

Teszner, K.: *Administracja podatkowa i kontrola skarbowa w Polsce* (Tax administration and tax control in Poland), Warsaw: Lex A Wolters Kluwer Business, 2012.

Woltanowski, P., Kosińska, R.: *Granice ochrony praw podatnika w świetle orzecznictwa Trybunału Konstytucyjnego* (The limits of protection of the taxpayer's rights in the light of the case law of the Constitutional Tribunal), in: Wójcicka E. (eds.): *Jednostka wobec władczej ingerencji administracji publicznej* (The individual in the face of imperious interference by public administration), Częstochowa: Jan Długosz University in Częstochowa, 2013.

## **Legal Acts**

Act of November 16, 2016, on National Revenue Administration.

Act of November 16, 2016, on Regulations introducing the Act of 16 November 2016 on National Revenue Administration, as amended.

Act of July 10, 2015, on Tax administration, as amended.

Act of August 27, 2009, on the Customs Service, as amended.

Act of November 21, 2008, on the Civil service, as amended.

Act of June 9, 2006, on the Central Anti-corruption Bureau, as amended.

Act of May 24, 2002, on the Internal Security Agency and the Foreign Intelligence Agency, as amended.

Act of August 24, 2001, on the Military Police and military law enforcement units.

Act of November 16, 2000, on Counteracting money laundering and terrorism financing.

Act of June 21, 1996, on Tax Offices and Tax Chambers, as amended.

Act of September 28, 1991 on Tax Audit, as amended.

Act of April 6, 1990, on the Police.

Commissioner for Human Rights: II.501.4.2017.MH.

Commissioner for Human Rights: II.501.4.2017.MH-K.11/17.

Commissioner for Human Rights: II.519.109.2015.MM.

Commissioner for Human Rights: V.711.6.2017.KB.

Constitutional Tribunal: S 2/06.

Constitutional Tribunal: Ts 263/13.

General Inspector of Personal Data: DOLiS-033-254/16/KK.

Member of Parliament Katarzyna Osos: Interpellation no. 17664, 2017.

Ministry of Finance: Reply to interpellation no. 17664, 2017.

Ministry of Finance: Strategy for modernization of the Polish tax administration by 2004, 2002.

OECD: Tax Administrations 2015: Comparative Information on OECD and Other Advanced and Emerging Economies, 2015.

Regulation of the Council of Ministers of February 22, 2017 on the performance of certain activities by officers of the Customs Service and cooperation of the Customs Service with the Police and the Border Guard.

---

# THE PRINCIPLE OF TAX FAIRNESS AND ITS ROLE IN SHAPING THE TAX SYSTEM

*Katarzyna Świąch – Kujawska*<sup>1</sup>

## **Abstract**

The paper addresses the problems of tax fairness in the aspect of shaping the tax system. The basic objective of the study is an in-depth analysis of the concept in question, the classic tax rule. The considerations undertaken serve to justify the thesis that theoretical assumptions have a significant impact on the functioning of the tax system and the legislator should also take into account the achievements of the doctrine in the process of applying tax instruments. At the same time, the practical use of the tax fairness principle causes many problems, especially interpretative ones, which is reflected in extensive judicial decisions. In the conducted research, the methods of analysis of the achievements of judicature and the doctrine of tax law as well as of the legal text were used.

## **Key words**

Tax; law.

## **JEL Classification: H2**

## **1 Introduction**

The purpose of this paper is to present and analyze ways of understanding and applying the principle of tax fairness. The design of the study was determined by the delineated research field. The starting point was the presentation of general issues of an introductory nature, such as the theoretical approach to the principle of fairness. This provided a background for further in-depth deliberations. Their essence was to determine whether and to what extent theoretical assumptions are reflected in system solutions. In the conducted research, the views of the doctrine, the rich jurisprudence of administrative courts and the method of analyzing legal acts were referred to. Due to the breadth and multifacetedness of the issue, selected issues were raised, which, however, were the most important for the discussed subject-matter. The results of the

---

<sup>1</sup> Professor for Financial Law, Department of Self Government Law, Faculty of Law and Administration, University of Szczecin, Poland. Author specializes in tax law and local government finance. She is the author of more than 60 publications. She is a member of Information and Organization Centre for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe. Contact email: [katarzyna.swiech-kujawska@usz.edu.pl](mailto:katarzyna.swiech-kujawska@usz.edu.pl)

considerations presented in particular in the numerous publications of A. Gomulowicz, such as *Zasada sprawiedliwości podatkowej* (The principle of tax fairness) or *Zasada sprawiedliwości podatkowej w orzecznictwie Trybunału Konstytucyjnego. Aspekt materialny* (The principle of tax fairness in the case law of the Constitutional Court. Material aspect) are taken into account.

## 2 The concept of the principle of tax fairness

The principles of tax law are postulates referring to numerous solutions that should be included in this law, so that the system is as optimal as possible and therefore closest to perfection. Perfection can be equated with rationality of the tax system. As it is emphasized, to create such a system it is necessary to adopt assumptions it is supposed to correspond to. Above all, it is necessary to achieve general economic and social objectives at the lowest possible cost (Komar, 1996: 29).

The principle of tax fairness is one of the primary rules of tax law (Gajl, 1998: 23; Tegler, 1998: 53ff; Gomulowicz, 1995: 2). However, it was not defined in any act that falls under this branch of law. In the rich literature of the subject, it is referred to the subject matter of detailed tax law, emphasizing its role in shaping the tax system. The understanding of tax fairness has evolved – from a classic study by A. Smith (Smith, 2013: 500ff; Musgrave, 1998: 20ff), to deliberations by J.S. Mill and A. Wagner (Gomulowicz, 2001a: 95), to its modern understanding.

The starting point for further considerations should be to refer to the understanding of “fairness” as such (which is not a purely legal concept). It should be stressed that it is practically impossible to define this concept unambiguously, and the extraordinary scope of the ambiguous understanding of fairness manifests itself in its meanings and colloquial, philosophical, scientific and official applications (Tokarczyk, 2016: 19ff).

According to its lexical definition (Jedynak, 1994: 213), fairness is a moral virtue based on due treatment of another human being (in accordance with his rights); giving others what they impartially deserve; also the law principle sanctioning the idea of equality and legal order (observance of the law).

Fairness is most often understood intuitively. As one of the virtues, it is often given the supreme and primary role among them. Undoubtedly, it is connected with equal allocation or equal distribution of something (Znamierowski, 1957: 700 – 701).

A virtue understood in this way can be presented using appropriately constructed formulas. The simplest of them is the formula: “equally to everyone” – the formula of simple egalitarianism. However, it cannot be used in conjunction with economics – it does not take into account the diversity of needs and in practice does not create incentives to intensify efforts to increase the resources of goods necessary for the society.

That is why the formula that is considered more useful is the one that states “from everyone according to his abilities, to everyone according to his work”. It becomes problematic here to determine the scope of effort borne by an individual for the production of these goods and the “valuation” of the individual’s work. Therefore, the most perfect formula is considered the one that states “from everyone according to his abilities, to everyone according to his socially justified needs” (Ziemiński, 1981: 65). Finally, it can be pointed out that the law itself (established at a given time and in a given country by a legally appointed organ) is considered as fairness (Kurowski, 1996: 25).

At this point in the study, it is necessary to refer to the understanding of the principle of fairness based on the doctrine of tax law. The development of tax theory in this area was initiated by the so-called “classic rules”. A. Smith is considered to be their creator, who formulated and introduced in the science of tax law, among others, the canon of equality of taxation, which is the most important of them, and which, despite being described as equality, refers rather to tax fairness. It comes from two coupled concepts: “benefit” and “ability-to-pay”. The basis for the first concept should be sought in A. Smith’s assumption that tax is a levy borne by citizens for protection afforded to them by the state (Musgrave, 1998: 20). In turn, the level of tax burden should be a reflection (measure) of this protection, with the simultaneous assumption that the ratio between the amount of tax and state expenditure for citizens is proportional (Gomulowicz, Malecki, 2000: 25ff). It is therefore necessary to find and determine (appraise) the proper (fair) tax amount, which may be different for entities with different wealth (the state granting protection to a wealthier person protects larger property, for which the person should pay a higher tax). The ability to pay is directly related to the actual possibility of paying tax at a certain amount. In connection with this, A. Smith postulated that no one should be forced to pay a higher tax than he is able to pay, which amounts to the distribution of the tax burden depending on the level of income excluding from tax the minimum subsistence.

The tax canons formulated by A. Smith derive from the theory of liberalism, which refers to “objective laws of nature”.

The described principle, as noted, was also referred to by other representatives of tax thought. And so, J.S. Mill understood tax fairness as the equality of sacrifice, arguing that because of the very living in a given society, its members are obliged to make sacrifices for the state. Equal treatment, according to him, involves carrying the same sacrifice, or the same loss in prosperity. This leads to the conclusion that taxpayers with the same level of income should pay the same amounts of taxes. So the concept of J.S. Mill primarily took into account the aspect of ability to pay. The principle of fairness, according to A. Wagner, consists in fact of two principles: universality and uniformity of taxation (Gomulowicz, 2001a: 95). The first one boils down to the postulate that the tax system should not contain any privileges exempting from taxation. On the other hand, uniformity of taxation means diversification of taxation, taking into account the taxpayers’ ability

to pay. In turn, F. Neumark, classified this principle in the group of ethical and social principles. According to him, the principle of fairness is implemented when the following three principles are observed in the tax system: universality, uniformity and ability to pay.

The contemporary understanding of tax fairness is far from the views presented above. Most often this concept is considered in the context of the entire tax system and it is assumed that a fair tax system must be individualized and diversified, taking into account many factors affecting taxation. This problem cannot be analyzed without taking into account the scope and principles of, for example, the social security system, material support for pupils and students, people with disabilities or those who are out of work. Each of these systems is conditioned by the solutions adopted in the other ones and only all of these links can be the answer to the question whether the tax system is fair or not.

It can therefore be assumed that the understanding of this principle on the ground of the levy law does not deviate from the concept of formal justice formulated by Ch. Perelman, according to which formal justice is the principle of operation, where entities belonging to the same essential category should be treated equally (Perelman, 1956: 62).

### **3 Shaping the tax system in accordance with the principle of tax fairness**

To perceive fairness as a certain feature requires determining its relationship with the law. This is an important and complex issue at the same time. The problems that may arise concern both fairness in the context of the entire legal system, the fairness of individual legal acts, or individual solutions included in a given legal act.

Finally, we can distinguish fair giving and fair application of law. Therefore, the thesis that the manner of understanding fairness in law is historically changeable and is the resultant of many various factors, among which one can point to: citizens' trust in the state (including the evaluations they formulate), public awareness of citizens, economic considerations, etc., is justified.

For the defined research field, the most important is to determine the place and role of the rule under discussion in shaping the tax system.

At the outset, it should be noted that adopting the idea that the system should meet the basic requirements of fairness requires reconciling this standard with the objectives of taxation. The basic objective is the fiscal one, i.e. to obtain income that will then serve the spending needs of the state. One should agree with the statement that being guided by only the tax efficiency criterion basically excludes the simultaneous taking into account tax fairness (Gomulowicz, 1996: 3). Therefore, one should agree with the view that in a democratic rule of law fairness and the obligation to provide income for the state should be perceived as two independent constitutional values, which, however, are not mutually exclusive but must be met jointly (Gliniecka, Harasimowicz, 1997: 1 and Łączkowski, 1995: 23).



It should also be emphasized that the obligation to take account of the principle in question on the ground of tax law can be derived from constitutional principles. According to Article 2 of the Constitution, the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice (Constitution of the Republic of Poland). It is not homogeneous though; it involves equality of rights, social solidarity, minimum of social security, securing basic living conditions for people who are unemployed not through their own fault (Gomulowicz, 2005: 483 – 484). The quoted provision of the Constitution is of a very general nature, and the source of the analysis leading to the determination of the content of the principle of fairness is both the legal doctrine as well as ethics and philosophy (Domańska, 2001: 13). Significant importance in this respect should also be attributed to the line adopted by the jurisprudence of the Constitutional Court (Constitutional Court: K 1/90 and K 9/90), according to which the constitutional principle of equality before the law (equality in law) in the broadest approach consists in the fact that all legal entities (addressees of legal norms) characterized by a given significant (relevant) feature are, to an equal degree, to be treated equally, and so according to the same measure, without discriminating or favoring differentiation (Constitutional Court: K 5/89). In the development of the cited ruling, the Constitutional Court also stated that there is a close connection between justice and equality in law (where “the judgement on equality in law is a derivative of justice”), and that if there are unfair differences in the distribution of goods (granting rights) and, related to it, in the division of legal entities, then these differences are considered as inequalities. Fairness requires that the legal diversification of individual entities (their categories) should remain in a proper relation to differences in the situation of these entities (Bator, 2002: 27). The distributive fairness expressed in this way means that equals should be treated equally, and similar ones should be treated similarly, where in the latter case one should take into account the extent to which individual entities (categories of persons) have certain features that should be taken into account in the process of distribution of certain goods (rights). The aforementioned principle presupposes the existence of a balance between the essential features of individual categories of persons and the treatment they deserve (principle of relevance) (Constitutional Court: K 7/92). It should be emphasized that such understanding and the need to respect the principle of equality are recognized not only in the Polish literature and legal order (Korinek, Holoubek, 1999: 49, Vogel, Waldhoff, 1999: 89–90, 115; Di Pietro, 1999: 124; Happé, 1999: 125; Rosembuj, 1999: 163; Gribnau, 1999: 32; Baker, 1999: 166ff).

On the ground of substantive law, tax fairness is linked to the determination of the tax burden and, broadly speaking, expresses the postulate that all entities should carry an equal tax burden, which does not mean that they should pay tax in the same amount (Gomulowicz, 1996: 3). This rule should be associated with the entire tax system and it should be assumed that it is consistent with the principle of fairness if it is individualized and diversified.

When shaping tax elements determining its amount, one should take into account, for example, not only the amount of income but also its source, family, personal or

economic situation. It is also important to choose between proportional and progressive rates, where progressive taxation is considered to be fairer (Bouvier, 200: 243ff), which does not mean that there is no extreme criticism of these rates (Hall, Rabushka, 1998: 39ff; Kornhauser, 2009: 29ff). Advocates of progressive taxation stress that it allows taking into account the taxpayer's personal situation to a greater extent while applying various types of tax reliefs, a tax-free minimum, exclusions and discounts as well as social or economic increases (Gajl, 1992: 142).

It should also be assumed that the constitutional standards regarding the approach to the tax burden in accordance with the principles of equality and universality clearly indicate that the tax burden must be considered as a matter of defining the limits in which the individual good (property, income) should be subordinated to the general good (Gomulowicz, 2008: 25).

A distinction is made between "vertical" and "horizontal" fairness, where the latter requires equal treatment of entities belonging to the same category and can be expressed in the maxim of "equal treatment of equals". At the same time, it is determined by the universality and equality (uniformity) of taxation. The term "universality of taxation" should be understood as an obligation to pay tax by all entities on whom a statutory tax obligation rests. On the other hand, uniformity means treatment in the same way for all entities that are in the same, tax-relevant situation (Gomulowicz, 2001b: 34; Kruse 1991: 45; Mastalski 1989: 68; Nykiel, 2009: 18–19).

"Vertical" fairness assumes a different distribution of the tax burden on entities operating under different economic conditions (Gomulowicz, 1996: 3).

It should be added that in the literature on the subject the rank of ability to pay, which is in fact a component of tax fairness, is being exposed. It is postulated that the tax burden should depend on the capability to pay the tax, which is directly related to the need to differentiate tax for individual taxpayers. The principle of ability to pay must refer to the measure – equality of taxation. This equality is to be manifested in two dimensions: the appropriate tax burden and the choice of a given good for taxation (Gomulowicz, 1998: 86). The subject literature indicates the following advantages of following this principle (Gomulowicz, 1998: 87):

- 1) due to the fact that this rule requires treating tax as a universal obligation, and not combining it with some payment from the state, the distance between the taxpayer and the spending of funds from the state budget is preserved, which in turn ensures the impartiality of the state towards the citizen .
- 2) using this formula creates premises for ensuring uniformity and moderation of tax burden. Acceptance by the legislator of the ability to pay indicates that his decisions regarding the tax system are not affected by the demand for funds derived from taxes, but taxes are individualized,

- 3) using this principle, it is possible to obtain public acceptance of tax law, which is undoubtedly important for the authority of the state and the law itself.

For the above-presented views, it is characteristic to link fairness in taxation with the individualisation of taxation (Famulska, 1996: 3; Gomulowicz, 1995: 62).

As is clear from the above considerations, in the construction of the tax system it is indispensable to respect the principle of tax fairness. However, there is a dilemma about what practical reflection should the formula in question have.

The indicated research field justifies referring the notion of tax fairness primarily to progressive taxation and the application of tax preferences in the form of tax reliefs (which are most often used in income taxes). As has already been pointed out, the prevailing view in the science of tax law is that progressive taxation of income is a reflection of the practical application of the principle of tax fairness. Income taxes, by their very nature, refer to the taxpayer's ability to pay, and the use of progressive rates strengthens this principle. Already in 1538 Francesco Guicciardini spoke about the need for progressive taxation – equality in taxation should mean the same “sacrifice” (Grapperhaus, 1998: 64). The use of tax privileges is also a widely discussed, but also disputed issue. It seems that this state of affairs is affected, among others, by the state of tax legislation. It should be assumed that tax practice affects theoretical concepts and often verifies them significantly. The critical assessment of actually functioning legal solutions often affects the negative assessment of the institution as such.

The theoretical foundations justifying the legislator's use of the institution of tax reliefs arise primarily from the fact that their application allows individualization of taxation, thus shaping the economic situation of individual taxpayers, while fairness cannot be understood here as a perfectly equal distribution, but more broadly, precisely as a distinction in relation to entities with different levels of affluence (Mastalski, 1996: 38). Tax reliefs are also considered an instrument for the implementation of a broadly understood socio-economic policy (Solovyeva, 2010: 49; Nykiel, 2002: 190; Tegler, Ofiarski, 1996: 81). At the same time, it should be noted and emphasized that views in this matter are variable and heterogeneous, depending on many practical factors and assumptions of the state's tax policy.

In this approach, the application of tax reliefs should be treated as an expression of the implementation of non-fiscal goals of taxation, it should not be only a means of reducing tax burdens, which requires precise determination of these goals and adjustment of fiscal instruments to achieve them. Long-term planning is essential. In the current legal status, most tax reliefs, of greatest importance, apply based on the Act on Personal Income Tax.

The analysis of legal solutions entitles one to indicate the fundamental shortcomings of the adopted legal solutions. As rightly pointed out, the basic flaw of tax reliefs is their improper distribution, which results from their improper construction and leads to their enjoyment only by persons with relatively high incomes (Gomulowicz, 2003:

22ff). Therefore, the institution itself is not denied, but its shape, configuration or eligibility conditions (availability of reliefs). Therefore, there may be situations in which even the best understood intentions will not be achieved due to design flaws inherent in the provisions determining the conditions for the use of given preferences in taxation (Brzeziński, 1986: 74-75; Gomulowicz, 1999, Łączkowski, 1992: 119).

An analysis of the *acquis* of jurisprudence in this field allows the identification of several key aspects to which attention is paid in respect of all tax reliefs. Above all, it is emphasized that the idea of tax fairness is pursued by the principle of universality and equality of taxation, expressed in Article 84 of the Constitution of the Republic of Poland. With a certain freedom in providing reliefs and tax exemptions, being a derogation from this principle and usually justified by economic and social reasons resulting from the objectives and principles of state policy implementation and the need to provide the means to implement them, the ordinary legislator must, however, take into account other principles resulting from the Constitution, and therefore also the principle of equality and justice. Establishing reliefs, he should not treat groups of entities with the same distinctive feature differently (Voivodship Administrative Court: II FSK 389/09; see also: Voivodship Administrative Court: ISA/Ka 1407/03, Voivodship Administrative Court: I SA/Op 264/09, Voivodship Administrative Court: I SA/Gl 495/09, Supreme Administrative Court: II FSK 43/09, Supreme Administrative Court: II FSK 78/09).

The treatment of reliefs as an exception to the principle of universality and equality (fairness) of taxation often leads to passing, in the course of tax proceedings, the burden of proof on the taxpayer, or withdrawal from systematic and teleological interpretation of provisions.

It seems significant to formulate such views on the basis of the analysis of the solutions adopted in the Polish tax system. Although the assessment of tax reliefs in the context of tax fairness has “always” been problematic, the recognition that tax equality should be treated literally is getting wider and wider, and in this case, tax reliefs should in fact be regarded as a solution contrary to this principle.

One should consider as fully legitimate the position that when interpreting the provisions on reliefs and exemptions one must take into account the following assumption: the legislator departs from formal equality in taxation for achieving equality on a wider level, especially economic one or in order to achieve specific social or economic goals. Consequently, the conviction that there is a need for a strict, and indeed restrictive interpretation of tax law with regard to provisions introducing tax reliefs and exemptions, has neither normative nor rational justification (Brzeziński, 2009: 449; Brzeziński 2008: 141). This is confirmed by the need for a comprehensive interpretation of tax law in the process of its application, related to the derivative concept of the interpretation of law (Mastalski, 2010: 338). Therefore, it would be justified to introduce provisions that would regulate the interpretation of tax law, in particular those that would resolve the interpretation doubts in question (Brzeziński, 2010: 334).

## 4 Conclusion

The principle of tax fairness is one of the so-called classic tax rules. This concept should be understood as postulates that the best possible tax system should correspond to. Despite a few centuries of tradition, this principle has not been defined. This is mainly due to the difficulty, and even the inability to clearly indicate what fairness is, which is in fact an indefinable feature and a virtue in the ethical reflection. It is all the more difficult to determine its relation to the legal system. All findings in this regard have a doctrinal, historically changeable value, subject to subsequent reinterpretations. Regardless of these dilemmas, fairness is one of the basic ethical and legal concepts analyzed already in antiquity.

Certain normative value of the principle of fairness was given by the constitutional legislator, stressing that the Republic of Poland is a democratic rule of law implementing the principle of social justice. The mere fact of using this rule does not raise any doubts or reservations. Practical application and implementation of it in legal constructions is, however, the subject of heated discussions and polemics. This applies, among others, to tax law. This is a consequence of the specificity of this branch of law, treated as intrusive. The characteristics of tax, as the basic instrument of tax law, and especially its obligatory and gratuitous nature are not considered fair.

That is why the putting together of the words “tax” and “fairness” is socially denied. Nevertheless, the principle of tax fairness is considered one of the prerequisites for shaping a modern tax system. As indicated in practice, most doubts and objections arise from the methods of its implementation, especially the application of tax privileges. When creating a rational tax system, the legislator should achieve a special compromise between fiscal efficiency and tax fairness. Undoubtedly, the perception of the tax system as a whole is influenced by a number of factors of assessment nature. Finally, one can point to the ways of perceiving the procedural fairness of taxes (Niesiobędzka, 2014: 101).

A system that corresponds to the presented concept of the principle, i.e. is individualized, can be regarded as a system respecting the principle of tax fairness. In addition, it should be postulated that the system should be as stable as possible, implementing not only fiscal objectives of taxation and all changes should be supported by reliable pre-legislative analyses.

In summary, it should be noted that the shaping of the tax system is influenced by a number of economic and political factors as well as interdependencies between the doctrine and the practice of tax law.

## References

Baker, P.: United Kingdom, in: Meussen, G.T.K. (ed.): *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law Internationals, 1999.

- Bator, A.: Instrumentalizacja opodatkowania a sprawiedliwość i bezpieczeństwo prawne (Instrumentalization of taxation and legal fairness and security), *Gdańskie Studia Prawnicze (Gdańsk Legal Studies)* no. 9 (2002).
- Bouvier, M.: Wprowadzenie do prawa podatkowego i teorii podatku (Introduction to tax law and the theory of tax), Warsaw: KiK Konieczny i Kruszewski, 2000.
- Brzeziński, B.: Zasady tworzenia prawa finansowego (próba sformułowania) (Principles for creating finance law (attempt at formulation), *Państwo i Prawo (State and Law)* no. 5 (1986).
- Brzeziński, B.: Podstawy wykładni prawa podatkowego (Basis for the interpretation of tax law), Gdańsk: ODDK, 2008.
- Brzeziński, B.: Wykładnia prawa podatkowego (Interpretation of tax law), in: Brzeziński, B. (ed.): *Prawo podatkowe. Teoria. Instytucje. Funkcjonowanie (Tax law. Theory. Institutions. Functioning)*, Toruń : TNOiK Dom Organizatora, 2009.
- Brzeziński, B.: Kilka uwag o przepisach normujących wykładnię prawa podatkowego (A few remarks on the provisions regulating the interpretation of tax law), in: Choduń, A., Czepita, S. (eds.): *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego (In search of a common good. Professor Maciej Zieliński commemorative book)*, Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2010.
- Di Pietro, A.: Italy, in: Meussen, G.T.K. (ed.): *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law Internationals, 1999.
- Domańska, A.: Zasady sprawiedliwości społecznej we współczesnym polskim prawie konstytucyjnym (Principles of social justice in Polish modern constitutional law), *Acta Universitatis Lodziensis. Folia Iuridica (University of Łódź Reports. Juridical Issue)* no. 66 (2001).
- Famulska, T.: Sprawiedliwość podatkowa (Tax fairness), *Przegląd Podatkowy (Tax Review)* no. 5 (1996).
- Gajl, N.: *Teorie podatkowe w świecie (Tax theories around the world)*, Warsaw: PWN, 1992.
- Gajl, N.: Teorie podatkowe fiskalizmu a normy systemu podatkowego w Polsce (Tax theories of fiscalism and norms of the tax system in Poland), in: Chojna-Duch, E., Goronowski, W. (eds.): *Księga jubileuszowa Profesora dr Leona Kurowskiego. Podstawowe zagadnienia prawa finansowego i polityki finansowej w Polsce w latach 1989 – 1997 (Professor Leon Kurowski commemorative book. Basic issues of finance law and finance policy in Poland in 1989-1997)*, Warsaw: KiK Konieczny i Kruszewski, 1998.

- Gliniecka, J., Harasimowicz, J.: Z zagadnień teorii podatku (Of the issues of the theory of tax), *Glosa (Commentary)* no. 5 (1997).
- Gomulowicz, A.: Granice fiskalizmu (Limits of fiscalism), *Glosa (Commentary)* no.1 (1995).
- Gomulowicz, A.: Funkcja trwalej wydajności podatku i funkcja sprawiedliwości a system podatkowy (The function of a stable efficiency of tax and the function of fairness vis-a-vis the tax system), *Ruch Prawniczy, Ekonomiczny i Socjologiczny (Journal of Law, Economics and Sociology)* no. 1 (1995).
- Gomulowicz, A.: Problemy teorii opodatkowania w Polsce (Problems of the theory of taxation on Poland), *Glosa (Commentary)* no. 4 (1996).
- Gomulowicz, A.: Postulat sprawiedliwości podatkowej a prawodawstwo podatkowe (Postulate of tax fairness and tax legislation), in: Brzeziński, B. (ed.): *Księga pamiątkowa ku czci Profesora Apoloniusza Kosteckiego (Professor Apoloniusz Kostecki commemorative book)*, Toruń: TNOiK Dom Organizatora, 1998.
- Gomulowicz, A.: Wybrane zagadnienia prawodawstwa podatkowego (Selected issues of tax legislation), *Przegląd Legislacyjny (Legislative Review)* no. 1 (1999).
- Gomulowicz, A., Malecki, J.: *Podatki i prawo podatkowe (Taxes and Tax Law)*, Poznań: Ars Boni et Aequi, 2000.
- Gomulowicz, A.: *Zasady podatkowe wczoraj i dziś (Tax principles then and now)*, Warsaw: ABC, 2001a.
- Gomulowicz, A.: *Zasada sprawiedliwości podatkowej (The principle of tax fairness)*, Warsaw: ABC, 2001b.
- Gomulowicz, A.: *Zasada sprawiedliwości podatkowej w orzecznictwie Trybunału Konstytucyjnego. Aspekt materialny (The principle of tax fairness in the case law of the Constitutional Court. Material aspect)*, Warsaw: ABC, 2003.
- Gomulowicz, A.: *Zasada równości opodatkowania jako przesłanka respektowania zasady prawidłowej legislacji podatkowej (The principle of equality of taxation as a premise of respecting the principle of good tax legislation)*, in: Zieliński, M. (ed.): *W kręgu teoretycznych i praktycznych aspektów prawoznawstwa. Księga Jubileuszowa Profesora Bronisława Ziemianina (Around theoretical and practical aspects of jurisprudence. Professor Bronisław Ziemianin commemorative book)*, Szczecin: Ars boni et aequi, 2005.
- Gomulowicz, A.: *Sprawiedliwość opodatkowania jako przesłanka prawodawcza i orzecznicza (Taxation fairness as a legislative and case-law premise)*, *Zeszyty Naukowe Sądownictwa Administracyjnego (Scientific Bulletin of Administrative Judiciary)* no. 1 (2008).

- Grapperhaus, F.H.M.: *Tax Tales from the Second Millenium*, Amsterdam: International Bureau of Fiscal Documentation, 1998.
- Gribnau, H.: General Introduction, in: Meussen, G.T.K. (ed.): *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law Internationals, 1999.
- Hall, R.E., Rabushka, A.: *Podatek liniowy (Flat tax)*, Warsaw: Dom Wydawniczy ABC, 1998.
- Happé, R.: The Netherlands, in: Meussen, G.T.K. (ed.): *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law Internationals, 1999.
- Jedynak, S. (ed.): *Mały słownik etyczny (Small ethics dictionary)*, Bydgoszcz: Branta, 1994.
- Komar, A.: *Systemy podatkowe krajów Unii Europejskiej (Tax systems of EU states)*, Warsaw: Polskie Wydawnictwo Ekonomiczne, 1996.
- Korinek, K., Holoubek, M.: Austria, in: Meussen, G.T.K. (ed.): *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law Internationals, 1999.
- Kornhauser, M.: The Rhetoric of the Anti – Progressive Income Tax Movement: A Typical Male Reaction, in: Infanti, A.C., Crawford B.J. (eds.): *Critical Tax Theory. An Introduction*, Cambridge: Cambridge University Press, 2009.
- Kruse, H.: *Lehrbuch des Steuerrechts, Allgemeiner Teil (Textbook of tax law. General part)*, Vol. I, München: C.H. Beck, 1991.
- Kurowski, L.: Jak rozumieć sprawiedliwość – głos w dyskusji (How to understand fairness – a voice in discussion), in: Ruśkowski, E., Konieczny, W. (eds.): *Podatki w orzecznictwie sądowym. Zjazd Katedr Prawa Finansowego (Taxes in case-law. Convention of Financial Law University Chairs)*, Wigry 1995, Warsaw: KiK Konieczny i Kruszewski, 1996.
- Łączkowski, W.: Granice opodatkowania (Limits of taxation), *Acta Universitatis Lodzensis. Folia Iuridica (University of Łódź Reports. Juridical Issue) no. 54 (1992)*.
- Łączkowski, W.: Orzecznictwo Trybunału Konstytucyjnego w sprawach dotyczących finansów publicznych (The case-law of the Constitutional Court in cases of public finance), in: Ruśkowski, E., Konieczny, W. (eds.): *Podatki w orzecznictwie sądowym. Zjazd Katedr Prawa Finansowego (Taxes in case-law. Convention of Financial Law University Chairs)*, Wigry 1995, Warsaw: KiK Konieczny i Kruszewski, 1996.
- Mastalski, R.: Analogia w procesie wykładni prawa podatkowego (Analogy in the process of interpretation of tax law), *Państwo i Prawo (State and Law) no. 9 (1989)*.



- Mastalski, R.: Zasada państwa prawnego prawie podatkowym (The principle of the rule of law in tax law), in: Ruśkowski, E., Konieczny, W. (eds.): *Podatki w orzecznictwie sądowym. Zjazd Katedr Prawa Finansowego (Taxes in case-law. Convention of Financial Law University Chairs)*, Wigry 1995, Warsaw: KiK Konieczny i Kruszewski, 1996.
- Mastalski, R.: Derywacyjna koncepcja wykładni prawa w procesie stosowania prawa podatkowego (Conceptual derivation in the interpretation of law in the process of tax law application), in: Choduń, A., Czepita, S. (eds.): *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego (In search of a common good. Professor Maciej Zieliński commemorative book)*, Szczecin: Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2010.
- Musgrave, R.A.: Social contract, taxation and standing of deadweight loss, in: Malecki, J. (ed.): *Koncepcje współczesnych reform podatkowych. Europa na drodze do wspólnej waluty (Concepts of modern tax reforms. Europe on its way to common currency)*, Poznań: Wydawnictwo Wyższej Szkoły Bankowej, 1998.
- Niesiobędzka, M.: Sprawiedliwość proceduralna podatków (Procedural fairness of taxes), *Optimum. Studia Ekonomiczne (Optimum. Economics Studies)* no. 4 (2014).
- Nykiel, W.: Cele i funkcje ulg i zwolnień podatkowych (Objectives and functions of tax exemptions), in: *Regulacje prawno – podatkowe i rozwiązania finansowe. Pro publico bono. Księga Jubileuszowa Profesora Jana Głuchowskiego (Legal and tax regulations and financial solutions. Pro publico bono. Professor Jan Głuchowski commemorative book)*, Toruń: TNOiK, 2002.
- Nykiel, W.: Zasady podatkowe (Tax rules), in: Brzeziński, B. (ed.): *Prawo podatkowe. Teoria. Instytucje. Funkcjonowanie (Tax law. Theory. Institutions. Functioning)*, Toruń: TNOiK, 2009.
- Perelman, Ch.: *O sprawiedliwości (On justice)*, Warsaw: PWN, 1956.
- Rosembuj, T.: Spain, in: Meussen, G.T.K. (ed.): *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law Internationals, 1999.
- Smith, A.: *Badania nad naturą i przyczynami bogactwa narodów (Studies on the nature and reasons for nations' wealth)*. Vol. 2, Warsaw: PWN, 2013.
- Solovyeva, N.: Tax Relief: Forms, Functions, Perspectives, in: Dobaczewska, A. et al (eds.): *Daniny publiczne. Prawo finansowe wobec wyzwań XXI wieku (Public levies. Financial law against 21st century challenges)*, Warsaw: CeDeWu, 2010.
- Tegler, E., Ofiarski, Z.: *Prawno – finansowe formy wspierania rozwoju budownictwa mieszkaniowego (Legal and financial forms of supporting the development of residential housing)*, Zielona Góra: Agencja Rozwoju Regionalnego w Zielonej Górze, 1996.

- Tegler, E.: Wybrane aspekty teoretyczne i praktyczne sprawiedliwości podatkowej (Selected theoretical and practical aspects of tax fairness), in: Chojna-Duch, E., Goronowski, W. (eds.): *Księga jubileuszowa Profesora dr Leona Kurowskiego. Podstawowe zagadnienia prawa finansowego i polityki finansowej w Polsce w latach 1989 – 1997* (Professor Leon Kurowski commemorative book. Basic issues of finance law and finance policy in Poland in 1989-1997), Warsaw: KiK Konieczny i Kruszewski, 1998.
- Tokarczyk, R.: *Sprawiedliwość: próba syntetycznej systematyzacji zagadnień* (Justice: an attempt of a synthetic systematization of issues), *Gdańskie Studia Prawnicze* (Gdańsk Legal Studies) vol. XXXV (2016).
- Vogel, K., Waldhoff, Ch.: *Germany*, in: Meussen, G.T.K. (ed.): *The Principle of Equality in European Taxation*, The Hague/London/Boston: Kluwer Law Internationals, 1999.
- Ziemiński, Z.: *Podstawy nauki o moralności* (Basis of the science of morality), Poznań: Wydawnictwo UAM, 1981.
- Znamierowski, Cz.: *Sprawiedliwość* (Justice), *Państwo i Prawo* (State and law) 1957.

## Legal Acts

- Act of April 2, 1997, *Konstytucja Rzeczypospolitej Polskiej* (Constitution of the Republic of Poland), as amended.
- Act of 26 July 1991, *O podatku dochodowym* (On personal income tax), as amended.
- Constitutional Court: K 5/89.
- Constitutional Court: K 1/90.
- Constitutional Court: K 9/90.
- Constitutional Court: K 7/92.
- NSA (Supreme Administrative Court): II FSK 43/09.
- NSA (Supreme Administrative Court): II FSK 78/09.
- NSA (Supreme Administrative Court): II FSK 389/09.
- WSA (Voivodship Administrative Court): I SA/GI 495/09.
- WSA (Voivodship Administrative Court): ISA/Ka 1407/03.
- WSA (Voivodship Administrative Court): I SA/Op 264/09.

**TAX SOVEREIGNTY  
AND THE CONCEPT OF FISCAL RULE-MAKING  
IN THE COUNTRIES OF CENTRAL  
AND EASTERN EUROPE**

Conference Proceedings

**Marina Sentsova (Karaseva), Eugeniusz Ruskowski,  
Aleksiej Paul, Michał Radvan (eds.)**

Редакторы *А. А. Борисова, С. Н. Володина*  
Компьютерная верстка *Е. Е. Комаровой*

Подписано в печать 14.11.2018. Формат 70×100/16  
Усл. п. л. 30,1. Уч.-изд. л. 32,0. Тираж 300. Заказ 542

Издательский дом ВГУ  
394018 Воронеж, пл. Ленина, 10  
Отпечатано в типографии Издательского дома ВГУ  
394018 Воронеж, ул. Пушкинская, 3