MASARYK UNIVERSITY
FACULTY OF LAW
Financial Law
Department of Financial Law and Economics

SYSTEM OF FINANCIAL LAW

SYSTEM OF TAX LAW

Conference Proceedings

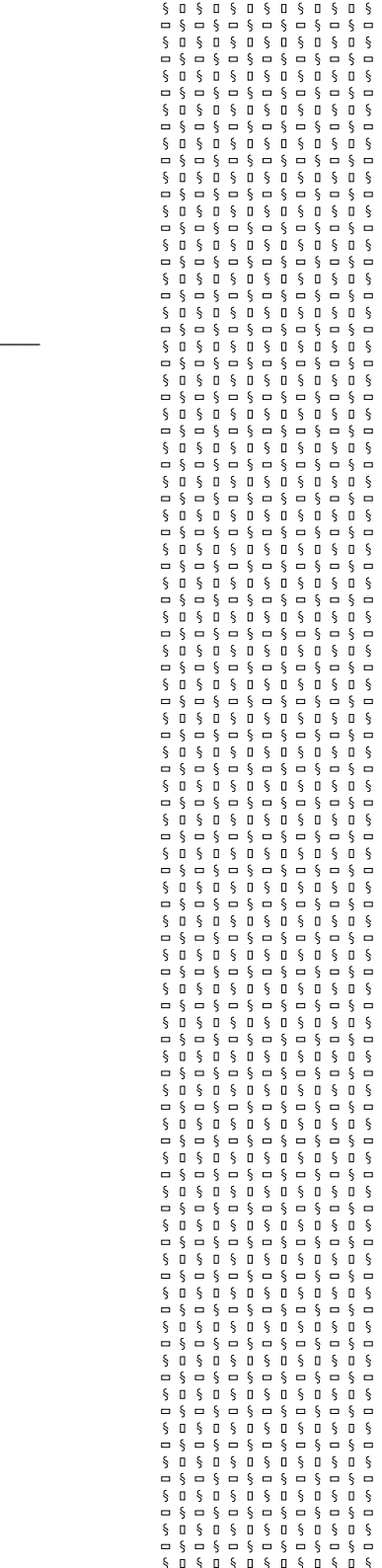
Michal Radvan (ed.)

ACTA UNIVERSITATIS BRUNENSIS

IURIDICA
Editio Scientia vol. 515

PUBLICATIONS
OF THE MASARYK UNIVERSITY

theoretical series, edition Scientia
File No. 515



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Masaryk University
Brno 2015

Citation:
RADVAN, Michal (ed.) *System of Financial Law : System of Tax Law : Conference Proceedings*. 1st ed. Brno : Masaryk University, Faculty of Law, 2015. 388 p. Publications of the Masaryk University, theoretical series, edition Scientia ; file no. 515. ISBN 978-80- 210-7827-7

National Library of the CR – Cataloguing in Publication data

System of Financial Law : System of Tax Law : Conference Proceedings / Michal Radvan (ed.). – 1st ed. Brno : Masaryk University, Faculty of Law, 2015. – 388 p. Publications of the Masaryk University, theoretical series, edition Scientia ; file no. 515. ISBN 978-80- 210-7827-7

347.73* 351.72* (062.534)*
- financial alw
- taxation
- conference proceedings

347.7– Commercial law. Financial law. Industrial property law. Patent laws and legislastion. Copyright [16]

Editor: Assoc. prof. JUDr. Ing. Michal Radvan, Ph.D.

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ISBN 978-80-210-7827-7

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Preface

The Information and Research Center of Public Finance and Tax Law of Central and Eastern European Countries is an association at the Law Faculty of the University of Bialystok, founded in 2002.

The main objectives of the Center are to gather information about scientific activities of its members, exchange information, introduce common research and conference initiatives, and to support the achievement of these goals. The Center develops exchange of information among research and university centers in CEE countries and around the world, initiates cooperation of institutions in CEE countries and cooperates with the government and non-governmental organizations. One of the crucial goals of its activity is to promote European standards in the fields of public finance and tax law in CEE countries, and to share experiences with other countries. The Center also focuses on publishing activity and the organization of workshops, seminars and conferences. The main aspect of the Center´s activity is the support of research exchange between scientific centers in Eastern and Western Europe. Among its members, the Center assembles distinguished scholars and academics specializing in public finance and tax law as well as in related fields from CEE and other countries.

So far, the Center has initiated and together with local institution organized several scientific international conferences:

- Methods and Instruments of Limiting Public Debt and Budget Deficit in Countries of Central and Eastern Europe, September 2002, Bialystok, Poland, with the University of Finance and Management in Bialystok;
- Tax and Local Fees Reforms – Polish and Selected European Countries Experiences, November 2002, Bialowieza, Poland, with the University of Bialystok;
- Problems of Public Finance and Tax Law in Central and Eastern European Countries before the Accession to the European Union, September 2003, Brno, Czech Republic, with Masaryk University;

- The Problems of Financial Law Evolution in Central and Eastern Europe within the Integration Processes, September 2004, Vilnius, Lithuania, with Mykolas Romeris University;
- Current Questions of the Efficiency of Public Finance, Financial Law and Tax Law in the Countries of Central and Eastern Europe, August 2005, Kosice, Slovakia, with Pavol Jozef Šafárik University in Košice;
- Establishing and Implementation of Financial Law in Central and Eastern European Countries, September 2006, Grodno, Belarus, with the State University in Grodno;
- The Modern Problems of Tax Law Theory, September 2007, Voronezh, Russia, with the State University in Voronezh;
- The Basic Problems of Public Finance Reforms in the 21st Century in Europe, September 2008, Paris, France, with the Polish Academy of Sciences;
- Public Finance and Financial Law in the Context of Financial Crises in the Eastern and Central Europe, September 2009, Lviv, Ukraine, with the State University of Lviv;
- Current Issues of Finance and Financial Law in Terms of Fiscal and Monetary Support of Economic Growth in The Countries of Central And Eastern Europe after 2010, September 2010, Prague, Czech Republic, with Charles University in Prague;
- Public Finances – Administrative Autonomies, September/October 2011, Gyor, Hungary, with Szechenyi Istvan University;
- Annual and Long-Term Public Finances in Central and Eastern European Countries, September 2012, Bialystok, Poland, with the University of Bialystok;
- Problems of Application of Tax Law in Central and Eastern European Countires, September 2013, Omsk, Russia, with Omsk F.M. Dostoevsky State University.

The materials from the conferences were published in a book-form after the events:

- Deficyt budżetowy i dług publiczny w wybranych krajach europejskich - The Budget Deficyt and the Public Debt in the Selected European Countries. Bialystok: Wyższa Szkoła Finansów i Zarządzania, 2003. ISBN-83-87256-5;

- Europejskie systemy opodatkowania nieruchomości - European Systems of Real Estate Taxation. Warszawa: Kancelaria Sejmu, 2003. ISBN 83-909381-6-2;
- Financování územní samosprávy ve sjednocující se Evropě - Funding of Local Government in Unifying Europe. Brno: Masarykova univerzita v Brně, 2005. ISBN 80-210-3677-X;
- The problems of the financial law evolution in Central and Eastern Europe within the integration processes. Bialystok-Vilnius: WP UwB & Talmida, 2004;
- Aktuálne otázky efektívnosti verejných financií, finančného práva a daňového práva v štátoch strednej a východnej Európy - Current Questions of the Efficiency of Public Finance, Financial Law and Tax Law in the countries of Central and Eastern Europe. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2005. ISBN 80-7097-604-7;
- Finansovoe pravotvorčestvo i pravoprimenenie v gosudarstvach centralnoj i vostočnoj Evropy - Establishing and Implementation of Financial Law in Central and Eastern European Countries. Grodno: Grodenskij gosudarstvennyj universitet imeni Janki Kupaly, 2006. ISBN 985-417-835-8;
- Sovremennye problemy teorii nalogovogo prava - The Modern Problems of Tax Law Theory. Voronež: Voronežskij gosudarstvennyj universitet, 2007. ISBN 978-5-9273-1340-2;
- Bialostockie Studia Prawnicze – Bialystok Legal Studies, Bialystok: Temida 2, 2009, 5. ISSN 1689-7404;
- Finanse publiczne i prawo finansowe w Europie Centralnej i Wschodniej w warunkach kryzysu finansowego - Public Finance and Financial Law in the Context od Financial Crisis in Central and Eastern Europe. Białystok - Lwów: Temida 2, 2010. ISBN 978-83-89620-85-9;
- Aktuální otázky financí a finančního práva z hlediska fiskální a monetární podpory hospodářského růstu v zemích střední a východní Evropy po roce 2010 - Current Issues of Finance and Financial Law in Terms of Fiscal and Monetary Support of Economic Growth in The Countries of Central And Eastern Europe after 2010. Praha: Leges, 2010. ISBN 978-80-87212-57-8;

- Public Finances – Administrative Autonomies. Győr: Universitas-Győr Nonprofit Kft., 2012. ISBN 978-963-9819-87-0;
- Annual and Long Term Public Finances in Central and Eastern European Countries. Bialystok: Temida 2, 2013. ISBN: 978-83-62813-33-9;
- Problems of application of tax law in Central and Eastern European Countries. Omsk: Omsk F. M. Dostoevsky State University, 2013. ISBN 978-5-7779-1628-0.

In 2014, the annual conference of the Center took place in Mikulov, Czech Republic. It was organized together with the Masaryk University. The conference topic was the system of financial law. Research papers that encompass the following areas were invited:

- Views on the definition of financial law as a branch of law in particular countries;
- Jurisprudence and financial law relationships to other branches of law;
- Approaches to jurisprudence systematization of financial law;
- Problems concerning constitutionalisation of financial law;
- European Union's impact on system of financial law;
- Atomization of financial law (diversification);
- System of didactics in financial law;
- Economic aspects of financial law.

As there were many participants with many contributions, organizers decided to publish three volumes of conference proceedings:

1. System of Financial Law - General Part of Financial Law and Budget Law;
2. System of Financial Law - System of Tax Law;
3. System of Financial Law - Financial Markets in the System of Financial Law.

This second volume on System of Tax Law is dealing not only with the system of tax law itself, but it concerns a lot of issues connected with taxes, charges and fees, their administration, national and European regulation, etc. It must be mentioned that tax law science has a longstanding tradition in the USA and Western Europe and is sufficiently advanced that the question is hardly even posed whether tax law can be considered an independent

branch of law. In contrast, Central and Eastern European legal science has only recently admitted the independent existence of financial law. Financial law, however, is a very broad legal area covering public finance, the financial sector (banking, insurance, capital markets), currency and foreign exchange, accounting, etc. In the next phase of development of financial law it will be necessary to react to these facts, which would with no doubt lead to a diversification of financial law. Editor believes that a specific volume of the conference proceedings dealing with tax law has its significance and will have at least minor relevance to accept tax law as an independent branch of law in CEE countries.

All contributions were double blind reviewed by experts in the area of tax law not only from the Central and Eastern European Countries.

Michal Radvan

SYSTEM OF TAX LAW

Michal Radvan[1]

Abstract

This contribution deals with the system of tax law. The main aim of the contribution is to confirm or disprove the hypothesis that there is a system of tax law. This can be really tough as in Central and Eastern European countries just a few legal schools accepts tax law as an independent branch of law. If the hypothesis is confirmed, the task is to describe and characterise the system of tax law using the knowledge from the legal theory and other branches of law in the Czech Republic and experience of tax law experts from the other countries in the Central and Eastern European region. Author will use the scientific methods of analysis, synthesis, and comparison.

Key words

Tax; tax law; system of tax law.

JEL Classification

K34, K40

1 Introduction

This contribution is based on the assumption that tax law is an independent branch of law as all criteria for tax law being considered an independent branch of law are met. Tax law has a separate and a very specific **object of regulation**, which is different from the other sub-branches of financial law. The object of tax law is the social relationships that, in addition to taxes

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sensu stricto, also deal with charges, customs duties and similar levies, provided that they are paid to public funds (the state budget, local self-government budgets, state funds, etc.). These relationships are created, implemented and expire in the process of creating public monetary funds. The primary purpose of regulation is to ensure a material basis for subsequent provision of public goods by means of filling up public funds. It is possible to determine the amount of the funds that are the object of such relationships (the amount of taxes, fees, etc.). Tax law is characterized by its own tax **regulation method** called as an administrative law method modified to include private law elements with the use of self-application. The **system coherence of tax law norms** must be divided into external system coherence, expressing the relationship to other branches of legislation (like constitutional law, financial law, administrative law, criminal law, international and European law, civil law, etc.) and internal system coherence, i.e. within the system of tax law. This article is dealing with this internal system coherence and details are introduced below. Tax law is, especially in Western Europe and in western countries, but not unanimously in Central and Eastern European countries, **accepted as an independent branch of law**, which is apparent not just in the opinions of individual authors, but also in the number of publications on this topic, separate instruction on tax law at law schools, establishment of specific courses focused on tax law at independent tax law departments, etc. (Radvan, in review).

As it was mentioned above, this contribution deals with the system of tax law. The main aim of the contribution is to confirm or disprove the hypothesis that there is a system of tax law. If the hypothesis is confirmed, the task is to describe and characterise the system of tax law using the knowledge from the legal theory and other branches of law in the Czech Republic and experience of tax law experts from the other countries in the Central and Eastern European region. The scientific methods of analysis, synthesis, and comparison are to be used.

There are no scientific articles or conference proceedings on this specific topic concerning system of tax law. Just in several textbooks authors as Babčák, Brzezinski, Etel, Gomułowicz, Małecki, Mastalski, Mrkývka, etc.) partially deal with this issue (but mostly the system of tax law can be recognized only from the textbook contents.

The article forms a part of the grant project no. MUNI/A/0856/2013 "Selected aspects ofdirect taxes and their interpretation and application in the jurisprudence" provided by Masaryk University.

2 System of tax law

Internal system coherence is expressed in the system configuration of tax law. Internal system clarification is not only theoretical in value, but primarily practical in the process of implementing and interpreting tax law norms. The tax law system should be understood as the internal differentiation of tax law into comprehensive collections or groups of tax law norms with regard to their content and the affinity of the social relationships they regulate (Slovinský, 1992). This system is not dogma, but is in its own way based on tradition, agreement and acceptance of tax law theories just as in other disciplines. It is changeable, just as the object of tax law and the law itself changes and develops. A classification system for tax law is needed due to its lack of codification and most likely the reluctance to prepare a general codification in the near future in all monitored states; there is therefore a need for a certain orientation in the countless sources and individual norms. The classification system for tax law is utilitarian and also reflects the concept of tax law as a branch of law, a science, or an educational discipline, which is why we can speak of the system of tax law as the system of one of the areas of national legislation, but also as the system of tax law science and the system of teaching the subject called "Tax Law", in particular at law schools and university economics departments. These systems are not strictly separated from each other, so just as there is a natural connection between the different views of tax law, there is also a certain level of connection between or merging of these system configurations (Radvan, in review).

There are several possibilities how to structure tax law norms. For example Babčák introduces four possibilities (Babčák, 2010: 49-53):

1. According to the level of concretization of tax law norms: general tax law and specific tax law;
2. According to the nature of public payments: tax law sensu largo and tax law sensu stricto;

3. According to the nature of tax law norms: substantive tax law and procedural tax law;
4. According to the influence to the tax law subjects: objective tax law and subjective tax law.

Babčák´s structure of tax law is the most complex one. All the other authors dealing with tax law (if they really deal with the system of tax law) are using the most common structure according to the nature of tax law norms (Mastalski, 2004: 38-42). Just Etel adds that there is not only substantive tax law and procedural tax law, but administrative tax law, too (Etel, 2008: 47). That is why the following text is based primarily on Babčák´s structure of tax law.

2.1 Structure of tax law according to the level of concretization of tax law norms

Like other branches of law, tax law can be divided into a general section and a specific section – general tax law and specific tax law. From a doctrinal and didactic perspective on tax law, the **general tax law** is made up of general information regarding tax law and its object, norms and relationships (Grúň, Králik, 1997). It includes legal norms concerning the tax system sensu largo, it means not only taxes sensu stricto, but as well charges, fees, levies, contributions, customs, insurance premiums, etc.[2] It deals with general conditions of tax law drafting and imposing and collection of taxes, the structure of tax administrators and their rights and obligations, forms and methods of tax control, etc. (Babčák, 2010: 51). According to Mastalski, general tax lax includes procedural tax law, criminal tax law, and administrative tax law including all tax liabilities. It sets basic legal standards and principles concerning tax law drafting and tax procedure, it defines basic institutes and instruments in the area of tax law (Mastalski, 2004: 38-41, Mastalski, 2010: 375-388).

In my opinion, **the general tax law contain certain institutes of a general nature which are completed in the individual sections of tax law, as well as certain general principles applying to tax law as a whole, which serve to create, implement and interpret it. There is no real**

2 For details, see Boháč, 2013.

need to codify the tax law to be able to define this part of tax law. Nevertheless, I believe this would be very helpful for implementation and interpretation of tax law norms. To what extent this can be formed into a coherent whole, using unified terminology, policies, and legal institutes valid for all tax law relationships will depend on the further development of tax law in the Czech Republic. These general issues could appear, for example, in existing regulations of a more procedural nature as well as entirely new legislation, e.g. the Public Finance Act, which would contain general institutes from the area of tax law as well as financial law. Poland stands out from this standard framework for Central and Eastern Europe with its Public Finance Act (ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych), which could provide an example for other states in this regard (Radvan, in review).

The specific section of tax law contains the substantive and procedural legislation with regard to individual tax (sensu largo) law relationships. Their regulation is split between many different legal regulations. Nevertheless we can find a certain organization system in the jumble of individual legal regulations and norms, based on which the specific section of tax law is made up of the following sub-branches:

1. Tax law;
2. Charge law;
3. Customs law;
4. Other similar levies to public budgets.

These sub-branches will be described in the following subchapters, as it is necessary to divide them according to the nature of public payments and according to the nature of tax law norms.

2.2 Structure of tax law according to the nature of public payments

Tax law sensu largo includes several parts, as there are many public levies, provided that they are paid to public funds (the state budget, local self-government budgets, state funds, etc.). They are not always called as taxes. The reason is mostly historical, partially depends on political will, because it is extremely unpopular to introduce new taxes. But if the legislator

introduces charge, fee, levy, contribution or something else (even the characteristics of such a levy means that it is real tax), the taxpayers and voters are more reconciliation with such a levy.

In my opinion, there are just four types of public levies in general, no matter what is the title of such a levy. We can distinguish between taxes, charges (fees), custom duties, and insurance premiums.

Tax is **tax** a mandatory, irretrievable, legally predetermined levy that is usually regular and non-equivalent. The revenue is directed to the public fund. On the other hand, **charge (fee)** is usually irregular and the public body offers some kind of compensation. It is collected not generally, but for specific act of public bodies. The taxpayer contributes for this act, as it is just for his/her need. It should be mentioned that there is a significant role of the regulation function of the charges. All the other characteristics of charges are the same as of taxes. **Customs** are specific levies, where the protective function prevails, as they are paid in cross-border trade. According to the characteristics, customs are more charges than taxes.[3] Public **insurance premiums** are obligatory payments to the public budgets. Not only OECD ranks insurance premiums among taxes.

That is why if the legal regulation concerns just taxes sensu stricto, we can talk about tax law sensu stricto. If other public levies are added, these relationships are regulated by tax law sensu largo (berní právo in Czech, prawo daninowe in Polish, etc.).

2.3 Structure of tax law according to the nature of tax law norms

One of the most typical structures of any legal branch is its substantive and procedural part. Each part includes its specific norms with substantive or procedural nature.

Substantive law generally defines legal relations – subjective rights and obligations. **The object of substantive tax law is legal regulation of the tax system and the content of tax law relation. Substantive tax law deals with structural components of taxes like subject of taxation, object**

3 See opposite opinion by Boháč (Boháč, 2013: 302).

of taxation, tax base and tax rate, correction components, tax administrator, conditions of payment (incl. responsibility and sanctions), and budget destination.

Another set of norms within the system of tax law is the relatively comprehensive set of procedural law norms. **Procedural tax law protects the substantive tax law; it is a tool to promote and to apply the substantive tax law. It sets the possibilities how to assess the tax, collect it and enforce it, how to deal with the tax evidence, etc.**

Specifically, procedural tax law regulates (Radvan, in review):

- The procedural law position of entities in proceedings on the rights, legally protected interests and obligations resulting for participants from substantive tax law;
- Procedural law practices in decision-making processes before tax administration authorities and legal and natural persons, if they were entrusted by law or based on the law with making decisions on the rights, legally protected interests and obligations of other entities resulting from substantive tax law norms, including basic principles of tax proceedings;
- The practices of subordinate entities when implementing substantive tax law, which do not involve proceedings before public authorities but procedures the subject (e.g. subject of taxation – taxpayer, payor) applies to him/her/itself or the payor sets a legal obligation for the taxpayer on the basis of substantive tax law (e.g. tax liability) using the prescribed technique (tax technique), declares such fact in the prescribed manner to the superior entity (authority), with this declaration having the same legal effect as a judgment in legal proceedings, and carries out the declared obligation, again in the prescribed manner (e.g. the apt Polish term "samowymiar", which describes this process sui generis). Unlike the processes set forth in the first two points, which are an authoritative application of substantive tax law, in this case the authoritative component is secondary, used only in the event of the subordinate entity's failure in the primary "self-application" of the relevant norms of substantive tax law. This method of implementing substantive tax law norms resulting in the above mentioned

declaration of obligation (e.g. in the form of a tax return) is not identical to direct implementation of the norms of tax law, which lacks such an outlet;
- The legislative process in creating, passing and monitoring fulfilment of public budgets pursuant to the financial (tax) documents.

With regard to the processes of applying substantive tax law, we can distinguish primarily the following (Radvan, in review):
- Tax proceedings;
- Administrative proceedings before the tax administrator, when the object of the proceedings is not the tax itself but another obligation of the taxpayer;
- The "self-application" process (see above).

2.4 Structure of tax law according to the influence to the tax law subjects

Additionally, tax law can be divided according to the influence to the tax law subjects into the objective tax law and the subjective tax law.

Objective tax law is to be understood as a group of social relationships those are created, implemented and expire in the process of creating public monetary funds. The primary purpose of regulation is to ensure a material basis for subsequent provision of public goods by means of filling up public funds.

Subjective tax law means a possibility of public body to protect its tax management. The subjective tax law is ensured and protected by the objective tax law (Babčák, 2010: 53.).

2.5 Other sub-branches of tax law

Other specific subsystems of tax law are quite closely bounded with procedural tax law. Especially judicial tax law, administrative tax law and criminal tax law are to be mentioned here (Radvan, in review).

Judicial tax law (e.g. Nováková, Foltas in Miškinis, Ruškowski, 2004) **regulates the decision-making processes in matters of substantive tax law in court**, in particular in administrative justice and judicial enforcement of tax administration decisions.

Public administration authorities clearly have an active presence in tax-related activities. The norms of an administrative law nature regulating the organization and legal position of tax administration authorities do not comprise a unified sub-branch of substantive administrative law or a unified section of tax law, although we can entertain the idea of a possible administrative tax law, made up of the set of legal norms regulating public administration in the area of taxes and related activities. This would involve, in particular, regulating tax administration authorities, i.e. public administration authorities, in the area of public revenues from taxes and charges, as well as regulating customs administration, such as public administration of customs and customs duties, etc. **Administrative tax law deals especially with the competences, scope of activities and jurisdiction of tax administration authorities.** The literature also mentions the term organizational financial (tax) law (e.g. Spáčil, 1970: 72).

The deliberate focusing of a certain section of tax law norms (including tax administration norms) on **defining the foundations and consequences of liability for breach of tax law norms, i.e. the set of such norms of a protective nature**, can be described jointly as **criminal tax law** (e.g. Šramková in Miškinis, Ruśkowski, 2004). For instance, in Poland this section is often reflected in an independent code, which regulates the liability system of what we would consider tax administration and financial administration offenses as well as criminal offenses (Prusak, 1996). In the case of the Czech Republic, the legal regulation of criminal tax law is contained in the Tax Code and Criminal Code, as well as to a lesser extent in the individual, predominantly substantive, tax regulations (e.g. in the Act on Local Charges).

3 Conclusion

This contribution was dealing with the system of tax law. The hypothesis stated in the introduction was confirmed: there is not just one, but several possibilities how to define the system of tax law.

In my opinion, the system of tax law is basically created by the general tax law and specific tax law. Besides those two parts, there are administrative taw

law, judicial tax law and criminal tax law. Specific tax law and administrative, judicial and criminal tax law can be divided into the substantive and procedural law;[4] in case administrative, judicial and criminal tax law procedural norms prevail.

Moreover, it must be taken into account, whether the tax law is understood in the stricter (tax law sensu stricto), or in the broader sense (tax law sensu largo). In the second case, we can distinguish between tax law sensu stricto, charge law, customs law, and public insurance premiums law.

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TAX LAW CREATION AS A RESULT OF PARTIAL ATOMIZATION OF FINANCIAL LAW IN SLOVAKIA

Vladimír Babčák[1]

Abstract

The paper deals with a very present issue of the justification of creating the tax law beyond the scope of financial law. This issue is, in the former common state of Czechs and Slovaks, out of interest among legal theorists in the field of financial law.

In this paper, the author addresses two problem areas. Firstly, it's a question of the current system of financial law which has undergone significant structural changes since the socio-political changes in November 1989. The result was the extension of the financial law-regulation of some new subsystems in specific part of financial law, such as the legal aspects of financial management of selected non-profit entities, financial management of public institutions but mainly financial market legislation. Secondly, the main objective of this article is to justify the existence of the tax law as a separate branch of law in the Slovak legal order.

Among the basic methods of this scientific work which were used in the paper, may be mentioned a method of scientific analysis and synthesis, formal-logical method and comparison method.

Key words

Tax; tax law.

JEL Classification

K34, K40

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1 Introduction

Financial law has always belonged to the crucial scientific and pedagogical disciplines, lectured at universities of law and economics specialization. In this way is regarded by professional community for over one hundred and fifty years.

Financial law has been built for decades as a stable part of the legal order of our state. Its primary goal is, in adequate legal form, to express the existing social and especially economic relations mainly realized by bond between subjects of economic activity and the system of monetary funds created by state or local government. This finding has general application irrespective of the form of the social organization in which financial law operated and different names for social order which was given by politicians, political scientists and historians. None ideological attribute which should, among other things, reflect the equality or inequality of the status of these entities, or democracy of social structure of their economic substance could not and cannot change a lot. Therefore, financial law was not in the former socio-political establishment as „servile" to the ruling government like some other branches of the law. In the period before 1990 in its structure, to some extent, although penetrated the ideological "coat" (what was difficult to avoid), but this was within the limits of objective necessity to regulate socio-economic relations.

In this year elapsed twenty-five years since socio-political changes which essentially modified also the professional public perception on financial law. In this regard, it may be noted that the financial law has been the subject of rather critical view by several economists and lawyers for his work in the past social regime. At this time, moreover, financial law registered significant quantitative and qualitative changes leading to its progressive profiling and crystallize the subject and subsequently the system.

Although financial law remain a traditional part of our legal system, but the first years of the democratization process were for this legal branch in particular the period of the search of his new place in Slovak law system. This was due to the necessity participate in creation of organizational and legal conditions for the functioning of the Slovak economy on market principles.

The conditions, under which financial law applies, have changed significantly. It might sound contradictory and paradoxically, however in my opinion at present state uses finance law incomparably more intense than in the previous regime to influence economic, social and other processes in society. From a society that got rid of the centrally planned economy it hardly anybody expected. In this respect, one can rightly say that in a market system is financial law strongly and more deeply connected with the economy than any other area of law forming our legal system.

2 The issue of the current system of financial law

Financial law has always been, without any doubt, among the sectors of public law. However, post-November development brought to this area of law new perspectives, also. In the last twenty five years this branch of law has undergone major changes that have affected the scope and content of the subject of financial law-regulation, it means his system.

It must be stressed that the current financial law ceased to be strictly delineated and relatively autonomous and closed branch of law, which focuses almost exclusively on the regulation of socio-economic relations, which are characterized by the dominant and overriding interest of the state. Along this line was perceived internal structure of financial law in the past. In the former social period was not an option discussions related to interconnection of financial law-regulation with private sector. Financial law was clearly perceived as a sector of public law without mentioned characteristics of private nature in the scientific literature. Truth be told, nor was a reasonable basis for such an approach by the professional community. It is a paradox that at a time when, in principle, there was no highlighted the division between public and private law, in fact the subject of financial law-regulation maintained a relatively strong in terms of its affiliation to a public relations.

With the changing of socio-economic system, however, financial law had to address as one of the priority the problem regarding the entities that operate in the private-sector. there are many such entities in the Slovak legal environment and have different organizational and legal forms. It is a wide diapason of such entities, which are largely considered to be the non-governmental

sector. Examples include political parties and political movements, churches and religious communities, foundations, non-investment funds, non-profit organizations providing welfare services etc.

What in relation to the system of financial law and the subject of regulation actually meant the development of these so-called non-profit entities? It meant extending the scope of financial law-regulation of several areas of social relationships related to the management of selected non-profit entities of private law. Their action was before November 1989 rather formally, respectively several of them our legal system did not recognize (such as non-profit organizations providing community services, non-investment funds, etc.).

Post-November connection between subject to financial law-regulation and the non-profit sector entities of private law is given by some issues of financial management. For those aspects of them which have a character of public law, it means private entities dispose with public funds, receive grants and contributions from the state budget, the state regulates the creation and use some of the funds listed entities, control their management, provide them various concessions. Moreover, it allows them to receive tax assignation (Prievozníková - Štrkolec, 2007:182-190).

Except selected non-profit entities which are included under the system base of financial law, it has significantly increased the subject of financial law-regulation by the area of management of public institutions. In the past twenty-five years, we may have seen the emergence and development of their various organizational and legal forms starting with public universities and ending with social security system. In performing its duties the following entities spend public funds, create and use different funds and, ultimately, organize and carry out financial activity in addition to or as a part of its main activities. In their case, they are bodies governed by public law with special nature, but they absented in previous socio-political system.

Development of new organizational and legal forms thus led to the fact that traditional sphere of existence and management of budgetary and contributory organizations and state-owned enterprises in terms of personnel aspect of the subject of financial law-regulation, has increased by selected non-profit entities of private law and public institutions.

The issue of legal relations of public and private interests expressed in the relevant legislation also affected several other areas of financial-legal relationships, such as payment and settlement, credit relations, commercial insurance sector and so on. Within this range of issues comes to the fore the issue of financial market regulation.

Financial markets law as a relatively new legal institute has evolved due to the dynamic development of the market economy. Legal relations arising in the financial market have a mixed character, because they present both public and private elements (Štrkolec, In: Babčák, 2012: 471). This fact also affects the classification of financial markets law under certain branch of law. In this respect, there comes together two opposing schools of thought. One assumes that the financial markets law is among the subsystems of special part of financial law (Bakes, 2006: 13). However, there are also views that the development seeks to achieve complete exclusion of the financial markets law under the financial law and its transformation into separate branch of law (Balko, 2004: 27; Králik - Jakubovič, 2004: 116).

From the previous lines result for the science of financial law following approaches and possible solutions:

1. conceived the financial markets law in his public and private expressions law as a relatively new or the youngest part of the financial law, which interferes with understanding by other authors (Bakeš, Karfíková, Kotáb, Marková et al., 2012: 13). In this case, the debate about the nature of financial and legal relationships in this area is necessary. In this respect it should be noted, that in the theory of financial law there is a rare consensus of authors to the existence of private and public nature of relations treated by norms belonging to the financial markets law. It creates suitable conditions for distinguish the financial law to the part of public and private. In this context, the scientific literature in recent years quite often mention the division of the financial law to private financial law (which includes financial markets law, its instruments and entities) and public financial law (with the institutes such as budget, tax, duties, tariffs, currency foreign exchange, management of state-owned enterprises and system of financial institutions) (Balko, 2004: 27), if necessary also, the division of financial law to substantive financial law and

procedural financial law. In order latter division cannot cause distortion of the internal cohesion of financial and legal norms as we know them today;

2. Admit, respectively accept the reality of the allocation of the financial markets law from the financial law and its transformation to the new branch of law, which consists of both parts - public and private law. This is the first example of the ongoing partial atomization of financial law.

From the above resonates, that at present reveals two trends in relation to the internal division of financial law:

1. extension of the scope of financial-regulation on some new field of social relations treated by legal norms;
2. current process of partial atomization of financial law accompanied mainly by separating the tax law, but also an effort to form the financial markets law as a separate branch of law.

The financial market is a complicated complex of social relations manifest themselves not only in economics but also in the social sphere, cultural fields etc. The basic division of the financial market to capital and monetary market with a number of instruments, entities, functional mechanism, public and private relations law precedes the complexity of the issue. This is related to issues such as various forms of state aid, investment incentives, public-private partnerships and so on. In their cases, there is provision of public funds from the state budget or from the European Union (such as the Structural Funds, the Cohesion Fund, etc.) to entities from the area of private law.

Despite the diversity of views on the nature of the right financial market, I believe that those aspects which are public in nature fall under a regulatory framework of financial law. Important issue, however, appears to create such a legal environment that will be able to ensure proper and safe functioning of financial markets, which also interferes with the positive reaction in the scientific literature (Štrkolec, 2008: 314). This would create the conditions for greater stability of the financial system as a whole and at the same time it would eliminate, respectively limit the threat of possible future financial crisis. The importance of the issue shows the current financial crisis, which has already reached a global character.

3 Tax law as an expression of a certain degree of atomization of financial law

So far notes and experiences clearly demonstrated that the system of financial law cannot be a priori unchanging. The system, as it is in other areas of law, is subject to changes from time to time, whether positive or negative. They are caused by scientifically justified conclusions of representatives of professional community, but also the needs of the economy at the national and international level and ultimately the world globalization in all its expressions (not just economic). This has general application without the fact if we consider changes in the system of financial law at the level of increase or reduce the scope of regulation of subject of this branch of law.

On the one hand, financial law extended on indicated range of financial-legal relations. However in the opposite direction at the same time, there were also some internal restriction. We can say that a degree of atomization, resulting in the separation of the tax law from the scope of the internal structure of financial law.

Tax law in Slovakia has been considered for decades for important, but not decisive subsystem of financial law. This recognition had been granted to the norms of budgetary law, which ensure fulfilment of the fiscal functions of public budgets, while the norms of tax law only create the necessary legal terms and conditions for the materialization of budgetary legal norms.

Position of tax law in the legal system was at that time just as the importance was attributed to the other components of the tax system. Despite the well-known thesis that the tax rests economic power of the state tax before the said milestone did not play such an important role that holds them nowadays. In the past time, levies on profits were the focus of state budget revenues. From there sprang the former perception, especially by professional public on the area of the legal rules that affect imposing, charging and collecting taxes. Tax norms were considered for only one type of financial and legal norms, and not the most important. Therefore there were not any discussions on the relative autonomy of the tax law; they would be not only useless, but in addition to their unfounded and too presumptuous (Babčák,

2005: 21). In this context, nor the problems associated with the creation, implementation and application of tax norms did not appear as worries, but rather presented as an issue of marginal nature. If still some discussions took place, so only sporadically, while focused on non-essential things, such as now obsolete theoretical differences between taxes and charges. If some renowned authors in their scientific writings dealt with tax and legal issues, they did so primarily from the perspective of the analysis of the current legal status and not from the aspect of the examination of this group of norms as something special and integrating the separate legal institution. Also one of the few monographs of that time, which dealt with the issue of tax and legal relationships, only mentioned the tax law (Girášek, 1981: 24).

In the context of the separation of the tax law from financial law that was noted a certain degree of its atomization. Atomization in this sense, and it must be stressed, in any case cannot be associated with a reduction of the importance of the financial law in the regulation of economic and social relations. On the contrary, the tax law in recent years has grown and formed in addition to the financial law as other autonomous branch of law and it is ranked to the group of those legal disciplines which are considered as part of a public law. They can work together and act on the socio-economic relations side by side and in symbiosis more efficiently than ever.

4 The issue of the relationship of tax law versus financial law

In the professional community in Slovakia for years is very little discussion about the relationship between branches of law; rather it talks about relations between the representatives of the legal sectors. Unfortunately, current jurisprudence is the product of the age in which we live. Every legal-scientific discipline is more or less closed to himself. The fact that for the development of the branch of law and his science is also necessary knowledge and experience of other legal-related disciplines, we mostly ignored.

Discuss about the relationship between branches of law is primarily in the importance of seeking what unites them. As the field of social relations which two or more areas of law combine, then for their smooth

functioning must be ensured symbiosis operation of legal rules that form them. This is sure necessary for entire legal order.

Symbiosis or cohabitation and coexistence side by side is characteristic to tax law and financial law. There are few areas of law that are so close to each other, but at the same time far enough. Tax law and financial law have a particularly close philosophical and social and legal spawn. This statement is true not only because all branches of law are very closely linked. If we should personify, tax law can actually be considered as a child begotten by financial law. As in life the child wants to go sooner or later their own way, in the legal viewpoint the path of financial law and tax law at some point parted; but broke to cause their congregation in different directions. Interconnection tax law and financial law in Slovakia - despite their relatively autonomous existence – is reflected in different ways.

The relation between tax law and financial law is very specific. Tax law and financial law are branches of our legal system that express dominance and superiority of the fiscal interests of the state and local governments over monetary and property interests of taxpayers which are in this interaction considered as the interests of secondary importance.

If we compare the tax law and financial law, we can conclude that exhibit many similar and in some respects identical sites. These are manifested in a similar structure of legal norms, in the calculation and the substance of the principles on which they are built, the organizational-legal base of the bodies in charge of the tax and financial legal relations, in the methods and forms of action etc.

Close connection between these branches of law determine the following essential aspects:

- tax law has been considered as a part of the financial law for decades,
- closeness of social relations that tax law and financial law regulate,
- related features of the legal norms of tax law and financial law,
- similar principles on which the tax law and financial law are based. This should be understand as a consequence of proximity and affinity of these branches of law, but also the fact that they belong to public law,
- similar methods of legal regulation.

Tax law and financial law mainly associated issues relating to legislation formation of the state budget and the budgets of local governments. Financial law in this regard establishes specific types of budget revenues, from which the form specified budgets in the first place are the taxes and fees. In this regard, however, is important to say that the subject of regulation, which forms the basis of financial law is much broader than just the revenues and their creation, this is already linked to the issue of system of financial law. Consequently, it should further be noted that the regulatory function of financial law in relation to taxes and fees as common object of regulation of both branches of law, with this begins and ends, also. In addition to general adjustments that taxes and fees revenues of the state budget or any local budget (among other revenue sources) and quantification of the volume of the revenue of these titles under the State Budget Act, the financial legislation has further revenues from taxes and fees not deal. Rather focuses attention on formal-legal aspect of budgeting, it means budget process and financial rules and principles, which is clearly beyond the scope of tax and fees issues. A similar finding can occur even in the legal regulation of the distribution and use of the state budget and the budgets of local governments. This domain is beyond the scope of any tax regulation.

Regulatory function of the tax law in relation to taxes and fees is very detailed and irreplaceable by any other area of law. Expect anchoring the legal existence of different kinds of taxes and fees, norms of tax law detail the rights and obligations of taxpayers in individual taxes and fees relating to the impose, collection and payment, as well as procedural approach competent authorities for issuing, reviewing and implementing compulsory decisions on tax matters for the purpose of tax collection and tax arrears.

From what we stated rises, that tax law provides materialization of budgetary considerations, it means that by the specific legal structure of taxes and fees are creating conditions for their formation and, consequently, distribution and use.

5 The issue of the substance of the tax law as a separate branch of law

Taxes represent the material site and legal norms of tax law represent formal aspects of being tax law in its legal-sectorial, legal-scientific and pedagogical position. From my perspective is irrelevant whether these different positions are perceived in some formalized uniform way.

Let's try to keep a cool head and in the same historical context considered becoming independent to tax law as an expression of period characterized by the globalization of the world economy in particular. Earmarking tax law from the scope of legal norms of financial law occurred naturally and by a legitimate way. It is nothing unusual in jurisprudence and legal system. Similarly it was, in not so distant past, when financial law, for example, was considered to be part of administrative law. The reason for this was the existence of some institutes governed by legal norms of financial law, which in essence were consistent with similar institutes enshrined in administrative law. In its similarities but at the same time fundamentally differed among themselves what caused specificity of financial relations towards administrative relations. This fact should be respected and accepted as the leading motive for autonomy of certain group of legal norms and legal relationships.

If we wanted to leave the traditional and we can say even conservative attitudes of the professional community, then we would have to admit that the present time wishes to self-existence and dynamic development of the tax law as it was before 1989, respectively 1993, when, as it is known, the tax reform began to operate on the territory of today's Czech Republic and Slovakia.

The legal norms of tax law which are forming tax law are based on the specificities of the subject regulation, specific methods of regulation and other characteristics of the tax norms and tax relationships concentrated in a new branch of law, which includes in the spirit of Article 59 of the Constitution of the Slovak Republic relations in the field of impose, payment and collection of fees. I am aware of the fact that smaller part of financial and legal community in the Czech Republic and Slovakia has different view on this question, yet. Nevertheless, we can already discerned in several

Czech and Slovak representatives of financial law same shift of opinion, which can be explained also by the fact that they are thinking about possibility of the autonomous status of tax law in the legal order. This can be demonstrated for example, in the finding of the renowned Czech lawyer, pedagogue and scientist M. Bakeš, that the concept of tax law as a separate branch of law is undoubtedly be termed as a "new phenomenon in law at the threshold of the 21st century" (Bakeš, In: Šturma – Tomášek, 2009: 254).

The fact that tax law is a viable organism is demonstrated by the fact that virtually no other branch of law experienced as much qualitative changes in comparison with the situation which was forced in the legal area before 1990. There were changes in the rule-making area, changes in the tax system, changes in legal institutions, changes in the understanding place of tax law in legal order and not least changes in the adaptation of society (Babčák 2009: 196-243; Babčák, 2012: 42-43).

Mentioned areas of changes in my opinion become a sufficient motive for changing attitudes to understanding the place of tax law in the Slovak legal order, especially when tax law conforms to the requirements relating to independent status. In this respect, I fully shares the opinion expressed by J. Suchoža that "... the development of law in the Slovak Republic in recent years provides sufficient evidence that the traditional criteria under which a system of law (and theory), including formation and fixation of branches or sub-sectors of law, is outdated" (Suchoža, 2004: 11).

Tax law in Slovakia:

- has its object of legal regulation,
- is characterized by specific methods of regulation,
- regulates specific and homogeneous group of social relations,
- creates a special set of legal norms,
- creates a set of legal norms with specific nature,
- is accepted by society as a branch of law.

The tax rules are applicable to regulated social relations directly and immediately, without any disturbing interference, respectively conditions from other areas of law. Tax law is thus not directly dependent on other branches of law,

and thanks to this freely and independently constructs its own legal institutions. It can also rely on its intrinsic principles and rules which are supported by constitutional norms of Slovak legal order. Legal norms of tax law thus represent a specific and coherent group of legal norms, and legal norms of other branches of law operate in relation to them only subsidiary.

The basic principle of tax law underlying its nature can include:

- clarity of expression and ensuring of fiscal interests of the state and local governments through legal norms of tax law;
- contradiction between fiscal interests of the state or local government and personal-property interests of taxpayers;
- conformism with the content of the legal norms of tax law. Some authors in this context, say about tax compliance, which comes in voluntary acceptance and fulfilment of the obligations arising from the practical implementation of the tax and legal relationships by single taxpayer without distinction, it is resultant of acceptance of national tax philosophy, without the threat of state coercion (Králik - Jakubovič, 2004: 424);
- political compromise as a result of regulation, which is conditioned by the need to material security of activities of the State and local governments;
- legal adjustment to tax relations through the legal norms of the highest legal force;
- binding force and imperative (power characteristics) of legal norms of tax law;
- tax equity;
- elimination of double taxation.

6 Conclusion

Tax law in Slovakia is a real social phenomenon, regardless of whether one wishes it or not. It was not necessary to take any decisions of government, academic or scientific bodies and institutions, even legal norms of European Union, under which it would constituted in particular homogeneous and dynamically developing whole. Regularities of social development, major changes in the economy, in the social sphere and then in area of law led

to the fact that tax law is per captioning as objectively existing reality not only in general public but also in professional community consisting mainly of representatives of other disciplines.

The process of creation of the tax law into one organic whole was not and is not easy and without problems. This reflects the fact that the reality of the tax law in the Slovak conditions is also characterized by large and dynamics changes in the legislative area. Frequent amendments of tax legislation depreciate the value of legal certainty taxable persons and they not conducive to the requirement for clarity of the tax legislation. Mentioned dynamics but also justified its determinants, which can be mainly added:

- entry of the Slovak Republic into the European economic structures with the consequences resulting from the membership in the EU,
- the membership in the European Union resulting in need to find new tools and mechanisms of tax and legal action.

For a long time I have put at least one fundamental question: is sufficient classical, traditional, unchanging and largely conservative perception and understanding of the tax law in the framework of financial law, or this legal institute deserves something more. I inherently believe that the community of financial law to which I proudly belong, should change its position on this issue. Unfortunately, most of the faculties of the former common state on this issue since year of 1989, has not changed much. Either it is because of the professional community is not convinced of the merits of the autonomous existence of tax law in the legal system, or objective reality, for we sometimes like to hide, such an approach does not allow changes.

I will be immodest when I declare that I feel to be the creator of the idea of creating the tax law as a separate branch of law within areas of law constituting the legal system of the Slovak Republic (Mrkývka, 2012: 20). In this context, I do not like to go into position of „liquidator" or „gravedigger" financial law in Slovakia, respectively. in eastern Slovakia. Financial law will exist regardless of whether internally most professional community aligns with separate existence of tax law or not.

With the financial law and its development I grew up, I have improved my knowledge and understanding about it and I have reached the highest academic honours at university. I am with this branch of law, metaphorically

expressed accrete since 1972, when I worked as a student at the Department of Administrative and Financial Law of my Alma mater. Still I proudly voice to ideas that I instil by my professors at the Faculty of Law in Bratislava A. Slovinský and J. Girášek. In any case, and I am adamant about it, financial law by its nature, subject, methods of regulation, system, functions and principles on which it has been built, not before 1989 and after that year equated. Therefore, ongoing changes in financial law, so to speak, that started after 1989 are nothing more than a reaction to the socio-political and legal developments in fundamentally changed conditions.

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TREATY SHOPPING IN TAX STRATEGIES OF COMPANIES OPERATING ON THE INTERNATIONAL MARKET

Bożena Ciupek[1]

Abstract

Considerations undertaken in this article refer to behaviours of companies that function on the international market and that wish to address fiscal burden imposed on their passive income. Much attention is paid to formulation of a tax strategy and using this strategy to implement treaty shopping. Therefore, the article aims at presenting treaty shopping and possibilities for of its utilisation in any tax strategy, particularly taking into account threats and opportunities that have to be faced while realising financial objectives of any entity that functions in the international context. The article contents cover discussions in which general remarks that justify employment of a given tax strategy as a tool used to manage taxes help identify a phenomenon of treaty shopping. Moreover, potential ways of using treaty shopping for corporate finance along with its limitations are demonstrated.

Key words

Fiscal burden; corporate finance; tax strategy; treaty shopping.

JEL Classification

H32

1 Introduction

Resistance of companies to fiscal burden is a common phenomenon that characterises contemporary economic relationships. Companies that

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perceive taxes as remarkable external limitations that prevent them from obtaining financial benefits that come from business activities undertaken are not passive in their fiscal related behaviours. Companies do not treat taxes as a given volume imposed by the state but they try to influence the volume in question by making adequate managerial decisions. A tax strategy is one of the methods to be used while managing taxes. Application of any tax strategy requires relevant tools that have to be used in compliance with the binding legal system in order to optimise fiscal burden. Treaty shopping is a particularly interesting instrument of realising any tax strategy implemented by companies that function internationally.

The article aims at presenting treaty shopping and the way it can be used to formulate and implement tax strategies of companies that function on the international markets.

To meet the above objective, the following thesis is formulated: adequate use of treaty shopping as an instrument of a tax strategy should lead to realisation of expected financial objectives in companies that function on the international markets.

The contents of the article are subordinated to the objective set and cover discussions in which general remarks that justify employment of a given tax strategy as a tool used to manage taxes help identify a phenomenon of treaty shopping. Moreover, reasons for treaty shopping, nature of the very phenomenon and potential ways of using it for tax optimisation along with threats to be faced while employing this method are demonstrated.

2 Nature and justification of employing tax strategies in management of corporate finance

Tax law regulations do not define a notion of a tax strategy. Understanding of this term has been developed through business practices and is manifested in application of the tax law. It is most frequently assumed that a tax strategy should be understood as intentional and conscious activities of companies that aim at optimising fiscal burden, deferring chargeability dates of fiscal liabilities and reducing tax risk (Ciupek, Famulska, 2013: 53-54).

Applying a tax strategy is in fact a complex process and means that a tax is perceived as an external factor that generates specific opportunities or threats for a company. Such opportunities and threats should be adequately utilised or neutralised by involving all possible means and powers companies might have. Building a tax strategy should be therefore deeply rooted in a strategy of corporate finance management to involve the following:

- setting tax objectives and priorities of companies,
- defining instruments of such objectives realisation,
- creating scenarios of behaviours related to taxes, and
- identifying tax risk and possibilities to manage the risk in question.

Hence, formulating a tax strategy requires recognition and analyses of the way a tax levy is constructed in the context of resulting opportunities and threats for realisation of financial objectives set by a company. It is also necessary here to determine whether identified opportunities and/or threats may be exploited and/or limited in the process of making financial decisions. A necessity and possibility of such behaviours of companies is justified both from the economic (resulting from principles of undertaking rational actions) and legal (resulting from the lack of any ban to behave this way) perspectives.

In its economic sense, formulating and applying a tax strategy is justified to meet financial objectives of a company. Maximisation of the market value may be recognised as the most important financial objective of any business entity including companies that function on the international market. This objective is possible to be met when profits are generated and financial liquidity is sustained. However, taxes, including an income tax in particular, are major factors that disturb realisation of the objective in question. Income taxes as direct tax burden naturally reduce a financial result generated by a company, which in turn limits company development capacities and owners' income. Moreover, the very technique of determining and collecting the tax in question may threaten financial liquidity since the tax liability is usually chargeable before the payment for taxable transactions made is received. This is why rationally operating companies that make management decisions must know and take into account future tax results of the decisions made.

However, in the legal context a tax strategy is justified as a consequence of lacking regulations that would introduce some obligation to face tax burden in its highest possible amount or a ban to fix taxes at their possible lowest rates. Since there are no such regulations, each taxpayer may apply the so-called Westminster principle in relation to the tax burden imposed. In compliance with this principle individuals are entitled to organise their matters in the way that would allow for paying the lowest tax possible provided it is legal. And if they are able to pay lower taxes because of their creativity, they cannot be forced to pay any increased tax (IRC v. Duke of Westminster, 1936: AC1). This principle may also be complemented with the statement that if taxpayers in order to realise their economic goals have two options including one that generates a tax liability and the other that does not, they are totally free to choose an option that would allow for avoiding the tax in question (Craven v. White, 1988: 3 ALL ER 495). Application of these regulations is also confirmed by Polish judicial decisions made by administrative courts. The decision made by the Supreme Administrative Court contains a statement that "(…) the very nature of business activities is to maximise profits instead of tax liabilities" (the Supreme Administrative Court, Warsaw 2002: II FSK 1399/10). The Voivodeship Administrative Court in Warsaw stated that "(…) there is no a general rule that would make a taxpayer undertake actions that were aimed at generating the highest possible tax liability" (the Voivodeship Administrative Court in Warsaw 2006: III SA/Wa 983/2006). This Court also stated that "(…) the legal system in use provides taxpayers with an opportunity for selecting several legal constructs to reach their intended economic goals and each of those options had a different tax dimension, a selection of the most beneficial fiscally solution cannot be treated as law evasion" (WSA Warszawa, 2004: III SA 2984/2002).

Formulating and applying tax strategies understood as economically effective and legally enforceable tools of realising financial objectives of companies require identification of instruments that may be used in this context. Generally, tax instruments that allow for meeting tax strategy objectives may include the following two forms:

- instruments that were intentionally established by the legislator who left taxpayers with a choice (total or conditioned) to use them in practice, and

- instruments that have not been defined by the legislator and whose existence results from some imperfection of the tax law in the context of complexity observed in the world of business phenomena.

The former type of instruments predominantly includes using tax reliefs, adopting a status of the subject or undertaking activities that enjoy tax privileges and selecting forms of running business activities or their taxation that would be subject to a more lenient tax regime. The latter type includes all activities undertaken by taxpayers that are neither forbidden by law nor directly encouraged to be used. A common feature of such instruments may be found in the fact that although they are legal, they lead to reducing tax burden below the level recognised by the legislator as adequate (or at least acceptable) in the situation that is not assumed by the legislator (Brzeziński, 2009: 290). The phenomenon of treaty shopping belongs to the latter type of the instruments in question. This results in the situation that treaty shopping is seen from two opposite points of views. Companies see treaty shopping as an opportunity for obtaining some financial benefits. Public authorities believe treaty shopping to be a phenomenon that reduces fiscal effectiveness of tax related instruments in use. In business practice such different approaches result in numerous problems of economic and legal nature.

In the context of the adopted objective of this article, it is possible to say that the phenomenon presented is a method of tax avoidance that is perceived by entities that wish to employ it as economically effective. However, some controversies are raised when acceptability of the phenomenon by public authorities is discussed. To evaluate opportunities for using treaty shopping reliably, it is necessary to pay attention to the fact that all treaties are concluded by countries to avoid double taxation express the involved countries' will and these countries should set the subject scope of the treaties concluded in the most precise way. Lacking legal solutions or imprecise regulations offers third parties some kind of permission to use privileges that result from the treaties in question. Moreover, such a legal situation may only be used to the benefit of taxpayers in any tax proceeding. That is why, with reference to the above remarks a phenomenon of treaty shopping may only be considered in a category of a legal tax instrument of a tax strategy although this instrument may be subject to additional tax risk.

3 Reasons for emergence and the nature of treaty shopping

Treaty shopping is identified as a situation in which a company that is tax liable that functions internationally and that is not entitled to benefit from any solutions included in double taxation treaties uses some other entity to take advantage of the solutions in question. Therefore, this phenomenon will take place if a person who is not a resident of any country that is a signatory of any double taxation treaty establishes a company or other entity in the signatory country in order to take advantage of the treaties concluded and / or of internal regulations observed in these countries (Lynos, 1997: 504).

Generally, a phenomenon of treaty shopping is a consequence of economic integration and globalisation processes, double taxation and relevant application of different solutions that are intended to reduce double taxation. Analysing treaty shopping in more detail, it is necessary to pay attention to contemporary behaviours of companies that while trying to increase financial results of their business activities more and more frequently realise such activities outside their domestic markets. International expansion of companies undoubtedly contributes to development and some increase in their market value. However, this simultaneously exposes companies to functioning in a particularly set tax system, which may be related to overlapping tax regulations of territories where business activities in question are run. Overlapping tax regulations mainly results from the fact that countries in their sovereignty wish to cover the highest scope of facts of cases possible with tax liabilities. To do this, countries use generally binding principles of unlimited and limited tax liability. In compliance with an unlimited tax liability in a given country, all income generated by a taxpayer are subject to taxation regardless of the place where they were generated (taxation in a country of residence). However, a limited tax liability means taxation imposed only on income that is generated in the territory of a given country (taxation at source). These principles result in the situation when companies that function on the international market may face imposing more than one unlimited tax liability and / or simultaneous imposing of unlimited and limited tax liabilities. The former situation is identified when tax solutions observed in all countries where business activities are run result

in recognition of the company in question as their resident. The latter situation is observed when a company should be levied with a tax liability of a resident and a tax liability at source.

Double taxation of the same income is commonly believed to be an undesired phenomenon because of at least two reasons: it is thought to be unjust and it prevents development of the international trade. Therefore, it is not accepted either in domestic regulations or in the international law. A major tool used to fight double taxation is provided by introduction of double taxation treaties into the international trade. These treaties provide naturally for tools that eliminate or limit rights of particular countries to impose taxes in particular situations. Construction of such treaties is based on exclusive standards – a particular income is taxed only in a particular country – or on non-exclusive standards – the income in question is subject to taxation in both countries, whereas in one of them it is subject to taxation that is limited by the treaty in force (Nykiel, 2006: 42).

Such attractiveness of solutions provided for by treaties that prevent double taxation attracts attention of companies that are subject to double taxation and those companies that should not be affected by the very problem. The latter group of companies is predominantly interested in the most beneficial taxation of the so-called passive income, i.e. dividends, interests on loans granted or licence fees. Companies that are not directly entitled to use solutions provided for by double taxation treaties and wish to benefit from such solutions take advantage of tax treaties concluded between countries where they are based and a third country (Zdyb, 6/2007).

In order to identify a phenomenon of treaty shopping, OECD has defined several features that distinguish treaty shopping from other business events. Firstly, we can discuss treaty shopping in a situation when there is not any double taxation treaty concluded between a country of residence and a country of the source income or the regulations in force are not beneficial enough there. Secondly, this phenomenon is observed when intermediating companies are established – usually in the territory of a country to enjoy a more lenient tax regime – to transfer income between entities. Thirdly,

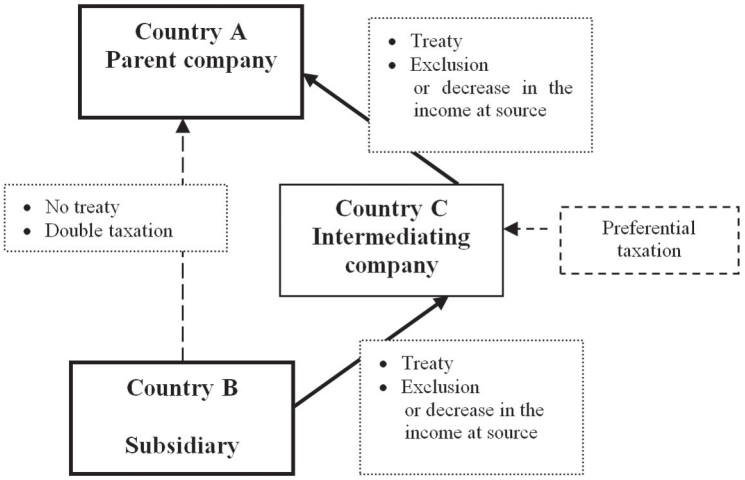
this phenomenon is identified when transactions made between entities do not have any other reason but they aim at using preferential tax solutions of the third country (Kuźniacki, 2010: 1).

4 Possibilities of tax optimisation performed by means of treaty shopping

Treaty shopping allows for obtaining tax benefits that predominantly include decreasing tax burden to be borne in the country where income are at source or applying an attractive tax rate in the income beneficiary's country. It is possible to use a phenomenon of treaty shopping by means of several methods. These methods are employed depending on the transaction objective, a type of companies that function in the subject structure and a type of a passive income that is subject to transaction. The most popular methods include: direct conduit, stepping-stone and bona fide structures.

A tax strategy that is realised by means of the direct conduit method may be applied in the situation when a company that is a resident of one country receives income from a company that is subject to tax jurisdiction of another country and these two countries have not entered into any double taxation treaty or the treaty concluded does not provide for reducing a tax at source. While using this method, it is assumed that a company that receives income establishes another company (a so-called intermediating company) that is subject to tax jurisdiction of a third country in order to avoid double taxation of its income taxed at source totally or partially. Location of the intermediating company requires double taxation treaties to be concluded between a country of tax jurisdiction that is going to host the intermediating company, a country of the income at source and a country of residence. An additional advantage of this solution is found in the fact that in the country where this intermediating company is located more lenient tax solutions are in force as compared to the country of residence. As a result, income is not directly transferred to entitled companies – they are indirectly transferred by the intermediating company. The scheme that illustrates tax strategy realisation by means of the direct conduit method is presented by Figure 1.

Figure 1: Treaty shopping: the direct conduit method



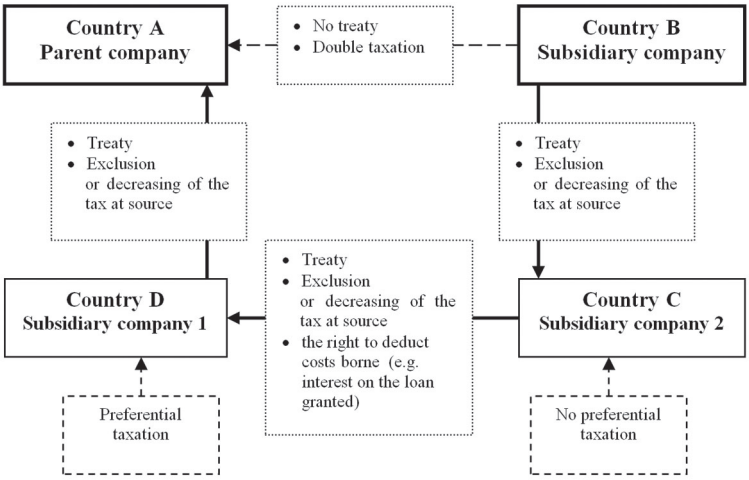
Source: own on the basis of (Panayi, 2007: 33)

Due to this relatively simple method a company is entitled to receive income but when it gets exposed to double taxation it uses its intermediating company to acquire contractual benefits that result from provisions of double taxation treaties that are concluded with a country in which the intermediating company is located.

A tax strategy that is realised on the basis of the stepping stone method is more complex as compared to the direct conduit method. However, it may similarly be applied in case a company that is a resident of one country receives income from another company that is subject to tax jurisdiction of some other country and these two countries have not entered into any double taxation treaty or the treaty concluded does not provide for reducing a tax at source. Employment of this method provides for establishment of subsequent companies by a company that looks for some savings and that is entitled to receive income. These subsequent companies are capital tied and in practice they function as a capital group. Newly established companies are dependant entities that are based in different countries that the company that generates income and the company that is entitled to receive the income in question. However, it is necessary to remember here that countries where dependant entities are based have to be characterised

by the following condition: not all locations are made in countries of high tax preferences but an adequate sequence of preferences that covers transactions made between countries where dependant entities function may finally result in decreasing tax burden. This method may, inter alia, be realised by establishing two dependant entities assuming that a country of the former entity applies general tax solutions but simultaneously has entered into a double taxation treaty with a country of residence of the former company. This treaty has to allow for deducting costs borne (e.g. interests on loans granted) from taxes due. On the other hand, a country of residence of a dependant entity is a country that employs lenient tax instruments. The difference between the above methods can be found in the fact that the direct conduit method aims at tax preferences that are offered by a country where an intermediating company is located. The stepping stone method, however, allows for reducing tax responsibility in the intermediating country by means of mutually counterbalancing expenditures. Although being much more complex, the stepping stone method is possible to be realised. This method results in obtaining tax benefits by an entitled entity. Such benefits would not be available in case of direct flows. An exemplary scheme that illustrates realisation of a tax strategy based on the stepping stone method is presented by means of Figure 2.

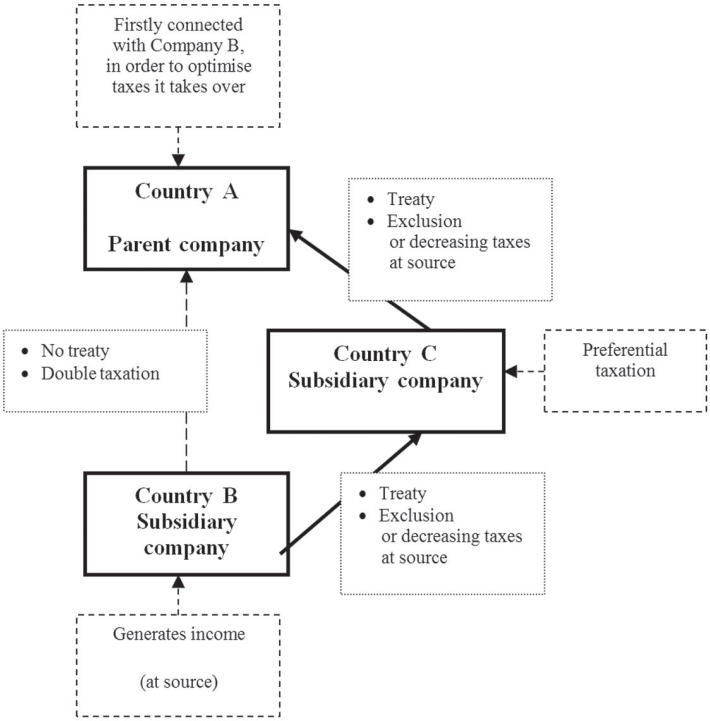
Figure 2: Treaty shopping: a stepping stone method



Source: own on the basis of (Panayi, 2007: 36)

On the other hand, employment of the bona fide structures is more similar to the direct conduit method although all entities make up a holding structure run actual business activities and they are not established solely to transfer income. Application of this method requires an entity that generates its income at source and that is obliged to transfer the income in question to another entity that is subject to jurisdiction of the state that is not a signatory of the tax treaty to be simultaneously an entity that is interconnected with such an entity that functions in a country that enjoys a more lenient tax regime. A company interested in obtaining income and avoiding double taxation may take over an entity that is based in a country of lenient tax jurisdiction, thus enforcing a flow of income due by this entity's intermediation. An exemplary scheme that illustrates realisation of a tax strategy based on the bona fide structures is presented by means of Figure 3.

Figure 3: Treaty shopping: the bona fide structures method



Source: own on the basis of (Panayi, 2007: 39)

Presented scenarios of formulating and realising a tax strategy by selected treaty shopping methods are not the only possibilities of reaching financial objectives of international companies. However, they belong to the group of the most popular ones that are employed in business practice.

Constructions of this type have been successfully used by Polish companies so far. Jurisdictions that are attractive fiscally and that simultaneously are not deemed tax havens are involved here. Such countries generally include Luxemburg, Cyprus, Holland and less frequently Malta or Singapore. Table 1 presents the most important elements that result from regulations of the Polish and international law that allow for using treaty shopping by Polish companies that function on the international market.

Table 1: Selected elements of tax treaties that allow for using treaty shopping by Polish entrepreneurs

State	Preferential elements of tax agreements
Luxemburg	Tax exemptions (subject to certain conditions) of dividends or sale of shares in a country of issue and in a target country Preferential treatment of loans in form of dividends that are paid to investors both in a country a company is based in and in a country of their recipients
Cyprus	Tax exemptions (subject to certain conditions) of dividends or sale of shares in a country of issue and in a target country Preferential treatment of loans in form of dividends that are paid to investors both in a country a company is based in and in a country of their recipients Lower (and frequently uncharged) tax on dividends paid to residents and a possibility to charge the tax in a resident's country
Holland	Lower tax on passive income charged at source
Singapore	Tax exemption (subject to certain conditions) of interests on bonds issued in Singapore
Malta	Lower (and frequently uncharged) tax on dividends paid to residents and a possibility to charge the tax in a resident's country

Source: own on the basis of (Głuchowski et al. 2013: 113-115).

5 Threats to be faced while using treaty shopping in the context of realising financial objectives of a company that functions on the international markets

Tax benefits that are obtained as a result of treaty shopping are perceived by tax authorities as instruments that reduce realisation of the fiscal role of taxes. This approach explains why tax authorities undertake actions aimed at limiting opportunities for usage of treaty shopping as a legal tool to optimize fiscal burden and use such burden in a tax strategy of an international company. This approach also results in public authorities' efforts that are made to change provisions of double taxation treaties that allow usage of the provisions by business entities that are not entitled to use them. Processes of limiting this usage have intensified recently as a result of changes in tax treaties being introduced. Major changes included in new or amended tax treaties with reference to instruments used in tax strategies include in particular the following:

- liquidating double taxation clauses in the income related context,
- introducing or expanding clauses of tax information exchange, and
- providing treaties with anti-abusive clauses.

In the context of changes introduced and treaty shopping used important activities undertaken by public authorities include introducing anti-abusive clauses, and in particular the beneficial owner clause, in tax treaties. Provisions of double taxation treaties now include this clause, especially in the context of passive income. In compliance with this clause, application of preferential tax solutions in the country of the income at source depends on the recipient's status of the actual income owner. The clause remarkably reduces possibilities of using treaty shopping as an instrument of a tax strategy. However, the clause is not perfect and will surely not eliminate treaty shopping completely. Identification of the beneficial owner notion is a major problem. This term is defined neither by the OECD Model Conference nor by double taxation treaties that include the clause in question. In practice this results in situations when the term is understood differently in different contexts and for different purposes of tax contracts concluded, which may also mean that application of the clause

should be a tool of avoiding double taxation and preventing phenomenon of tax avoidance and not the tool to prevent tax avoidance in general (Ziółek, 2007: 219). Moreover, it is necessary to highlight that although public authorities launch systematic changes to double taxation agreements, not all agreements include the beneficial-owner clause. Such a situation provides for some room to keep looking for solutions that would optimise tax burden by companies that function on the international markets. In particular, in judicial decisions of Polish administrative courts there is some domineering position according to which effectiveness of beneficial owner clauses depends on its clear localisation in the tax treaty. A good example may be provided here by the decision made by the Supreme Administrative Court in which it is stated that in some double taxation treaties that were concluded by Poland the beneficial owner clause was not introduced, which means that it is the country – party of the double taxation treaty – that decides whether to introduce this clause or not (the Supreme Administrative Court 2012: II FSK 1399/10). In this aspect, it is necessary to understand that not introducing such a clause into tax treaties means that both parties consciously give up application of the clause, which in practice means some acceptance for treaty shopping to be used as an element of a tax strategy.

Introduced restrictions in tax treaties, especially in those concluded with Cyprus and Luxembourg, are understood as limitation of investment attractiveness of the countries affected. However, this is not going to eliminate a phenomenon of treaty shopping. Companies are still going to legally locate their activities in other countries that enjoy more lenient tax jurisdictions and that have not been used in this respect so frequently so far. This is confirmed by more and more frequently observed activities of companies that aim at formulating tax strategies that would be based on tax solutions available in Slovakia, the United Arab Emirates, Malaysia or Hong Kong.

Slovakia is a tax jurisdiction that has recently been attracting Polish companies. Slovakian limited partnerships as holding structures use benefits that originate from the directive concerning subsidiary and dominant companies. However, dividends received by Slovakian companies are exempt from taxation in both Poland and Slovakia. Attractive tax jurisdiction that may soon replace structures in Cyprus or Luxembourg may be found in the United

Arab Emirates where income of foreign companies that are registered there are exempted from taxation if the income in question are generated outside the Emirates. Malaysia is more and more frequently used for treaty shopping transactions. In compliance with the tax treaty, dividends paid to a Malaysian company are exempted from taxation at source. Polish companies may also be interested in establishing their subsidiaries in Hong Kong. Pursuant to the local tax law, passive income of companies, both paid and received, are exempted from taxation.

6 Conclusions

Companies wish to reduce their tax burden, which is observed in every tax jurisdiction. Manifestations of tax resistance are different and they may include, inter alia, refraining from business activities or tax frauds. A tax strategy is a possible behaviour of companies. Effective realisation of any tax strategy requires using adequate instruments. Treaty shopping is one of such instruments that may be used by entities functioning internationally. Employment of treaty shopping leads to reduction of tax burden, thus contributing to realisation of company's financial objectives. Simultaneously, this phenomenon (and in fact the tax benefits obtained while using this) is not entirely accepted by tax authorities. This negative approach is reflected in more tax risks involved and exposes entities that use treaty shopping to increased interest of tax authorities. However, lack of acceptance for this kind of tax related behaviour of companies does not mean that companies must not behave this way. It is important to remember that using treaty shopping methods cannot infringe regulations in force.

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LEGAL SYSTEM OF THE TAX ON GOODS AND SERVICES FROM THE PERSPECTIVE OF TAX STRATEGIES EMPLOYED BY COMPANIES IN POLAND

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Abstract

The main objective of the article is to identify possibilities of using tax strategies in the context of the tax on goods and services. This work aims at confirming hypotheses that legal provisions that regulate the tax on goods and services (its Polish version, i.e. Value Added Tax) make it possible for companies to use tax strategies in their limited scope. Moreover, preferences related to the tax on goods and services set in the provisions in question are not always beneficial for companies. Economic analyses of the law are applied in the article.

Key words

Tax law; tax strategy of companies; tax on goods and services.

JEL Classification

H32, K40

1 Introduction

Contemporary companies function in their complex environment that is subject to constant transformations. A system of the tax law is a specific

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element of this environment. Taxes are factors that somehow limit business activities. They reduce monetary resources that are available to companies, thus making companies undertake some protective measures. A tax strategy is one of possible reactions that belong to the group of such measures. This means taking a tax factor into consideration while making specific decisions in an enterprise. This also contributes to optimisation of tax burden borne.

The article focuses on the tax on goods and services (and its Polish version, i.e. VAT). The major objective of the article is to identify possibilities of using a tax strategy within the scope of the tax in question. The following hypotheses are assumed: (1) legal regulations of the tax on goods and services make it possible to apply a tax strategy of companies in the limited scope and (2) preferences related to the tax on goods and services stipulated by law are not always beneficial for companies. In the article, a method of the economic analysis of law is predominantly used. A problem of a tax strategy is seldom dealt with in the relevant literature. The latest Polish publications that are worth mentioning include, inter alia, 'Strategie podatkowe przedsiębiorstw' ('Tax Strategies of Companies') (Ciupek, Famulska, 2013) and 'Optymalizacja podatkowa' ('Tax Optimisation') (Mazur, 2012).

2 Regulations of the tax law in the scope of the tax on goods and services that make it possible to use a tax strategy

2.1 Potential of the tax on goods and services in the context of a tax strategy

Undertaking the issue related to identification of the potential of the tax on goods and services (the Goods and Services Tax Act) in the context of a tax strategy of an enterprise, it is predominantly necessary to pay attention to the specifics of the tax in question. This tax is burden placed on consumption (a consumer). However, the system of the tax collection involves all subsequent links of business relations. Therefore, the tax affects all companies although it is supposed to remain neutral towards them. Hence, the very nature of the tax on goods and services limits the potential being considered. This does not mean that in the construction of the tax there are not

regulations that would allow for implementing a tax strategy. On the contrary – it is possible to show some solutions that provide for 'selection possibilities', thus simultaneously meeting an initial condition to use a tax strategy. Specific decisions that result in the tax on goods and services may be of long-term nature (tax planning) or they may be related to current events (current tax optimisation). These diversified decisions may be frequently inter-dependent to large extent.

Any analysis of the tax law regulations in the scope of the tax on goods and services shows that entrepreneurs have limited possibilities to choose and these possibilities mainly refer to tax periods (monthly or quarterly) and to subject status (this only refers to small and medium enterprises). Further considerations refer to the subject status because their integral part is focused on the issue of selecting a tax period.

Taxpayers of the tax on goods and services include legal persons, organisational entities without legal personality and natural persons who individually conduct such business activity as referred to in appropriate regulations, regardless of the aim or result of this activity. In case of the tax on goods and services, the term 'business activity' encompasses all activities undertaken by producers, traders and service suppliers, including farmers and entities obtaining natural resources, as well as the activity of liberal professionals. Business activities particularly encompass all activities that involve using goods or intangible assets for commercial purposes in the continuous manner (the Goods and Services Tax Act). Such a definition of business activities implies a wide range of subjects that are potential taxpayers of the tax on goods and services. Thus, an elementary feature of the tax in question, i.e. its universality, is aimed to be respected. Additionally, in the subject scope another major feature of the tax discussed is manifested – its territoriality, i.e. the so-called territoriality of the country of the acquirer of the goods and territoriality of the place of service provision. It is worth noticing that in identification of a taxpayer of the tax on goods and services, the following notions are not taken into account: enterprise / entrepreneur and they are replaced with the notion of business activities.

2.2 The right to select exemption from the tax on goods and services

Status of an enterprise as a taxpayer of the tax on goods and services in the potential perspective does not equal its actual perspective. For some group of companies are entitled to select whether they wish to be taxed or exempted.

Polish legislator took advantage of a possibility to apply exemptions in case of small entrepreneurs as provided in the European Union regulations (Council Directive on the common system of value added tax, Article 281). The right of exemption depends on the value of the taxable sales. In the context of the tax on goods and services, the notion of sales is understood to include the following: supply of goods for consideration, and provision of services for consideration within the territory of the country, exportation of goods and intra-community supply of goods (the Goods and Services Tax Act, Article 2, Point 22). Taxpayers whose value of taxable sales in the previous tax year had not exceeded 150,000.00 PLN shall be exempt from tax. The sales value shall be deemed as being net of tax. It is worth noticing that the value mentioned above does not include, inter alia, supply of goods for consideration and provision of tax exempt services for consideration. The above exemption may also be applied in case of a taxpayer who in the course of the tax year begins to perform his activities and the sales value he anticipates does not exceed, in proportion to the period of conducting business activity in the tax year, the amount of 150,000.00 PLN (the Goods and Services Tax Act, Article 113, Point 1).

In the current text of the Act a taxpayer is not exempted from paying the tax. The exemption is granted to sales, which means that the exemption is of object-subject nature. However, taking into consideration that the preliminary condition for exemption is related to the subject, the notion of 'subject exemption' is going to be used in further considerations in this article.

Exemption discussed is of voluntary nature and therefore it is a specific construct. Its voluntary nature involves a right to give up 'subject exemption' provided a written notice informing of such an intent is submitted to the Head of the Tax Office prior to the commencement of the first

month when the exemption is not to be applied. In case of taxpayers who commence their activities in the course of the tax year and who wish to abandon their exemption related to the first performed activity, the notification should be made before the activity is performed.

Subject exemptions are not aimed at specific groups of taxpayers including, inter alia, supplies of selected goods (inter alia new means of transport) or provisions of certain cervices (e.g. jewellery related). In the general approach, however, a part of entrepreneurs is entitled to select between taxation and exemption, which means a necessity to make an adequate decision. Decision-making problems in this respect may occasionally repeat since the legislator provides for the right to get another exemption after a year since the end of the year in which a taxpayer lost his right to benefit from exemption or abandoned such a right.

A right to make a selection between taxation and exemption by a taxpayer means a possibility to use a tax strategy. However, it is necessary to note down that for some enterprises an option of taxation is beneficial. For others exemptions may turn out to be better. Therefore, making a decision in this respect will always be of individual nature. In spite of all this, it is possible to highlight common premises that influence the decision made in this context. The problem analysis should be made taking the following criteria into consideration: purchase, rate, investment and service (Famulska, 2007).

It is necessary to assume that the preliminary criterion, and simultaneously the most important one, is based on the identification of the acquirer of goods sold or the recipient of the services provided. If in a majority of cases these are other enterprises that are subject to a tax on goods and services, it is necessary to opt for taxation. In practice, entities that are taxpayers of the analysed tax exclude entities that are exempted from this tax from their groups of suppliers and service providers.

Exempted entities do not issue invoices that allow for deducting the input tax. Activities that eliminate exempted entities are not totally correct because of this reason. That is why, in case of every transaction it would be necessary to compare net value suggested by the tax on goods and services taxpayer with the price offered by the taxpayer who is exempted from paying this tax. Because of some regularity according to which the comparison

in question is rarely favourable to entities exempted from paying the tax on goods and services, enterprises that are taxpayers of the tax in question prefer other entities that are also taxed this way.

As far as the criterion of an acquirer is concerned, exemption is supported by selling goods and services to entities that are exempted from the tax on goods and services and to consumers. In reality, this happens in case of retail outlets and service providers aimed at general public. Therefore, if acquirers are not interested in documenting their transactions by means of invoices, an enterprise that is exempted from the tax on goods and services will not be eliminated. On the contrary, this enterprise may even be favoured as a result of the price criterion.

To make a decision concerning exemption or taxation, it also is important to consider a rate of the tax applied to goods sold or services provided. Taxation seems to be supported by the 0% rate that particularly covers export transactions of goods and intra-community supplies of goods. When the transaction is subject to preferential rates (5% or 8%) taxation seems to be more preferential than exemption in a majority of cases as a result of some systematic surplus of the input tax over the output tax.

Another criterion shown is related to recognition whether an enterprise is going to make investment (understood as acquisition of fixed assets or intangible assets subject to tax on goods and services). An enterprise that uses 'subject' exemption cannot deduct any input tax from investment and other acquisitions. Then, the tax included in prices of goods and services acquired becomes a cost. Therefore, this type of investment is more expensive because of the tax on goods and service in case of enterprises that are exempted from the tax in question as compared to enterprises that are taxpayers in this context. Original costs of fixed assets subject to depreciation are different because these costs include the tax in question. However, if expenditures made to acquire fixed assets are non-recurringly classified as income generating costs, then the tax on goods and services included in these expenditures becomes a 'non-recurring' cost that is not spread in time as in case of depreciation.

While making a decision between taxation and exemption, it is important to take a criterion of servicing into consideration. The tax on goods and

services is a complicated and difficult regulation that requires taxpayers to have much knowledge. Settling the tax due may be particularly troublesome for small enterprises that on the one hand may find it difficult to service the tax in question themselves and on the other hand – they might not have sufficient financial means to pay for professional services provided in this context.

Apart of the decision-making criteria shown, some elementary selection made between taxation and exemption depends on some elements that are specific for each situation. This decision is of exceptional nature and implies taxation and non-taxation results. Diversified economic and financial consequences that result from the selection in question allow for concluding that binding regulations create some specific space for enterprises to use a tax strategy.

2.3 The right to select a status of a small taxpayer of the tax on goods and services

While discussing a subject context of a tax strategy of enterprises in respect of the tax on goods and services, it is necessary to pay some attention to the unusual legal regulation of a small taxpayer category.

In compliance to the Goods and Services Tax Act (the Goods and Services Tax Act, Article 2 Point 25) a small taxpayer is a payer of goods and services tax whose value of sales (including tax) in the preceding tax year did not exceed the Polish zloty equivalent of 1,200,000.00 Euro. In case of a taxpayer running a brokerage enterprise, managing investment funds, operating as an agent, a mandatary or a person providing services of similar nature, excluding contracts under which commission is payable on purchase or sale (including tax) – if the amount of the commission, or other form of remuneration for the services rendered, did not exceed in the preceding tax year the Polish zloty equivalent of 45,000 Euro. The amounts denominated in Euro should be converted at the average exchange rate announced by the National Bank of Poland *(Narodowy Bank Polski)* for the first working day in October in the preceding tax year, rounded to the nearest 1,000 zloty.

For enterprises that meet statutory requirements of a small taxpayer the following tax privileges are introduced: (1) a quarterly settlement, (2) cash-basis settlement that obligatorily involves a quarterly settlement.

A taxpayer's right to make an adequate selection in the scope of privileges provided means a necessity to make a specific decision. It is obvious that such a decision should be beneficial for a taxpayer. Similarly as in case of deciding whether taxation or exemption should be selected, for some enterprises it is going to be more beneficial to opt for a small taxpayer status. For others, a different choice made may turn out to be better. Although in this case making each decision may be of individual nature, it is possible to determine some premises that are necessary to be taken into consideration.

First of all, it is necessary to note down that the very nature of preferences that are aimed at small taxpayers is related to a category of enterprise's financial liquidity. Tax on goods and services charged is not only some measurable financial detriment for enterprises but this also affect enterprises' financial liquidity. Major results in this context stem from specific legal regulations that apply in case of the output tax, input tax and forms and times of settlements. In case of these elements, small taxpayers are provided with some solutions that differ from those aimed at other taxpayers. Additionally, such solutions are much diversified depending on the small taxpayer's decision whether to choose or not to choose a cash-basis method of settlements.

In case of an enterprise that will opt for a small taxpayer status in the version with no cash-basis method, a possibility of a quarterly tax settlement is a privilege. Adoption of a quarterly settlement period instead of the monthly one is in principle allowed in case of all taxpayers of the tax on goods and services. However, in case of small taxpayers, their preference involves a possibility not to make monthly advance payments related to their quarterly tax liabilities. This regulation should be considered positive not only in the context of enterprise's financial liquidity but also from a perspective of the way tax settlements are serviced. Quarterly settlements are less troublesome than their monthly equivalents, which is a great advantage. A taxpayer has to make four tax returns instead of twelve.

However, this advantage should not be the only one to take into account while making a decision concerning the type of settlement. It is necessary

to highlight that quarterly settlements are not always more beneficial than monthly settlements. Analyses should predominantly be focused on long-term relationship (in at least one year period) of input tax to output tax. In case of systematic surplus of input tax over output tax, which results in specific tax liabilities, quarterly settlements are more profitable. This means that tax burden is somehow deferred in time. A taxpayer is then provided with some 'crediting' in the context of his deferred liabilities resulting from his tax on goods and services.

However, in case of a systematically observed difference between input tax and output tax that generates some returns from the tax office, quarterly settlements become less profitable than their monthly equivalents. Permanently experienced surplus of input tax over output tax requires some additional in-depth analysis of anticipated purchases of investment nature (fixed assets or intangible assets subject to the tax on goods and services). If such acquisitions were to be made in the nearest year (selection of the quarterly settlements is in force in the period of four quarters) and if they involved large amounts of the output tax (to be returned), it would be advisable to refrain from switching to quarterly settlements. Moreover, it is necessary to stress here that deferring tax burden means aggregating the burden in question, which requires skilful management of financial liquidity in an enterprise.

On the other hand, discussing decision-making related problems in the context of the small taxpayer status in the variant of the 'cash-basis method', it is firstly necessary to conclude that all premises that would support 'no cash-basis method' could be used in this case as well. This results from the fact that in both variants a quarterly period of settlements is in use. Specific solutions aimed at small taxpayers who use the cash-basis method are also applied in regulations connected with the moment a tax liability arises and the moment a small taxpayer is entitled to deduct his output tax.

Generally, Polish regulations provide for arising a tax liability resulting from a tax on goods and services at the time of handling over goods, or the performance of a service. Additionally, other moments of arising a tax liability are set. The catalogue of such cases includes, inter alia, a solution that is favourable for small taxpayers who opt for a cash-basis method. For them, a tax liability resulting from the tax on goods and services arises on the day

of when the amount due is paid, in part or in whole. This is a rare example of a situation when the accrual basis of accounting is not applied at all. However, if acquirers include other entities than active taxpayers of the tax on goods and services, a tax liability arises on the day of when the amount due is paid, in part or in whole, no later than on the 180th day after the goods were handed over or the service performed (Zubrzycki, 2014). Obvious advantages of the cash-basis method that match a moment a tax liability arises with realisation of sale related payments due are counterbalanced by systematic application of this method in case of deducting the input tax. Small taxpayers who opt for the cash-basis method may make their deductions in their quarterly settlements when they pay in part, or in whole their liabilities resulting from invoices.

Particular solutions that refer to determining a moment a tax liability arises and a moment a deduction may be made require small taxpayers to perform some 'monitoring' of acquisition and sale transactions, which is not only troublesome but may also involve additional costs (e.g. related to purchase of special computer software). Advantages of the cash-basis methods are also weakened by limitation of the right to deduct the input tax by contractors of small taxpayers who opt for the cash-basis method. Contractors of such entities may deduct the input tax that is disclosed on the invoice only when the invoice is paid in part or in whole. As a result, in practice when acquirers of goods and services who are taxpayers of the tax on goods and service have a choice between a supplier who is a small taxpayer that uses a cash-basis method and other supplier, decide to co-operate with others. Such a selection made allows for deductions made from acquisition invoices without any complications. Therefore, similarly as in case of 'exemption or taxation', a criterion of an acquirer is the most important. The cash-basis method that is some preference aimed at small taxpayers has to be therefore criticised because in fact it is realised at costs of contractors involved.

The discussed regularity that preferences aimed at small taxpayers of the tax on goods and services provided by the legislator are not always favourable is confirmed by empirical data (Ministry of Finance, 2014).

While analysing materials of the years 2005 – 2013, it is necessary to note down that a number of taxpayers of the tax on goods and services that

meet criteria of small taxpayers is huge. In the years subject to this analysis these entities made up approximately 96% of all the so-called active VAT taxpayers. In this group, every year more and more taxpayers decide to use quarterly settlements. In 2005 entities that used quarterly settlements were approximately 5% of all small taxpayers. In 2013 this number amounted to almost 18%. This tendency might mean some increase in tax awareness of enterprises, especially connected with their knowledge about settlement periods of the tax on goods and services.

Application of elements of a tax strategy by enterprises is also confirmed by a number of taxpayers who opt for the cash-basis method. Although their participation in the number of all small taxpayers who make quarterly settlements was diversified (in the years subject to this analysis fluctuated from 4 to even 10%), this participation in the general number of small taxpayers (who meet relevant criteria) may lead to interesting conclusions. In the years 2005-2012 the value was around 0.5 – 0.6%. However, in 2013 this increased to 0.95%. The increase is a response to favourable changes in regulations connected to the cash-basis method. Unfortunately, the percentage is still very low, which means that negative aspects of selecting forms of settling the tax on goods and services dominate over the positive ones.

3 Conclusion

The conducted economic analysis of legal regulations related to the tax on goods and services allows for concluding that the hypotheses formulated are true. Statutory regulations make it possible to apply a tax strategy of enterprises in the limited and mainly subject scope. This implies a necessity for identification advantages and disadvantages of each tax subject status, i.e. in the context of taxation as opposed to exemption and a category of a small taxpayer. Pros and cons are not constant here and they depend on numerous factors. Therefore, selections made by enterprises in this context should be preceded by some thorough analysis that would additionally include determinants specific for a particular case. It is necessary to state that actions undertaken by a taxpayer in this context are not only possible but also desirable because of his own interests. Statutory preferences for enterprises that function in the small and average scale make up some

specific climate for making choices of long-term nature. It is important to be able to take advantage of such opportunities skilfully. As it has already been found out preferences related to the tax on goods and services stipulated by legal regulations are not always profitable for enterprises.

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SAFE TAXPAYER OR SECURED FISCAL INTEREST OF THE STATE IN THE LIGHT OF THE CONDITIONAL INDIVIDUAL INTERPRETATION

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Abstract

Analyzing accepted in Tax Law provisions solutions we can formulate that tax administration was equipped in such institutional solutions which are submitted to implement the fiscal goal. Thus, in confrontation with fiscal interest of the state, the taxpayer' s interest may suffer prejudice. This fact upgrades unusual, important question of the relevant guarantees which protect taxpayer's rights. This circumstance is particularly meaningful while we take into account tax law fluctuation. Frequent tax law provisions amendments constitute denial of the Montesquieu idea " to judge today as it will be judged tomorrow", they lead to lower so called "availability of law" referring to the norms addressee. Taking it into account, the article analyzes the tax law interpretation institution. On the background of the accepted solutions, the analyzed institution may be treated as *sui generis* expectation of the tax organ reaction. It is worth to indicate therefore, that protection and guarantee functions of the individual interpretation is performed at the moment while, acting in confidence to the tax organ, which issued interpretation of specified activities and conducts which purpose, indication, subject, are determined by the content of the issued interpretation, we undertake particular activities.

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Key words

Tax; law; conditional individual interpretation.

JEL Classification

K34

1 Introduction

The guarantee of the correct comprehension of the tax law provisions constitutes legislative correctness, stability of validation and appropriate knowledge of law (Kosikowski, 2012: 82). On the other hand, vague rules raise risk of their incorrect application; it can originate serious consequences for the taxpayer. In the article the institution of individual interpretation is analyzed. It is stressed that cited law regulations satisfy the taxpayer expectations, making possible gaining individual interpretation which declares appropriate comprehension of the tax law provisions. The significant question of the conditional interpretation is present in the article, too; simultaneously indicating that unambiguous, precise and unconditional interpretation not only assures explanation of the case, but also enables to acquire certainty for the taxpayer of accepted by him/her legal estimation of the anticipated conduct. Thus the main purpose of the introduction of the individual tax provisions interpretation institution was creation of simple, while ensuring uniform interpretation of the tax law, interpretative procedure. Such a recognition of the analyzed institution allows to qualify individual interpretation as a legal assistance form that is provided to the concrete taxpayer (Brolik, 1999: 7).

2 Legal form of the conditional individual interpretation of the tax law regulations

Regulation of the content and the form of individual interpretations of tax law regulations, as well as the mode of their issuance is included in art. 14b-14p (Act of 29 August 1997 Tax Law consolidated act: Journal of Law from 2012, Item 749 with subsequent amendments). Pursuant to art. 14b § 1 of the Fiscal Law, the appropriate minister of the public

finances[2], upon written application of "the involved person"[3] (Provincial Administrative Court in Warsaw of 25 January 2010: III SA/Wa 1346/09; Supreme Administrative Court in Warsaw judgment of 30 May 2012: FSK 1323/11; Provincial Administrative Court in Łódź judgment of 9 October 2012: I SA/Łd 1036/12; Provincial Administrative Court in Warsaw judgment of 24 October 2011: III SA/Wa 260/11; Provincial Administrative Court in Bydgoszcz judgment of 20 December 2011: I SA/Bd 734/11)[4] issues in his/her "individual case" written interpretation of tax law regulations. Thereby individual interpretation, which is provided in art. 14b § 1 of the Fiscal Law does not constitute an abstract explanation of the legal regulations, but it is legal appraisal of the position of the proposer of the motion on background of individual facts of the case or future event, which as the basis for individual interpretation application, is presented by the involved person in his/her application to furnish the interpretation (Similarly Supreme Administrative Court in Warsaw judgment of 2 March 2011: II FSK 1896/09; Supreme Administrative Court in Warsaw judgment of 14 July 2010: II FSK 490/09; Supreme Administrative Court in Warsaw judgment of 10 August 2011: I FSK 1211/10). The issuance of individual interpretation settles the given interpretation matter through furnishing information on application and individual interpretation of the Fiscal Law. In such a state of affairs individual interpretation cannot be treated as adjudication concerning its application. The involved person complying with the content of the issued interpretation, not its furnishing and issuance, creates,

2 Pursuant to § 2 Minister of Finances Disposal of 20 June 2007 on authorization to issue tax law interpretations (Journal of Law from 2007, No 112, item 770 with subsequent amendments), Directors of Treasury Chambers in Bydgoszcz, Katowice, Łódź, Poznan and Warsaw are authorized to issue, on behalf of the appropriate minister for public finances, individual interpretations.

3 The subject lodging a motion to issue individual interpretation may apply to define his/her own legal and tax situation, not a legal and tax situation of other subjects, including the subjects connected with the applicant by obligation relations.

4 Supreme Administrative Court in Warsaw judgment of 8 January 2014: I FSK 1761/12 share fixed in the jurisdiction view that the person involved, in the meaning of art. 14 § 1 of the Fiscal Law, is exclusively the subject which enquires about own legal and tax situation, not enquiring about the situations of other subjects.

connected with it, legal protection[5] (Filipczyk, 2013: 178). It should be also stressed the fact that on the ground of the interpretation the involved person receives exclusively information on interpreting organ opinion, i.e. its opinion on comprehension of legal regulations and the manner of their application in the given case, which make possible or make easier to undertake relevant activities on the ground of tax law (Kosikowski, 2012: 82).

Pioneering attempt of the analysis of the subject matter of legal form of individual interpretation was made by J. Glumińska-Pawlic (Glumińska-Pawlic, 2008: 93), declaring that tax law regulations interpretation cannot be qualified as the source of commonly binding law. This position states the reasons, among others in art. 87 of the Constitution ,which includes closed catalogue of sources of commonly binding law. Hence, it results correctly, that the result of individual interpretation cannot constitute the basis of tax decisions. We should agree with a view that individual interpretations cannot be recognized as internal administrative acts because they are not held in the scope of the internal law sources (Adamiak, 2008: 119). It should be noticed, too, that the individual interpretations do not constitute independent act of law creation: they will constitute an organ activity form, separate from decisions and resolutions. This thesis finds its confirmation turning over to Part IV of the Fiscal Law, particularly art. 14h in wording after the amendments. This provision does not allow to use in the cases concerning individual interpretations neither provisions contained in Chapter 13 - Decisions, nor in Chapter 14 - Resolutions in Fiscal Law. The provisions of this last chapter may be adequately applied pursuant to art. 14g of Fiscal Law, but referring to resolutions in the case of leaving the motion to individual interpretation issuance without examination, exclusively.

The legislator pursuit was separate, other than decision and resolution, legal form establishment of tax administration acting, in which framework the organ can explain the involved persons the manner of tax provisions

[5] Legally substantive effect of individual interpretation and protection for the involved person who acts in confidence to it, results, however, from so called " principle of making no harm" This principle is established by provision of art. 14k of the Fiscal Law, where individual interpretation application, before its amendment or before delivery to tax body a copy of the valid administrative court judgment, which revokes the individual interpretation, cannot make a harm to the applicant, as well as in the case of lack of taking it into consideration in tax case decision.

interpretation. Conducting legal analysis of this institution, we should take into account its specification, which consequences, among other, that there are not any legal grounds to appeal in this scope to the Tax Law regulations referring to the decisions , particularly to their substantiations, because these referring to individual interpretations in particular way regulate, among others, the character of the individual interpretation substantiation.

From 1 July 2007 modified regulations connected with tax law provisions interpretation came into force (Act of 16 November 2006 on amending the act - Fiscal Law and other acts amendment: Journal of Law from 2006, No 217, item 1590). These regulations do not indicate the form which should shape interpretation issuance , either, while its content was specified in art. 14 c Fiscal Law exclusively, (lack of the reference to art. 210 of Fiscal Law or art. 217 Fiscal Law). Relevantly to indicated regulations individual interpretation should include: estimation of the applicant position, legal substantiation of the presented estimation (not due if the applicant position is entirely correct), indication of the correct position, including legal substantiation - in the case of negative estimation of the applicant position, instruction on the right to appeal, lodging a claim in administrative court.

The above considerations lead to the conclusion that individual interpretations uneasily undergo descriptions and classification, that is why they make many troubles to close them in the proper frameworks. Surveys, which subject to individual interpretations, unambiguously indicate that they do not possess masterful features and, in result of it, they do not make any obligation on the addressee side. It is worth to underline that from the exclusive character of individual interpretation only we cannot bear possibility of its consideration as administrative decisions. Presumption of duty to issue an administrative decision while the legislator itself distinguish different legal forms of administration bodies activities would be interpretation operation which goes too far. Additionally, it should be noticed that the legislator cares of individual interpretations supervision, because they may constitute a subject of the complaint to administrative court (art. 3 § 2 of the act of 30 August 2002 Law on administrative court procedures consolidated act: Journal of Law from 2002, Item 270 with subsequent amendments).

3 Functions of Individual tax law regulations interpretation

There is indication in the research literature that individual interpretation of the tax law provisions constitutes a legal institution, which should protect such values as certainty of law. Legal safety is built of positive results of law certainty at large, which are specified from the subject perspective, who refers to the law (for example: a taxpayer). In particular, it is the state of this subject, acquired thanks to the fact that the law is characterized by the certainty features (Tobor, 1998: 66). That is why irresistibly arises the question about the mechanisms which guarantee implementation of this value. It is worth giving an appropriate space to functions' analyses which assure: guarantee, information, uniformity, which are grounds for individual interpretation institution.

Guarantee function comes to the fore in the case of individual interpretations. However, it should be stressed at his moment that its scope was limited to the involved person, exclusively. Information given to the involved persons in the interpretation have features of legally valid one for the organs, whenever it turns out to be mistaken, and the involved person applied it. The protective function exemplifies, then, itself in " no harm rule". This protection function possesses subsidiary features in the regard that its activity appears when the interpretation occurred to be mistaken, i.e.it misled the involved person. In this case, as an announcement originating from tax administration, it opposes the information function (Filipczyk, 2011: 261; Brolik, 201: 26).

It can be accepted that legislator intention was granting information function the leading role, whereas practical experience assigned it as secondary character function. "No harm rule" updates in the case when the way of the law regulation understanding by the tax body, while tax case is settled in jurisdiction proceedings, is different from the one declared in the interpretation. Then, the interpretation "is launched" which assures the protection to the taxpayer. It is accurately noticed by H. Filipczyk, in this term, interpretations constitute the law certainty substitute or certain kind of its complementation, and in this way they "limit losses" resulting from lack of predictability of the tax bodies activities and treasury supervising organs.

That is why we should indicate that interpretation *ratio legis* is "assurance of individual protection in the situation when there appears legal uncertainty" (Filipczyk, 2013: 262).

There is indicated in many studies that individual interpretations constitute valuable tool of realizing legal certainty. WE should pay particular attention to the need of their rational and conscious exploitation in this role (Filipczyk, 2011: 164). It seems that the protective function of individual interpretations of tax law regulations, which emerges from the tax law regulations analysis, confirms authoritarian, i.e, reliable and plausible for taxpayers character of legal estimations of the tax organs, which is expressed in the content of the interpretations issuing.

The second function of individual tax law interpretations discloses its features in informing the taxpayers of appropriate, in opinion of tax administration, tax interpretation of the tax law regulations. Informative role of interpretations, is indicated by Z. Kmieciak (Kmieciak, 2006: 4) and W. Nykiel and D. Strzelec (Nykiel, Strzelec, 2007: 5) who stress that individual interpretation is a source of knowledge on appropriate interpretation of problematic law regulation also for different subjects, not only for the involved addressee.

At this point it is worth to pay attention to cited in literature standardizing function (Filipczyk, 2013: 264). Its aim is to standardize tax law application, particularly through standardization of operative interpretation. In the case of individual interpretations, although it was not articulated in relevant provision, standardizing impact of the organs is noticeable, too. Praxis analysis unambiguously shows that tax organs searching reference points while interpreting "difficult cases", take these interpretations into account, although they do not possess value of common law sources.

Completing the consideration referring to individual interpretations, it should be stressed that their influence is weaker than when referring to general interpretation. It is undoubtedly consequence of issuing these interpretations in relatively centralized system and the fact that each time they refer to concrete facts of a case.

4 "Conditional" individual interpretation

It results unambiguously from the previous analysis that individual interpretation institution gained popularity among the involved persons (number of issued individual tax interpretations: in 2010 – 30 918, 2011 – 35 929, 2012 – 36 816 and 2013 (in the period I–VII) 20 918. Tax Administration Department of the Ministry of Finances), constituting *sui generis* the protection instrument which assures tax safety. However, in the conducted discussion, the problem whether tax safety may maintain while interpretation sentences are contradictory or unclear or interpretation sentence is not consistent with its substantiation or substantiation includes conditions and legal objections, is noticed. In connection to mentioned above functions which incorporate individual interpretation, relevant place should be given to interpretations analysis but called "conditional" (variant), indicating, most of all, which legal effects it will bring to the involved person.

Reviewing rich judicature (Provincial Administrative Court in Szczecin judgment of 3 November 2005: I SA/Sz 425/05; Provincial Administrative Court in Warsaw judgment of 24 August 2008: III SA/Wa 191/08; Provincial Administrative Court in Kielce judgment of 6 June 2010: I SA/Ke 226/10; Provincial Administrative Court in Kraków judgment of 18 January 2012: I SA/Kr 1642/11) where is the issue of conditional individual interpretation appears, we can express the unambiguous conclusion that it does not grant sufficient warranty of legal safety for the party.

Administrative courts judicature is in the opinion that we cannot require the taxpayer can read the meaning of a legal norm through complicated interpretative operations, applying simultaneously system, historic and teleological interpretation. Thereby court states that we cannot require an addressee is able to give full interpretation of the provision. That is why an organ which, while conducting a legal estimation of the position of the involved person, cannot introduce any reservations or conditions (Supreme Administrative Court in Warsaw judgment of 6 September 2013: II FSK 2616/11. In this state of affairs, taking into account both judicature and the literature,

it follows therefore that implementation of reservations or conditions constitutes violation of law[6] (Supreme Administrative Court in Warsaw judgment of 6 June 2010: I FSK 1217/09).

Supreme Administrative Court states in one of the sentences that issuance of a conditional interpretation which limits to enquire for a single question, even the factual state causes consequences referring to more than one tax, destroying the purpose of interpretation purpose, violates the legality principle (art. 120 of Fiscal Law), and confidence principle (art. 121 § 1 of Fiscal Law) (Supreme Administrative Court in Warsaw judgment of 15 January 2011: I FSK 1796/08). Tax interpretation must be as far concrete and unambiguous as the involved person could comply with it. Taking care of his/her legal safety the involved person has the right to await explanation by relevant organ, referring to arising doubts concerning regulations which are formed by tax law provisions, also in the circumstances when .they mesh with other legal norms and regulations. Supreme Administrative Court in Warsaw judgment of 4 November 2010: II FSK 1019/09 and Supreme Administrative Court in Warsaw judgment of 27 June 2011: I FSK 1182/09 in the Court of Appeal opinion, it is necessary requirement to be fulfilled – tax interpretation must be cleared out and it must explain the party, fully, his/her legal situation, which features are not available in the interpretation that was examined In the case the court of first resort. Meanwhile, the construction of the individual interpretation, taken over by the interpretative organ, often arises doubts and sense of insecurity referring to the tax organ position in the case arising doubts of the subject lodging the relevant motion. Includes opinion that settlement and substantiation of written interpretation of tax

6 The essential element of individual interpretations is estimation expression referring to applicant position, which was presented in the application/motion/. Fulfilling of the mentioned duty is closed, generally, by the statement: "the applicant's position is correct", or "the applicant's position is incorrect". If applicant's position estimation is positive, this interpretation may be limited to the statement that the applicant's position is estimated as correct. However, significant meaning possesses legal substantiation of the individual interpretation, when the applicant's position is estimated as negative one. In this case, indeed, it is necessary to include in the interpretation, indications to the position which was recognized by the organ as positive one and legal substantiation of this position.

law regulations should form logic entity and refer to all elements which were presented in the motion. (Supreme Administrative Court in Warsaw judgment of 6 January 2010, I FSK 12109).

The issued interpretation fulfills its purpose only when the involved person gains knowledge on correctness or incorrectness of the position he/she presented. Applying for interpretation the involved person wants to be sure referring his/her tax consequences of the presented status, so the interpretation should refer to presented entirely in the motion the actual state and include answers for all put questions. It is reasonably underlined by T. Bekrycht and J.Brolik that law certainty rules and law safety, including in this way rules of citizens' confidence towards the state and statutory law, are not built by constitutional declarations but, most of all, through actual activities of the particular authorities. Fair execution of the interpretation obligation by an organ of the administration, means, most of all, specification of legal consequences of the fixed actual state of affairs and connection that actual state of affairs with appropriate legal norm. (Bekrycht, Brolik, 2012: no 85). It is undisputed that conditional interpretation issuance, which does not include unambiguous estimation of the taxpayer's activity correctness not only does not fulfill the substantiation construction standards pursuant to art. 14 c § 1 of the Fiscal Law, but does not implement individual interpretation function, i.e does not protect the taxpayer, either. Individual tax interpretation to fulfill its informative and guarantee functions must be unambiguous, precise, and unconditional pursuant to art.14 b § 1 of the Fiscal Law, art. 14 c § 1, art. 14 k § 1 of the Fiscal Law.

The content of the above legal norms does not arise any doubts and it is clear enough, stating that individual interpretation, fulfilling the information function, should include the answer, replying concretely not in conditional way. Caring about legal safety, the involved person has the right to gain explanation through relevant organ doubtful legal regulation formed by tax law provisions; the role of the interpretative organ means not so much as the presentation of particular detailed ways of understating the binding law than settlement of the doubts the party had, in the actual state of affairs that was presented by the applicant to the organ which was considered as a basis to issue relevant interpretation. Interpretation where

interpreting organ states legal estimation of the taxpayer position with reservation to the appearance , which occurrence fulfillment rely on any successions , infringes art. 14 b§ 1 of the Fiscal Law, because in "conditional interpretation" lacks of the actual state of affairs qualification that should be included in the motion to issue an interpretation (Supreme Administrative Court in Warsaw judgment of 6 February 2014: II FSK 201/13).

In the research literature the opinion prevails (Kosikowski, 2013: 14) that the purpose of individual tax interpretation institution was tax risk mitigation connected with activities undertaken by a taxpayer. *Sine qua non* condition of risk reduction is thorough explanation by the tax organs what are the consequences of the taxpayer activities. It is worth to underline at this point that administrative courts, after considering various contentions of syntactic nature, usually came to a conclusion that "results of linguistic and grammar law interpretation of tax law provisions do not give unambiguous results." It can be the source of many interpretation possibilities, independently to actual state of affairs changes which are subject to these provisions. Moreover, the tax legislation quality is the cause of the fact that subjects obliged to apply law sometimes possess "troubles choosing such a variant of conduct which is considered as lawful." It is worth to stress, at last but not at least, that institution of conditional interpretation was not anticipated by the legislator, and tax administration organs are obliged on the grounds of art. 120 of Fiscal Law, art. 2 and art.7 of the Republic of Poland constitution act pursuant to law, that is why conditional interpretation issuance extends the scope of the organ empowering to issue interpretation according to art. 14 b § 1 of the Fiscal Law.

5 Complaint due to individual interpretation

Introduction of tax law provisions interpretation to Polish law system in issued individual case, no doubts – upgrade the standard of the legal safety of the taxpayers who navigate a maze of unstable tax law provisions. The safety might be illusory only, if individual interpretations were not subject of court control. In the light of binding, being in force provisions – the following complaints are liable to the administrative court: issued written individual interpretation, amended interpretation and leaving the

application without a diagnosis (after earlier call to the organ to remove the law infringement/. The court control of the tax individual interpretations leads to: firstly – to quashing interpretation which is contrary to law –in the case when the complaint is allowed, secondly – complaint dismissal in the case when the incorrectness of the interpretation with binding law is not found, thirdly in the case of dismissal of complaint for formal reasons. In the case of complaint allowing due to the organ inaction, the court obliges the organ to launch legal action in the specified accurately period , which omission was the subject of the complaint (Marszał, 2011: 252).

The interpretation estimation is subject to the formal features and its substantial content . The complaint allowance causes quashing of the interpretation. Minor meaning has possibility of the interpreting organ inaction because in the case of the authorized organ inaction, we are facing with so called legal fiction issuing the interpretation through recognizing that the interpretation is consentient to the involved person's position, according to art. 14o § 1 of the Fiscal Law.

Practice shows that individual interpretations appealing to the administrative courts is almost a rule, as interpretation organs in small percentage confirm the correctness of the applicant position. Judicial decisions analysis referring the appealed individual interpretations clearly manifested that 70% of the appealed interpretations were quashed. This fact is worth of our intention as the administrative courts judgments quashing given provision, does not constitute a "new" individual tax law regulations interpretation (because only the interpreting organ is authorized and obligated to its issuance).In the consequence – potential " application" to the administrative court judgment does not cause establishment of the individual legal protection connected with it exclusively, either. (Supreme Administrative Court in Warsaw judgment of 27 June 2012: II FSK 2608/10. Simultaneously, interpretation organs do not issue new interpretations, because of it, the applicants must wait to the 3- months period expiry for interpretation issuance, to be able to benefit from the rule of so called "silent interpretation". This practice should be judged negatively as it is certainly contrary to the legislator's intention (Pachecka, 2013: 94).

In the light of binding regulations the complaint to the administrative court falls under: an issued written individual interpretation, amended interpretation and leaving the application without a diagnosis (after earlier call to the organ to remove the law infringement/.The court control of the individual interpretations in the tax cases leads to: The court control of the tax individual interpretations leads to: firstly – to quashing interpretation which is contrary to law –in the case when the complaint is allowed, secondly – complaint dismissal in the case when the incorrectness of the interpretation with binding law is not found, thirdly in the case of dismissal of complaint for formal reasons. In the case of complaint allowing due to the organ inaction, the court obliges the organ to launch legal action in the specified accurately period , which omission was the subject of the complaint (Marszał: 2011: 254).

It is an apt remark which is raised in the literature about administrative courts' role, in the sphere of a personal rights protection. The above remark takes special meaning towards increasing fiscalism, which is effected by several, subsequent amendments of Fiscal Law, which were conducted without relevant preparations and cogitation. Moreover, the direct fixing factors of the amendments are political reasons which are difficult to substantiate using legal arguments. It is an apt remark that the organs which apply law we cannot deny the competence to perform interpretation which removes appearing unclear places leading to lack of the given provision comprehension, however the legislator burdens the duty of unclear points elimination through amendment of the binding so far provisions (Gomułowicz, 2013: 146).

6 Conclusion

The subject literature frequently pays attention to the obviousness that stable, predictable tax law means the safe taxpayer. The legal state rule requires for the legal norms, which impose tax obligation on a taxpayer, to be clear and comprehensive enough to predict the tax burden. The same is required from other standards resulting from legal state rules, particularly the rule of law certainty, legal safety and confidence in the state and statutory law binding in it (Supreme Administrative Court in Warsaw judgment of 6 September 2013: II FSK 2616/11).

On the grounds of the above ascertainments, binding tax law interpretations appear as, mainly, institutional guarantee for a respect of the rule of individual confidence to the state (Waksmudzka, 2011: 370). Individual tax interpretations should save taxpayers interests, respecting, simultaneously, values of rationality, uniformity, and high quality of the applied tax law, including its correct interpretation (Glumińska-Pawlic, 2008: 93). "Legally and economically safe taxpayer" means the taxpayer who awaits coherent and completed tax law provisions regulations; the regulations which is free of faults, deficiencies or "conditions".

Similar views we can find basing on the jurisdiction (The Constitutional Court judicial decision of 26 September 1989: K 3/89, OTK 1989, no 1 and Resolution of the Constitutional Court of 26 April 1994: W 11/93, OTK 1994 no 1), as, repeatedly, in the indications there is mentioned that the genuine essence of taxes cause noticeable financial affliction. For these reasons, the role of the individual tax interpretations is not only legal safety assurance but also strict connected economical safety of the taxpayer assurance, as well, that is tied with the necessity of applying by him/her unclear, complicated and internally contrary tax law norms.

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THE TAX SYSTEM IN THE CZECH REPUBLIC AND ITS TRANSFORMATION IN THE 20th AND 21th CENTURY

Petra Jánošíková [1]

Abstract

This contribution deals with the tax system in the Czech state and its transformation in the 20th and 21th century. The main aim of the contribution is to confirm or disprove the hypothesis that, the tax system was changed during the period of the existence separate Czech state. Author used these scientific methods: comparison, description and analysis.

Key words

Tax; law; tax system; tax law; tax administration; system of taxes.

JEL Classification

K34, K40

1 Introduction

We can speak about the independent Czech state in connection with the establishment of Czechoslovakia in 1918. During almost a century there have been several changes in the constitutional arrangement. In terms of time, it is focused on the following time periods: the 1st Republic (1918-1938) and 2nd Republic (1938-1939), the Protectorate (1939-1945), the post-war period from 1945 to 1952, the period from 1953 to 1989 and period beyond velvet revolution and the establishment of Czech Republic to the present day (1990-2014).

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The aim of this thesis is to answer the question of whether the tax system is changed and or how. In terms of the processing area, the author focused on exploring these elements of the tax system, system of taxes and tax administration from an institutional point of view. The time period studied is 1918-2014. The subject of research is in terms of Czech territory.

There are aspects of the work dealing with the tax system in a certain period or certain issues in terms of historical or legal (especially Girášek, 1981; Starý, 2009; Picmaus, 1985; Janák, Hledíková, 2005). Comprehensive processing, however, is still missing.

The thesis is based primarily on contemporary legal sources.

In terms of methodology were used method of comparison, description and legal analysis.

As a starting point it is necessary to identify and define the object of study, which is the tax system.

The tax system is a broader concept than the system of taxes, although in many cases these terms used interchangeably (Boněk, Běhounek, Benda, Holmes, 2001: 88; Vančurová, Láchová, 2008: 34).

The tax system is to be understood not only the system of taxes, but the system of institutions that provide the tax administration, their assessment, assurance of payment and control, and also a system of tools, techniques and workflows that these institutions shall apply in relation to taxable entities or to other people (Bakeš, Karfíková, Kotáb, Marková a kol., 2012: 163; Grúň, 2009: 119; Jánošíková, Mrkývka, Tomažič, 2009: 296; Radvan, 2009: 45; Sidak, Duračinská a kol., 2012: 175).

Each system has to be a summary of related elements combined into meaningful complex, which consists of interconnected parts. The tax system of the state is usually the result of long-term political, economic and cultural development with the often shaped for generations.

During the existence of Czechoslovak or Czech state there have been changes not only political, but social and legislative. Among the important historical and political milestones were especially following events: the emergence of an independent Czechoslovak state, the occupation, February 1948, the

formation of the Federation, the disintegration of Czechoslovakia and the establishment of the Czech Republic and the Czech Republic's accession to the European Union.

The tax system in terms of the object of research belongs to the tax law, which is subject to its nature, economic development and political influences. In terms of theoretical disciplines tax system, respectively tax law, is part of the financial law, which regulates other relations arising in the process of making and using the cash state funds and other entities (Jánošíková, Mrkývka, Tomažič, 2009: 48; Mrkývka, 2004: 60; Bakeš, Karfíková, Kotáb, Marková, 2006: 13; Sidak, Duračinská, 2012: 10).

2 Period of 1st and 2nd Republic (1918-1939)

Czechoslovak state was established in 1918 on the ruins of the Hapsburg Monarchy (Act No. 11/1918 Coll.). This Act was adopted also valid tax adjustments, including the tax system (the Austrian tax system and the Hungarian tax system). The differences between the two systems were small. Although the principle of making the two systems was unified, there were variations caused by economic and political conditions in Hungary. Both systems include direct and indirect taxation. In the field of direct taxation was a direct personal taxes (*general tax production, tax production of manufacturing companies publicly cashier, pension tax, income tax, tax on royalties and higher stipend) and direct real taxes (land and house tax*). In the area of indirect taxes was mainly a *tax on sugar, tax on alcohol, tax on wine, tax on beer, the tax on mineral oils*.

Very soon it became evident efforts on new and unified regulation of tax relations in the whole country, because of enacting was obsolete and unfit. In 1927, on the basis of the tax reform, initiated by the Minister of Finance Karel Engliš, called Engliš tax reform, a new law on direct taxes was adopted (Act No. 76/1927 Coll.), which with some amendments or supplements paid up to 31. 12. 1952. Besides the law on direct taxes were part of the tax reform and other laws: Act No. 77/1927 Coll., the new regulation of the financial management of local government unions and Act No. 78/1927 Coll., of stabilizing the balances.

Direct taxes were the basis of the tax system of the Czechoslovak Republic. According to Act No. 76/1927 Coll., direct taxes were divided into *income tax and profit tax*. Income tax penalized the entire income of the household. Subject to her natural persons who have income from various sources, mainly from holding land and buildings, of various production activities from the service of capital benefits and other sources (tickets, prizes, speculative profits, writers royalties, alimony). The tax base has always been the sum of the net income of all these sources of all persons living in the same household. The exceptions were only income from employment, from which the withholding tax levied on their distribution. The tax rate was progressive and graded according to the height which they receive income (with an annual income above 460,000 CZK to 550,000 CZK reached 18 %). In 1934, taxpayers income tax was introduced conscription post extra allowance (Act No. 266/1934 Coll.) and in 1937 a contribution to national defense and special income tax (Act No. 247/1937 Coll.). Unlike income tax, taxable income that individuals facing the household as a whole, revenue taxes were determined by objective, real, because they were focused exclusively factual and did not take into account the relationship of yield to the person who received it. Among yield tax included: *general production tax, personal production tax, land tax, house tax, rent tax, tax of royalties and tax of higher stipend. General production tax* penalized any person or association of persons which led manufacturing company under his own name or perform work towards achieving profit excluding allowances and field of primary production. The tax base was the net income of the enterprise (production). The tax rates depend on the amount of the tax base and did not exceed 4 %. *Personal tax production* followed the general production tax. The base rate was at 8 %, and for some taxpayers, such as manufacturing and economic community, loan companies, credit unions and funds, savings banks, were designed personal rate. Since some entities, such as partnerships, limited partnerships, limited liability companies, the tax levied at more premium graded according to the profitability of the enterprise. *The land tax* was focused on all cultivated land. Tax paid landowners enrolled in the land cadastre. The tax base is determined multiple of the specified net revenue cadastral parcels. The amount of the tax burden was 2 %. Together with taxes levied personal contribution

of 1.5 % of the tax base. *House tax* is levied in two basic forms, as an apartment house tax and house tax class from the owners or users of permanent buildings. Apartment house tax is levied in all the cities of the houses in which more than one third of rooms rented, and all leased buildings. The tax base was a gross rent or rental value, the tax rate was 8 %, respectively 12 %. House tax class was selected in each municipality and vacant buildings. The tax is paid on the living room and the rate was graded tariff class taxes by number of rooms in the building. *Rent tax* penalized benefits that flowed from items of property and rights particularly interest, licenses and rent. The tax base consisted essentially of gross annual emoluments from which tax is assessed on the basis of either a tax return or congealing on their distribution. The tax was graduated according to the type subjected to tax benefits from 1 % to 10 %. *Tax on royalties* was paid by members of the board of partnerships and limited liability companies from royalties, from a performance reward office of member of the board of directors. The tax is levied withholding tax is payable at 10 %. *Tax of higher stipend* penalized income from stuff emoluments, which exceeded the total amount of CZK 100,000 per year, amounting to 3 % of the amount in excess of this amount. All income taxes are also levied surtax in the benefit of the local unions, as well as some further increases particularly in favor of chambers of commerce, church, health and education.

The system of indirect taxes over direct taxes was dissected and its legislation was divided into several laws. The group of indirect taxes included: *sales tax, luxury tax, tax on sugar, tax on alcohol, tax on mineral oils, general beverage tax, tax on beer, tax on soft drinks, mineral and soda water, tax on sparkling wine, tax on meat, tax on lighters, tax on coal, tax on water power, tax on electric light sources, excise tax on line, tax on yeast, tax on preparations for loosening dough, tax on acetic acid and tax on artificial edible fats*. *Sales tax* was originally only a temporary financial measure to overcome the post-war monetary and financial problems. It turned out, however, that both in terms of technology as well as tax revenue is the most appropriate means of shifting the tax burden on consumers and, therefore, has become a permanent part of the tax system. Sales tax was adjusted together with luxury tax (Act No. 268/1923 Coll.). Sales tax plagued the product in all its stages (by the manufacturer, wholesale trade,

retail trade). The tax is levied from product sales between private individuals and also subject to performance and services of all kinds, especially: repairs, professional character, barber acts, organizing the production and storage of things. Tax also covers own consumption, as well as products imported from abroad. Structurally it was a chain- tax, which affected each turnover of the respective product, starting with the producer and the consumer ending. The tax is calculated and led the sales actually executed. The company may request that he authorized the tax calculated and made the issued invoices. In the context of tax simplification techniques for collecting the sales tax is gradually coming for some types of products for flat fee. The tax is here mince from each turnover of the product, but once at a higher rate, usually the manufacturer, and other turnovers are already untaxed. *The luxury tax* was first introduced by Act No. 658/1919 Coll. The second time it was introduced together with the sales tax (Act No. 268/1923 Coll.). It was a one-time tax, which affected sales items and procedures listed in the articles of luxury and performance which are issued by the government. The articles of luxury imported from abroad, the tax levied in customs procedures as part of a customs debt (More Jánošíková, 2013: 80-87). Object of *tax on sugar* (Act No. 260/1923 Coll., the amount of taxes on sugar; Act No. 258/1995 Coll., the amount of taxes on sugar and Act No. 98/1926 Coll., the tax on sugar) was sugar produced from raw materials or residues of previous production of sugar. The taxpayer was an entrepreneur of sugar refinery. Tax paid each recipient that received tax-free sugar in any way, or that such a tax had escaped. The rate was determined by a fixed per 100 kg net weight of sugar produced graded according to the quality of sugar. *Tax on alcohol* (Imperial Regulation No. 95/1888 Imperial Laws, the duties of burnt spirits and liquor tax, as amended by Act No. 643/1919 Coll.) covered alcohol produced in the territory of Czechoslovakia, or imported from abroad, as well as mixtures containing added spirit or made from alcohol. The taxpayer was an entrepreneur of alcohol production and drinking alcohol distillery one who got alcohol for free use. The tax rate was determined by a fixed per hectoliter degree of alcohol. Tax on alcohol paid until 1946, when it was introduced alcohol monopoly. *Tax on mineral oils* (Imperial Regulation No. 55/1882 Imperial Laws, as amended by Act

No. 75/1924 Coll.) covered all mineral oils produced domestically or imported from abroad. The taxpayer was an entrepreneur of refineries usually after removal of oils. The tax rate was determined by a fixed sum per 100 kg net weight and graded according to the density of the oil. The object of general beverage tax (Act No. 533/1919 Coll.) was particularly wine, cider and other juices from grapes and fruit mead. The tax was rigidly fixed to one liter drinks by species. *Tax on beer* (Act No. 168/1930 Coll., the tax on beer) originally belonged to the general beverage tax, but since 1930 it is governed by a separate special tax law. Object of taxation was beer produced domestically or imported from abroad. Taxable at the rate established three to one liter of beer, depending on whether it was a beer, lagers and specialty beer. Tax paid beer producer before its selling or sales of any brewery or beer importer. Also, *the tax on soft drinks, mineral and soda water* was placed in the general beverage tax. Since 1937, it is a separate indirect tax (Act No. 248/1937 Coll.). The tax is levied a fixed sum per one liter drinks by types. *Tax on sparkling wines* (Imperial Regulation No. 40/1914 Imperial Laws, as amended by Government Regulation No. 219/1919 Coll.) was held to a dose of sparkling wine, and as such it is so marked. The object of taxation was sparkling wines of all kinds. Tax paid importer from abroad, manufacturers from selling or anyone in a sales and the one who received tax-free sparkling wine. The rate was fixed firmly on one bottle contents and price of the wine. *Tax on meat* (Act No. 262/1920 Coll.) was selected from the slaughter of cattle whose meat is intended for consumption by the consumer, outside game, as well as imports of meat or a trade sale or sales of tax-free meat. Tax paid slaughter, importer or seller. The tax was set at a fixed rate according to the weight, if it was possible to find a credible way, or by cattle. Object of *the tax on lighters* (Imperial Regulation No. 278/1916 Imperial Laws) were the matches of all kinds, spark plugs and lighters. Tax paid a manufacturer or importer, at a fixed rate determined by the types and amount of packaging. From lighters produced partially or entirely of gold or silver tax was increased free times, respectively five times the basic rate. Object of the *tax on coal* (Act No. 1/1924 Coll.) was coal mined domestically or imported from abroad. The tax paid by the entrepreneur of coal mine specified percentage of the price set at the mine site.

The imported coal from abroad to substitute tax levied at a rate determined by the Minister of Finance. *Tax on water power* (Act No. 338/1921 Coll.) was introduced in 1921 as a counterweight to tax coal. The object of taxation was water force applied to the actuator and its quantity is measured on the shaft of the drive device. Tax paid for by user of the water power, and to a fixed rate per one horsepower and one hour. *The tax on electric light sources* (Act No. 38/1933 Coll.) was introduced in 1933 and was object of taxation were every electric light sources except electric lighting equipment X-ray or rectifier. The tax is determined by the wattage and was graded according to the type of light bulbs. *Excise tax on the line* (Act No. 264/1920 Coll.) was selected initially in major cities on the edge of the circuit. In 1920 it moved to the state financial administration and chose only in Prague, Brno and Bratislava. Object of taxation was food for consumption by consumers or animals. The tax is levied at the rates which was a supplement to the law, and subject to anyone who crossed the border district in which it is collected. *The tax on yeast* (Act No. 123/1932 Coll.) started to pick up in 1932 and was the object of yeast produced domestically or imported from abroad. The tax paid by the manufacturer or importer, at the rate fixed firmly to one kilogram net yeast. *The tax on preparations for loosening dough* was introduced in 1936 as an additional excise tax on yeast. Object of taxation were the products or loosening dough rise. The tax was set at a fixed rate to the unit specified by types of product. *Tax on acetic acid* (Act No. 41/1936 Coll.) was introduced in 1936 and object of taxation was acetic acid made from untaxed alcohol, acetic acid, a chemical produced by the dry distillation of wood by chemical means and even acid made from other substances containing alcohol. Tax paid producer. The rate was fixed at the unit specified. *Tax on artificial edible fats* (Act No. 180/1936 Coll.) was also introduced in 1936 and the object of taxation was plant and animal artificial fats (edible oil, natural products like butter and fat). Tax paid producer. The rate was fixed relative to one kilogram of net weight depending on the type of artificial shortening.

In the area of indirect taxes can be concluded that the union's efforts were not so successful. The unification occurred rarely and usually amendment

to the then laws, especially taxes on beer in 1930, taxes on soft drinks, mineral and soda water in 1937, or the introduction of other indirect taxes, especially taxes on yeast in 1932 and the tax on artificial edible fat in 1936.

Direct and indirect taxes were complemented by the introduction of states *financial monopoly*, namely: salt, tobacco, artificial sweeteners and explosive substances. State financial monopoly has historically evolved from the so-called "*regalia minora*" royal prerogatives. It was the exclusive state right to the production and marketing of certain things in order to facilitate the selection of the indirect (excise) taxes. The system of indirect taxation in the financial monopolies is based on the fact that the production or trading price of the tax credits and each product is sold at a fixed single price without the buyer would be able to find out the cost of production and monopoly tax. The advantage of this tax is higher tax revenue, simpler and lighter tax collection, and reduction of the risk of non-payment of taxes and the possibility of tax differentiation according to quality.

Central financial administration has been focused on the *Ministry of Finance* and also in some *professional offices* based in Prague, which were directly subordinated to this Ministry (Directorate of public debt, Central treasury, Chemical-technical service of financial administration, the Central directorate of tobacco, Directorate of the state lotteries and Directorate of the state mint in Kremnice). *Lower financial administration* authorities continue to financial shared *administrative authorities* consisted of a set of administrative offices substantive decisions on financial legal issues in the field of taxes and benefits, and the *powerful financial authorities*. The financial administrative offices were *provincial financial offices (Provincial Directorate of Finance in Prague and Brno, financial headquarters in Opava*). They reported directly to the Ministry of Finance organized a second instance of financial administration in various countries. Ministry of Finance were also reports directly *Financial Prosecutor's Office* in Prague and Brno, whose task was to continue the legal state representation and some other subjects, in whom the right to be lent. Their work was recently regulated by Law No. 97/1933 Coll., and service instructions from 1936. Authorities of first instance in the field of direct taxation become taxing authorities which arose in 1919 from the department of political administration. Their territorial districts are generally coincided with the political

districts. Financial and administrative agency indirect levies, excise taxes, and charges monopolies exercised and now the financial district headquarters. Administration of Customs by the end of 1927 engaged in financial district headquarters. New Customs Act, this administration transferred to the *district customs* and the *customs offices*. Powerful financial authorities remained even now taxing authorities. As the new executive offices created income control authorities. They went to them all the tasks and powers of the former administrations of districts and supervisory department financial officers, as they related to inland inspection services. The scope of these offices is covering in particular the supervision of the state financial monopoly, the stamps and fees and the uncovering pension offenses. The local effect is usually covered by the county tax collector circuit. Materially, these authorities subordinated financial district headquarters. In the closed cities (Prague, Brno) were the *authorities excise taxes* on the line, which is also subject to the financial district headquarters. The executive body of financial administration was *financial guard*, which was in 1920 as a single corps abolished and divided into income financial control and border guards. Custom Act of 1927 changed the financial border guard again in financial guard, and it became the customs authorities. The choir performed guard duty at the customs frontier and other supervisory and auxiliary customs service. Financial guard was used by analogy in inland service.

It can be concluded that the pre-Munich republic was typical decline in the importance of direct taxes and shifting the focus of government revenues in indirect taxes. The most profitable of direct taxes was income tax, tax production of manufacturing companies publicly cashier, general income tax and land tax. A special kind of tax became a sales tax and the luxury tax. Typical for this period was the separation of financial administration from the political administration with separation of the revenue office in 1919, and also that for each income sector operated various financial authorities.

3 Protectorate 1939-1945

In the Protectorate big legislative changes were in the Czech lands. Direct and indirect taxes were replaced by legislation Reich, especially payroll tax, corporate tax, property tax and tax on the eviction.

For Protectorate was a typical double-tracking of public administration, though there have been created in some way modified Reich administrations and they were fully subordinated to the autonomous administration bodies. Financial administration has been incorporated into the imperial financial administration. Of the Protectorate *Chief financial district of Bohemia and Moravia* was made and in Prague the *President's office* was established as chief financial institution. This adjustment related to administration of customs duties, excise taxes and monopolies, which continued to be divided between the imperial authorities, headed by the chief financial director and the autonomous protectorate authorities. Financial protectorate authorities were on the substance, if it concerned the administration of customs duties, excise taxes and monopolies, Chief Financial subordinate to the president, after the personal Protectorate, however, subject to the Minister of Finance. The powers of the Ministry of Finance were in this limited. Administration of customs, excise taxes and monopolies were charged by the *office of customs*. The basis of the main was customs offices. The other maids were the customs authorities. Effect of customs involvement in the Protectorate Empire and the associated new organization of customs offices resulted in a total state of financial administration. In addition to the competencies of the Ministry of Finance has narrowed competence of provincial financial directorates and district financial headquarters. In 1943, the district financial headquarters were canceled and the remaining agency took the fee offices and certain taxing authorities. Old customs authorities, existing under the law of 1927, stopped its activity in September 1940 and the same was true for financial guard and income control offices. The rest of their competence has been transferred to the tax office.

4 Period 1945-1952

After the liberation of Czechoslovakia in 1945 took over the old people's democratic state tax system pre-war Czechoslovakia. Occupation regulations were abolished and made some strictly due to social, economic and policy changes.

Postwar tax system was newly formed: *Dose of assets and asset growth* (Act No. 134/1946 Coll.); *Sales tax* supplemented by excise taxes and tax monopolies (Act No. 31/1946 Coll.); *Payroll tax* (Act No. 109/1947 Coll.); *Millionaires' dose* (Act No. 185/1947 Coll.); *Luxury tax* (Act No. 200/1947 Coll.); *Tax on interest from savings deposits* (Act No. 294/1948 Coll.); *Tax on literary and artistic activities* (Act No. 59/1950 Coll.); *Tax on self-employment* (Act No. 60/1950 Coll.).

Dose of assets and asset growth (Act No. 134/1946 Coll.) be to raise funds for the treasury to eliminate war damage and help restore social justice, in particular load war profiteers. In contrast, the Act No. 31/1946 Coll., it renews only prewar sales tax (3 %). *Sales tax* was complemented by a renewed system of excise taxes (sugar, yeast, acetic acid, mineral oil, beer, sparkling wine, artificial edible fats, coal, lighters, electric light sources, meat, wine, cider, fruit juices and cigarette paper) and system of monopolies (tobacco, salt, explosives, artificial sweeteners and alcohol).

Act No 51/1947 Coll. had a social impact. It secured the reduction of prices of certain good's needs and stabilized the prices of other essential goods. It introduced price compensatory amounts for goods of mass consumption. Sources were obtained pumping of corporate profits in general compensatory prize fund. Lower income groups were preferred here like in payroll taxes under Act No. 109/1947 Coll., that the highest wages were experiencing marginal rate of 85 %. Similarly the *Millionaire´s dose* (Act No. 185/1947 Coll.) and *Luxury tax* (Act No. 200/1947 Coll.) acted. Luxury tax introduced a rate of up to 100 % of the selling price. Reduce the so-called unearned income should also *tax on interest from savings deposits (*Act No. 294/1948 Coll.) The rate was 14 % and the tax levied by deduction at source.

Act No. 283/1948 Coll. introduced a *general tax*, thereby abolished the system of indirect taxes: sales tax, state monopolies, luxury tax and cost

recovery amount. The amendment No. 263/1949 was renamed the *general tax shopping*. This tax is levied only on the final stage. Taxes were subjected to substantially all of the goods listed in the tax tariff.

Writers and artists paid *tax on literary and artistic activities* (Act No. 59/1950 Coll.). The maximum rate was 10 % and counting of each work separately.

Private doctors and lawyers were subject to *tax on self-employment* (Act No. 60/1950 Coll.) with a high progression rates.

By the end of 1952 was still in force general production tax, house tax, land tax, income tax, rent tax and tax on royalties.

Constructive Gotwald government program of 1946 envisaged a reduction of the tax system on three types of taxes: tax on labor income, corporate tax and tax on unearned income. It has been recognized only the adoption of the law on payroll (Act No. 109/1947 Coll., the payroll tax). Tax collection was based on the retention of payroll, which was easier for tax payers.

Basics of the new financial system were laid in years 1949-1952. Since 1950 *national committee* were linked to the state budget. National committees were simultaneously debt relief on state account. In the same year the national instance scheme was included in the State budget. In addition, in 1953, were subsequently destroyed all the special central fund created after the liberation and fulfilling various functions of government, especially the National Renewal Fund, the National Land Fund, Winding Monetary Fund. In total it was a few hundred funds. The state budget had become a financial plan and to be reflection of an annual implementation plan.

The newly formed national committees as state powers and administrative organs took agency of taxing authorities, based on Act No. 281/1948 Coll. So far, a separate system of financial authorities switched from 1st January 1949 on the *financial reports of national committees* whose instance the structure was as follows: *financial reports of district and municipal committees, financial reports of regional national committees and the Ministry of Finance*. Since the beginning of 1953, a new system of taxes and levies, which fully express the essence, built centrally controlled economy.

5 Period 1953 - 1989

Major tax reform was at 1st January1953, when all previous tax abolished, except for taxes on literary and artistic activities, and the newly introduced: *Sales tax* (Act No. 73/1952 Coll.), which was replaced in the year 1992 by added value tax (Act No. 588/1992 Coll.); *Payroll tax* (Act No. 76/1952 Coll.), which was also replaced in 1992 *Income tax* (Act No. 586/1992 Coll.); *Agricultural tax* (Act No. 77/1952 Coll.) related to private farmers and single agricultural cooperatives, newly regulated by Act No. 50/1959 Coll.; *Income tax of the population* (Act No. 78/1952 Coll.) related income of individuals that were not taxed by those taxes, the highest rate for the highest income group was 80 % (new regulated by Act No. 145/1961 Coll.); *Trade tax* (Act No. 79/1952 Coll.) was selected from each business activity in addition to income tax and was graded, abolished by Act No. 145/1961 Coll.; *Income tax cooperatives and other organizations* (Act No. 75/1952 Coll.) and *House tax* (Act No. 80/1952 Coll.) which are subject to all buildings, regardless of the form of ownership, the newly regulated by Act No. 143/1961 Coll.

Sales tax was regulated by Act No.73/1952 Coll. It replaced the previous general tax. It was created a system of two state prices (wholesale and detail). The tax shall become part of the price and ceased to be merely a surcharge on the cost of production.

Performance tax (Act No. 74/1952 Coll.) marked accumulation of cleavage in companies engaged in various works from the existing general tax. The new rules on the taxation of the cooperative sector were reflected in Act No. 75/1952 Coll., the *Income tax cooperatives and other organizations*. Cooperative ownership was one of the kinds of socialist property. The introduction of the *Payroll tax* (Act No. 76/1952 Coll.) is publicly proclaimed interest to dispose of the remains of the private sector. Determining the amount was influenced by many factors (social and personal factors). Legalization of new *Agricultural tax* (Act No. 77/1952 Coll.) was preferred collective farm. *Income taxes of the population* (Act No. 78/1952 Coll.) express differentiation between the layers of the professions (craft small remnants and a private detail). Has a definitive abolition of the direct taxes from 1927. *Trade tax* (Act No. 79/1952 Coll.) refunded general tax. This Act differentiated

paying taxes on the type of trades in terms of their expected demise. Unlike the previous regulation, which was income tax, a new trade tax had registration character. New House tax (Act No. 80/1952 Coll.) significantly penalized owners of apartment buildings. Taxation of home owners is basically not changed. *Tax on performances* (Act No. 81/1952 Coll.) replaced a general dose of entertainment. Along with house tax the basis of local taxes was formed. The only tax that still remained in force was *tax on literary and artistic activities* (Act No. 59/ 1950 Coll.).

Tax reform meant a settlement with the tax legislation of the period of former Czechoslovakia and expressed a new form of socialist tax system, which consisted of: tax drain on the accumulation of the socialist sector of the economy, taxes from the population and local taxes flowing into local budgets.

The financial state requirements to corporates under socialism expressed mostly not tax, but removal system that accurately reflects the transfer of money in single (state) forms of ownership and other corporate obligations of the possibility of modifying the special state administrative acts, national committees or corporate organs of economic management. Tax reforms in 1953 changed the system of levies on profits and other levies of the state enterprises. Enterprises used gain according to the financial plan to increase current funds for capital construction fund and allocations to director´s fund. They diverted reminder of the profit after deducting scheduled items or surrendered over profit 80 % to the state budget. In addition, enterprises divert depreciation and relaxed working capital.

Payments in the State budget to the end of 1954 carried out through a centralized over enterprises authority. Since 1955 it moved by Act No. 248/1954 Coll., to a decentralized system of levies, which was established through a direct relationship between the company and the State budget. However centralized system returned by Act No. 260/1956 Coll.

The adoption of the new Constitution in 1960 occurred in the area of taxation, some changes, namely the adoption of the new Act on *Income tax of the population*, *Tax on literary and artistic activities, Special income tax and Tax on motor vehicles*. Tax system in 1960 consisted of taxes paid by socialist

organizations (*sales tax*, i*ncome tax cooperatives and other organizations*, *agricultural tax*)and taxes paid by the population (*payroll tax, special income tax, tax on literary and artistic activities, income tax of the population, house tax and tax on motor vehicle*).

Another change in the tax system was caused by the adoption of Act No. 143/1968 Coll., on the Czechoslovak Federation. They were introduced so-called corporate tax. With effect from 1st January 1970 the system of corporate taxation consists of income taxes, property taxes and payroll taxes. This led to the replacement of existing levies on gross national income businesses. In addition to these taxes were introduced as a separate contribution to social security.

Separation of financial and political administration was again in 1970. Complete separation of existing state departments finances from the national committees formed *district financial administration* (1st instance) and *regional financial administration* (2nd instance). *Municipal financial administration* was established in statutory towns. Jurisdiction of the financial reports reflects circuit's scope of district and regional national committees. The highest authority was the *Ministry of Finance*. National committees continue its place in the financial administration. Administered by public revenues were taxes on income of the population, income citizens from agricultural production, land tax paid by citizens, agricultural tax on enterprises managed by the national committees, income tax, house tax, local and administrative fees and fines. This situation lasted until 1990, when the Act No. 531/1990 Coll. was adopted.

At the end of 1971, with effect from 1st January 1972 stabilized standardization regime introduced a new system of payments to the federal budget in accordance with Act No. 111/1971 Coll. to the budgets of both national republics by Act No. 117/1971 Coll. and according to the Act No. 122/1971 Coll. The system formed in accordance with § 1: delivery of the profits, delivery of assets, delivery of payroll, social security contributions, payments from the depreciation of capital assets, additional payments and direct payments to selected economic organizations in accordance with the financial plan.

In the eighties there has been a reassessment of the concept of corporate taxation. Act No. 16/1982 Coll. was introduced delivery of profit, delivery of free balance income, social security contributions, payments of depreciation of fixed assets and additional payments.

6 Period 1990 - 2014

Changes in political and social orientation of the state after 1989 forced changes in the tax system. Economical system moved from a planned to a market economy. The overall concept of tax reform was approved by Act No. 532/1990 Coll. New system of taxes was established by Act No. 212/1992 Coll. It was dropped from the current breakdown of taxes on taxes paid by socialist organizations and taxes paid by the population. Taxes were divided into direct (property and income) and indirect (general excise tax and selective excise taxes) and the breakdown of the system of taxes based on the criteria of their subject.

System of taxes (Act No. 212/1992 Coll.) consisted of *value added tax; excise taxes* (hydrocarbon fuels and lubricants, tax on alcohol and spirits, tax on beer, tax on wine, tax on tobacco and tobacco products); *income tax* (personal income tax and corporate income tax); *real estate tax* (land and buildings tax); *road tax*, *inheritance tax, gift tax, real estate transfer tax and taxes for environmental protection*. Individual tax, except tax for environmental protection, which are not implemented, were adjusted in individual tax laws, namely: *Act No. 586/1992 Coll., the income tax; Act No. 338/1992 Coll., the real estate tax; Act No. 357/1992 Coll., on inheritance tax, gift tax and real estate transfer tax; Act No. 339/1992 Coll.(later Act No. 16/1993 Coll.), on road tax; Act No. 213/1992 Coll. (later Act No. 587/1992 Coll., the excise tax and Act No. 222/1992 Coll. (later Act No. 588/1992 Coll.), the value added tax.*

Value added tax replacing sales tax. There payer pays the state only part of the tax attributable to the added value. It does not therefore the number of stages or cycles to which the goods or service is going through, but the total value added.

Realization of the rights and obligations of taxpayers was defined by Act No. 337/1992 Coll., on administration of taxes and fees and Act No. 531/1990 Coll., the local financial institutions.

In 2004 the Czech Republic joined the European Union. The system of taxes for this reason has undergone changes. Act No. 212/1992 Coll., the system of taxes, was abolished. Individual tax laws remained in force until the indirect taxes. Act No. 588/1992 Coll., the excise tax, was replaced by Act No. 353/2003 Coll., the excise tax, and Act No. 585/1992 Coll., the value added tax, was replaced by Act No. 235/2004 Sb., the value added tax.

The energy tax (tax on natural gas and other gases, tax on solid fuel and electricity tax) complemented the system of taxes from 1st January 2008 (Act No. 261/2007 Coll., the stabilization of public budgets). These taxes when their base is a physical unit that has demonstrated a negative impact on the environment.

From 2013 there is a new system of financial administration authorities. The system of territorial financial bodies existing under Act No. 531/1990 Coll., the local financial authorities, as amended, has been replaced by a system of organs of financial administration of the Czech Republic pursuant to Act No. 456/2011 Coll., the Financial Administration of the Czech Republic. By 2012, a system of territorial financial authorities was formed: *financial offices, directorate of finance and the Ministry of Finance* (its internal organizational departments of *central tax and financial administration*). Since 2011 established the g*eneral directorate of finance* and from 2012 the system of territorial financial authorities completed a *specialized financial office*. The Act on Financial Administration of the Czech Republic regulates the three-tier system of bodies consisting of *financial offices and specialized financial office*, *the board of finance directorate and the general directorate of finance*. The system of customs authorities has also undergone changes. Act No. 185/2004 Coll., the Customs Administration of the Czech Republic, was replaced by a system of Customs Administration of the Czech Republic under Act No. 17/2012 Coll., The Customs Administration of the Czech Republic. Three-tiered system of customs authorities (*customs offices, the customs directorate and the general directorate of customs*) has been reduced to a two-level (*customs offices and the general directorate of customs*) from 1st January 2013.

Recodification of civil rights embodied in Act No. 89/2012 Coll., the Civil Code, which entered into force on 1st January 2014. Upon adoption of the Civil Code was required to issue a number of implementing regulations and amend existing arrangements number of regulations. For this reason, the Senate of the Czech Republic, at its 14th meeting approved the legal measure No. 340/2013 Coll., the tax on the acquisition of immovable property and legal measure No. 344/2013 Coll., amending tax laws in connection with the re-codification of private law and amending some laws. Deputies at its first meeting, the two legal measures approved by its resolution, so both entered into force on 1st January 2014.

The system of taxes from 1st January 2014 has undergone the following changes. Act No. 358/1992 Coll., on inheritance tax, gift tax and real estate transfer tax, as amended, has been canceled. Inheritance and gift taxes have been incorporated into the regulation of income tax (Act No. 586/1992 Coll.). Real estate transfer tax was replaced by a *tax on the acquisition of immovable property* is governed by a legal measure No. 340/2013 Coll. The real estate tax (Act No. 338/1992Sb.) has been renamed to *tax on immovable property*. Other taxes in the name retained, although their legal substantive legislation was amended legal measure No. 344/2013 Coll. The changes affected the treatment of process regulation. Tax legal measures changed approximately 40 rules, including: an extensive amendment to the Income Tax Act (Act No. 586/1992 Coll.), an extensive amendment to the Real Estate Tax Act (Act No. 338/1992 Coll.), an amendment to the Value Added Tax Act (Act No. 235/2004 Coll.), an amendment to the Road Tax Act (Act No. 16/1993 Coll.), an amendment to the Tax Code (Law No. 280/2009 Coll.), an amendments to the Accounting Act (Act No. 563/1991 Coll.) and amend the rules on public insurance.

7 Conclusion

The creation and organization of the tax system is contributed by other factors than those that undermined the form of the tax system in each period. These factors were mainly demographic and technological changes

or changes in the political perception of some functions of taxation and public finance at all as a result of the outcome of the election, war or regime change.

Changing refers to observable, measurable or quantifiable difference to the state or properties of an entity in a given reference frame. Changes in the system of taxes (the tax system), are changes related to a change in tax principle; introduction or withdrawal of the type of tax or widening or narrowing of institutions managing the tax.

It can be said, that the tax system in the Czech lands in the study period changed, because it was the product of political, economic and cultural development. Changes in the tax system logically related to economic and social ideas of the state, which they adapted and usefulness of the tax system and may be involved relations, the implementation of which was then in accordance with the factual effects of taxes.

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THE PRINCIPLE IN DUBIO PRO TRIBUTARIO IN THE POLISH JUDICIAL DECISIONS

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Abstract

The tax law doctrine emphasizes that the tax law is a law of intrusive nature on the basis of which citizens' property constituting one of the fundamental values protected by the Constitution is taken away from them. It is in this context that one of the guiding principles of the tax law is the principle in dubio pro tributario. The doctrine and the Constitutional Court suggest that the principle in dubio pro tributario is a quasi-logical consequence of the principles specified in Art. 2 (the principle of a democratic state ruled by law) and Art. 84 (the principle of statutory regulation of taxation) of the Constitution of the Republic of Poland. in the current legal situation, the principle of resolving the doubt in favor of the taxpayer is only a quasi-logical consequence of constitutional principles. By codifying the principle in the Polish tax law provisions, the taxpayer would be safeguarded against tax authorities and, last but not least, against legislative errors committed by tax legislators. As regards substantive law, this principle would be an interpretative directive, whereas as regards the procedure, it would be a directive raising the requirements which have to be fulfilled if tax authorities are to be able to prove any possible discrepancies.

Key words

In dubio pro tributario; tax law; Tax Ordinance Act; the Constitution of the Republic of Poland; Supreme Administrative Court; the judgment; taxpayer.

JEL Classification

K34, K40

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1 Introduction

The tax law doctrine emphasizes that the tax law is a law of intrusive nature on the basis of which citizens' property constituting one of the fundamental values protected by the Constitution is taken away from them. It is in this context that one of the guiding principles of the tax law is the principle in dubio pro tributario. (Brzeziński, Nykiel, 2002)

Flaws in the provisions of the Polish tax law are unfortunately a permanent phenomenon. Already at the time when legislative works on the Tax Ordinance Act were conducted as well as now the tax law doctrine has advocated introducing the principle of resolving any doubt in favor of the taxpayer (in dubio pro tributario) in the tax law provisions. This principle would be some sort of panacea for interpretation problems as regards the tax law provisions.

The doctrine and the Constitutional Court suggest that the principle in dubio pro tributario is a quasi-logical consequence of the principles specified in Art. 2 (the principle of a democratic state ruled by law) and Art. 84 (the principle of statutory regulation of taxation) of the Constitution of the Republic of Poland. Also, based on administrative courts' decisions, one can point out arguments suggesting that the principle of resolving any doubts in the taxpayer's favour should be derived from the principle of property protection and economic freedom. On the other hand, reference literature acknowledges that the principle in dubio pro tributario is also a corollary of the principle of legal certainty enshrined in the Constitution. (Brzeziński, 2003).

Tax law is frequently compared through the tax law doctrine to criminal law because not unlike the criminal law it interferes significantly in the sphere of human liberty (thus restricting ownership). In reference literature, it is noted that the interpretation and application of intrusive laws should be based on resolving any doubts in favor of the citizen. The principle, expressed in legal provisions, of resolving any doubts in favor of the accused (in dubio pro reo) is the standard and foundation of contemporary international criminal law, including the Polish criminal law. Since criminal law and tax law are similar in terms of the intrusive nature of their legal standards,

the principle of resolving any doubts in favor of a taxpayer (in dubio pro tributario) should also be expressed explicitly in the tax law provisions. (Gomułowicz, 2009).

Too frequent amendment and the highly complex tax law are often the reason for the law to be incomprehensible not only to an average taxpayer but also to a professional.

In one of the judgments of the Supreme Administrative Court (Supreme Administrative Court: III SA 700/97), the court stated that "tax law cannot be perceived as a sort of trap for taxpayers, hence its provisions should be understood without having to resort to complicated interpretation endeavors." Therefore the principle in dubio pro tributario offers the taxpayer the possibility of protection against incomprehensible tax provisions, as any interpretation doubts would have to be counted ex lege in favor of the taxpayer by a tax authority.

Under the tax proceeding procedure currently in force, the burden of proof lies with tax authorities. It is the authority which, while justifying its tax decision, identifies which circumstances give reasons to question the presumption of truthfulness of the tax recorded by the taxpayer, pursuant to Art. 21 of the Tax Ordinance Act. In the above context of the presumption of truthfulness declared by the taxpayer, expressing explicitly the principle in dubio pro tributario would warrant a fair conduct of evidentiary proceedings by a tax authority. If a tax authority were not to conduct in-depth and thorough evidentiary proceedings, it would not be able to use any subsequent doubts to the disadvantage of the taxpayer (Gomułowicz, 2009).

2 The significant judgments given in a tax case

In one of the judgments given in a tax case (Constitutional Court K 33/09), the Constitutional Court recalled that while interpreting tax provisions it is necessary to apply constitutionally justified rules of interpretation pursuant to which resolving doubts resulting from unclear tax regulations must not be done to the disadvantage of taxpayers, and furthermore, their analogous or extensive application was inadmissible if with the purpose

to increase tax liabilities – the principle in dubio pro tributario. The importance of this principle is further indicated by the doctrine and experts in tax law. Moreover, administrative courts are more and more often following this maxim.

It therefore seems justifiable to invoke the above principle whenever unclear provisions can be interpreted in two ways based on appropriate arguments. Unfortunately there are many examples of such tax law provisions, which has more than once been the result of tax acts being designed imprecisely – we need only think of the regulations pertaining to determining exchange rate differences on income tax, property tax liability which arises if the value of the building increases or how the limit on the value of small value gifts is to be treated (either gross or net amount) on value added tax (if the taxpayer keeps a register with persons receiving gifts). If applications are submitted for interpretations in case of ambiguous provisions, the line of arguments related to the unit in which interpretations are given or a uniformly negative position appear to be standard practice. Help may come with taxpayers' lodging an appeal with voivodship administrative courts which increasingly more frequently follow the principle in dubio pro tributario.

Moreover, the Supreme Administrative Court recognises the necessity, resulting from the Constitution of the Republic of Poland and being generally acknowledged by this court in its decisions, for adhering to the interpretation principle that is in favour of the taxpayer, also called the directive in dubio pro tributario, requiring that if it is necessary to decide on various interpretation options involved, law-applying bodies should choose the outcome that is most advantageous to the taxpayer.

The Supreme Administrative Court emphasised in its decisions (Supreme Administrative Court: I SA/Łd 48/0, II FSK 223/10, I SA/Gd 1604/96) that it was not necessary to recourse to the above interpretation directive (i.e. primacy of linguistic interpretation and the principle in dubio pro tributario) in case of all the provisions of the tax act, whatever subject they regulate. In other words, the sole fact of the provision being set out in the tax act does not yet require that the primacy of linguistic interpretation and the principle in dubio pro tributario be applied.

Under the tax law doctrine (Brzeziński, 2003: 251), it is made clear that according to the principle in dubio pro tributario, significant doubts or ambiguities as regards the factual or legal situation must not be construed to the disadvantage of an entity to whom the decision of a tax authority pertains. Also, the decision of the Voivodship Administrative Court in Lublin of 11 July 2008 (Voivodship Administrative Court: I SA/Lu 722/07) showed that "the principle in dubio pro tributario is the consequence arising from Art. 187, para. 1 of the Tax Ordinance Act which stipulates that the evidence must be collected and extensively assessed by a tax authority. It prohibits to resolve any doubts as to the factual and legal findings to the disadvantage of the taxpayer. As a result, a breach of fundamental principles of the investigation procedure and of, building upon them, specific provisions of the Tax Ordinance Act regulating the bringing of evidence is justified by the claim that there is discretion as to findings of facts". The decision of the Supreme Administrative Court in Warsaw of 22 February 2011 (Supreme Administrative Court: II FSK 224/10) reads that "the principle established in the tax law by the content of Art. 121 of the Tax Ordinance Act not only requires that the interpretation of legal provisions (procedural law and substantive law) which is in favour of the taxpayer be adopted while applying law, but, not unlike the principle in dubio pro reo in criminal law, it also pertains to factual doubts. Hence any doubts connected with evidence and findings of facts should be interpreted in favour of taxpayers".

The decision of the Voivodship Administrative Court in Gdańsk of 12 August 2008 (Voivodship Administrative Court: I SA/Gd 275/08) stated that "Any ambiguities or doubts as regards the factual situation cannot be resolved to the disadvantage of the taxpayer. Therefore the practice of resolving doubts to the disadvantage of the taxpayer (in dubio pro fisco) is inadmissible".

Lack of clarity of tax provisions, in this context one should mention in particular the provisions pertaining to taxation of the income from shareholding made by legal persons, cannot result in negative consequences suffered by a taxpayer. In accordance with the principle in dubio pro tributario, which derives from the constitutional guarantees for fundamental civil liberties, any doubts as to the interpretation of tax provisions should not be interpreted

to the disadvantage of the taxpayer (Supreme Court: III RN 14/97). In addition, based on the constitutional principle of specifying the key components of taxes by law (Art. 217 of the Constitution), the assumption arises that the object of taxation – being one of these components- should be clearly identified by statute and cannot be extended by legal interpretation. The decision of the Supreme Court of 22 October 1992 (Supreme Court: III ARN 50/92) already stated that the fundamental principle of the tax law in a democratic state ruled by law was the fact that the scope of the taxation object had to be precisely specified by the tax law, and the interpretation of its provisions could not be extensive.

Any doubts as to the interpretation of the provisions of law in force in a situation when the law obliges tax authority to make a decision which is to determine authoritatively and individually for every taxpayer a basic amount (standard pay) used for calculating the tax debt, must not be interpreted to the disadvantage of the taxpayer (in accordance with the principle in dubio pro tributario, which derives directly from the constitutional guarantees of fundamental civil liberties, in particular, from art. 6 and art. 7, maintained in conformity with the provisions of the Constitution of the Republic of Poland of 22 July 1952 (Constitution Act, Art. 77).

While discussing the principle in dubio pro tributario it should be noted that firstly, it aims at preventing decision making that is contrary to the results of a proper interpretation of the tax law provisions (Supreme Administrative Court: I SA/Gd 1604/96). (it is prohibited to look for other meaning than the one arising from the linguistic context if the outcome were to be unfavorable to the taxpayer).

Secondly, if the results of the literal interpretation are ambiguous, the principle aims at obligating law-applying entities to make decisions which are more favorable to the taxpayer, and thereby preventing looking for interpretation that would not be favorable to the taxpayer (it is required that the interpretations be adopted which are more favorable to the taxpayer, thereby prohibiting to look for interpretation which would not be favorable to the taxpayer).

Moreover, with respect to the validity of legal standards, the principle in dubio pro tributario aims at directing law-applying bodies to make the

decision which would be favorable to the taxpayer, and thereby the application of repealed provisions can only be possible if they are more favorable to the taxpayer (directing to apply repealed provisions if they are more favorable), as well as to prohibit the application thereof if they are unfavorable (prohibition). Literature distinguishes two separate principles: applying the existing provisions for conducting cases initiated thereunder, if these provisions changed and the law does not contain transitional provisions, and the principle of non-retroactivity. However, in my opinion, these principles are the logical corollary of the same standards as the principle in dubio pro tributario, and therefore they can be regarded as their corollary (Mariański, 2009: 76).

In evidentiary proceedings, the principle in dubio pro tributario advocates to direct tax authorities to collect full evidence, and deficiencies thereof cannot be resolved to the disadvantage of the taxpayer, as well as to prohibit the assessment of evidence that is unfavorable to the taxpayer unless there are grounds for doing so resulting from other evidence (doubts arising during this process should not be resolved to the disadvantage of the party (in dubio pro tributario)" (Supreme Administrative Court: I SA/Łd 636/98) – requiring to collect full evidence – burden of proof, the prohibition of resolving the deficiencies of relevant evidence to the disadvantage of the taxpayer.

The tax law doctrine stresses that the principle in question is a logical corollary of the principles specified in Art. 2 of the Constitution of the Republic of Poland (the principle of a democratic state ruled by law) and Art. 84 (the principle of statutory regulation of taxation) (Brzeziński, 2002: 9-11).

It seems therefore that the principle in dubio pro tributario should be the consequence of the principle of the presumption of truthfulness of the tax due as declared by the taxpayer – Art. 21, para. 3 of the Tax Ordinance Act. Therefore only if the tax authority finds in the course of the tax proceeding that the taxpayer, despite being liable to pay taxes, failed to make a full or partial payment of taxes, failed to file a tax return or that the amount of tax liability is other than the one declared on the tax return, the tax authority issues a decision in which it determines the amount of tax liability – Art. 21, para. 3 of the Tax Ordinance Act.

At the same time, the application of principle under discussion also prejudges the question of the burden of proof. For this means that the prohibition to reverse the burden of proof to the taxpayer in connection with the presumption of truthfulness of the liability arising from the submitted tax return, triggers the obligation to prove otherwise by tax authorities. Similar regulations in establishing the burden of proof are applied, for example, in criminal proceedings.

The principle in question needs to be statutory regulated in the tax law not only for the reason that when tax authorities apply law what prevails is the interpretation based on non-legislative suppositions, very often leading to an unfavorable interpretative outcome for the taxpayer, but unfortunately it also happens so in the decisions of the Supreme Administrative Court. In the situation when the result of the interpretation of provisions is ambiguous, adjudication panels look for arguments which are to the disadvantage of the taxpayer. As if that were not enough, individual panels of the Supreme Administrative Court very frequently, while following the a priori suppositions for instance, of tax advantages, make decisions that are contrary to the literal interpretation of the provision concerned. The principle is to prevent such "perversions" which are inadmissible in the state ruled by law (Mariański, 2009: 80).

At the same time while discussing the principle in dubio pro tributario one should not forget the complexity and lack of clarity of the contemporary tax law. As the reference literature rightly points out, not only is the increasing number of the provisions worrying, but also the degree of the complexity of the tax law and thus the uncertainty as to its content (Brzeziński, 2002: 13-14). Therefore the legislator's role is to design legal acts in a precise way. In law-making, the principle creates in particular the obligation to shape the law in a manner that does not restrict citizens' freedoms, unless significant public or individual interest so requires; the obligation, which is protected by the Constitution, to grant rights to citizens, simultaneously establishing safeguards for these rights; the obligation to make law that is coherent, clear and comprehensible to citizens, so that those who are subject to it could understand, based on the content itself, what the desirable conduct is, which in turn means that one cannot require from

persons subject to that law to know other interpretations conditions, for example, the purpose of the regulation concerned (Duniewska, 1998: 196-197)[2]. The provisions, especially of public law, should to the greatest extent possible comply with the call to make law using words and phrases that are commonly used (Brzeziński, 1999: 339). Since the provisions of public law in force do not fulfill these requirements, a particular care should be taken when applying the principle ignorantia iuris nocet.

It should therefore be noted that all the above considerations have to be especially applicable in the Polish tax law (Brzeziński, 2000: 111-123). Taxpayers have increasingly more often been unable to identify their rights and obligations, which should unambiguously result from the tax law provisions (Kmieciak, 2000: 21-22). Therefore the situation of the tax law, as well as the manner and directions of the tax legislation show that any interpretation of the tax law must be conducted with full respect of the principle discussed in this paper.

3 Conclusion

The presented analysis of the tax law-making and its application reveal the taxpayer's difficult situation: ambiguous and frequently changed tax law provisions have to be interpreted and applied by the taxpayer in the process of self-calculation of the tax due. Conducting their work, tax authorities follow their distrust towards taxpayers' statements, sometimes undertaking to prove outright the irregularities of their tax return. In such a situation the taxpayer is unable to fulfill the obligations incumbent on him/her. This leads to failing to accept the tax law and thereby to failing to observe it. Consequently, the number of disputes between taxpayers and tax authorities is growing.

In conclusion, in the current legal situation, the principle of resolving the doubt in favor of the taxpayer is only a quasi-logical consequence of constitutional principles. By codifying the principle in dubio pro tributario in the Polish tax law provisions, the taxpayer would be safeguarded against

2 Art. 29 projektu ustawy Przepisy ogólne prawa administracyjnego, Przegląd Legislacyjny 1/1997, p. 127ff.

tax authorities and, last but not least, against legislative errors committed by tax legislators. As regards substantive law, this principle would be an interpretative directive, whereas as regards the procedure, it would be a directive raising the requirements which have to be fulfilled if tax authorities are to be able to prove any possible discrepancies (Mariański, 2011).

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INTERNATIONAL TAX LAW IN THE SYSTEM OF FINANCIAL LAW

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Abstract

This paper analyzes the modern concepts of international law and approaches to defining its content. Special attention is paid to international taxation as a precondition of occurrence of special international legal norms.

Key words

International tax law; international taxation; international double (multiply) taxation.

JEL Classification

K34, H87

At present time the importance of international tax law is constantly growing and the influence of international tax law on national tax legislations is intensifying. Forming national tax policies and setting standards of the national tax legislation, each State has to take into account external factors as well as requirements and practices developed by the international community.

In particular, among the external factors affecting national tax legislation and tax policy the following ones should be noted:

- globalization of the system of world economic relations (globalization of business, information and financial globalization, international economic integration);

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- population income growth;
- demographic processes in the world economy;
- global environmental impacts of economic activity of mankind;
- factors of instability of the system of global economic relations (Pogorletsky, 2004: 20).

Globalization is one of the characteristic features of the modern world, and the economy is the most important area of globalization. The consequence of economic globalization is that monitoring and managing of globalization in the modern world become possible only by uniting the efforts by the States. This process involves active cross-border cooperation expressed through the establishment of international organizations, formation of regional unions, formation and development of the principles and norms of international law (Kucherov, 2007: 41-44).

Economic integration has led to the fact that carrying on activities of legal entities and individuals on the territories of two and more States have 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 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.

As regards the notion of foreign element, according to Professor D. V. Vinnitsky, this concept must be determined by the general rules adopted in private international law, according to which foreign elements of legal relation are classified as follows:

- foreign element on the side of the subject;
- foreign element on the side of the object;
- foreign element characterizing the occurrence of a legal fact.

The presence of a foreign element in tax legal relation means that:

- the subject of such legal relation is non-resident, foreign citizen or foreign organization or
- an object of taxation which is the reason of occurrence of such relation appeared or situated outside the territory that is subject to the tax sovereignty of certain State (Vinnitsky, 2003: 14).

Clear and unambiguous definition of international tax law cannot be found in any known world encyclopedias or dictionaries of legal terms, or textbooks, not to mention the fact that the possibility of recognition of this phenomenon causes debates. In modern domestic scientific and educational literature it is possible to determine three basic approaches to the definition of international tax law.

According to the first approach, international tax law consists only of international legal norms. So, Professor I.I. Kucherov defines international tax law as a sub-branch of the international financial law and integral part of tax legal regulation of a state representing a set of legal norms fixed on the interstate level and regulating international tax relations (Kucherov, 2007: 58-59). A similar view is expressed by Y.S. Merkulov who indicates that the interpretation of the term "international tax law" should be quite restrictive and suggests defining it as a complex institute of international financial law that represents a set of principles and norms contained in international treaties (agreements) and aimed at solving the basic problems of elimination of international taxation (such as the elimination of international double taxation, the fight against international tax evasion. etc) (Merkulov, 2004: 96 et 102).

The second approach, on the contrary, assumes that international tax law is a set of provisions of national tax legislations regulating legal relations with a foreign element (Shakhmametyev, 2006: 29). There is the point of view that such definition could be used and makes sense only when a particular country is specified, for example, "international tax law of the USA" (France, Germany, etc.) (Paskachev, 2008: 176).

The third approach represents a comprehensive understanding of international tax law, i.e. a set of international legal norms regulating cooperation of States on tax issues and provisions of national tax legislations regulating legal relations with a foreign element (Shakhmametyev, 2006: 30). According to the point of view of Professor A.I. Pogorletsky, international tax law should be understood as the international aspects of national legal systems (tax regulation of foreign economic activity) as well as international legal cooperation in tax issues including international tax treaties (Pogorletsky, 2005: 30).

The definitions that are similar to the third approach can be found in the foreign scientific literature. For instance, international tax law is defined as a term of art used to indicate a set of rules that affect the tax treatment of cross-border operations. This set of rules is constituted primarily by domestic tax rules, whose application is generally limited by double tax treaties and other international law instruments (Russo, 2007: 5).

According to the point of view of M.A. Denisaev, depending on the nature of the regulated relations and subjects that take part in such relations, in international tax law it is possible to distinguish international public tax law and international private tax law. International public tax law regulates international tax relations, whose participants are the Sates and international organizations. Such relations mainly arise from general distinction or restrictions on the powers of the States to levy taxes on international organizations and subjects of private law and implemented by the conclusion of international legal acts or by the establishment of mutual norms of international character in national legislation of the States. International private tax law regulates relations between the State and subjects of private law as well as between subjects of private law without participation of the State. These relations arise regarding the collection of taxes from taxpayers in accordance with international agreements concluded by the States.

The author defines international tax law as a set of rules of international law regulating public relations between States, international organizations, legal entities and individuals regarding to the establishment, introduction and collection of taxes with the aim of reducing the total tax burden to create the necessary conditions for the development of international economic relations as well as regarding to creating the necessary obstacles to international tax evasion (Denisaev, 2005: 25-28).

There is a view that those who term tax legal relations with a foreign element as international tax law, in fact, adhere to the analogy with international private law. However, the use of the term „international tax law“ may in certain cases lead to its wrong understanding as a separate branch of law what would be wrong. Foreign participation in tax legal relations does not change the essence of these relations, though, undoubtedly, leads to their complexity and introduces additional sources of regulation of these legal

relations. The concept of the law implies the accrual of qualitatively different legal relations which does not happen in case of international tax law. The author does not object to the validity of the existence of the term „international tax law" but prefers to term tax legal relations with a foreign element as „international taxation" (Baev, 2007: 2).

According to E. C. Merkulov's opinion, international taxation acts as preconditions of occurrence of special international legal norms fixed in the relevant international acts and forming international tax law. The author notes that international taxation occurs when the taxpayer falls on the tax jurisdiction of two States which levy taxes on the objects of taxations that taxpayer has. The defining element (criterion) of international taxation is not just the presence of „foreign element" in tax legal relation but the fact that taxpayer bears tax obligation in favor of several countries at the same time (Merkulov, 2004: 94 et 95).

Shakhmametiev A. A. indicates that international taxation as a legal problem occurs due to the coordinated or conflict interaction of two or more national tax systems regarding to the payment of taxes with the same or similar elements (Shakhmametyev, 2014: 51).

There have not been developed similar definitions of international taxation, too. It is possible to point out narrow and broad understanding of international taxation. In the first case we are talking about legal relations related to the imposition and collection of taxes by the State in respect of persons who are subject to the tax jurisdiction of this State, including foreign legal entities and individuals who are temporarily in its territory and in respect of income received by citizens and residents of this State from sources outside of the State.

A broad understanding of international taxation along with the above mentioned relations also includes a set of issues of collaboration between tax authorities of different States, effective exchange of information, counteraction to international tax evasion and other aspects of cooperation in tax field regulated by bilateral and multilateral international agreements on tax issues (Baev, 2007: 2-3).

Narrow and broad understanding of international taxation can be demonstrated on the example of such phenomena as international double (multiple) taxation.

Organization for Economic Co-operation and Development defines international juridical double taxation as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical period[2].

In fact, international double taxation occurs when the fiscal interests of several States are affected. From the legal point of view it happens due to the existence of competition of two or more tax jurisdictions which simultaneously possess authoritative powers in relation to the same taxpayer, or the right to tax the same object of taxation (Kucherov, 2007: 229-230). In other words, each State pursuing its own fiscal interests aspires to tax residents as well as non-residents receiving income in its territory.

Having studied the practice of tax disputes' resolutions in different States, V.A. Babanin and N. Voronina managed to identify the following causes of international double (multiple) taxation:

1. recognition of the same legal entity or individual as a resident in two or more countries;
2. qualification of the same income or property as having a source of origin in two or more States;
3. differences in definitions and classifications of income in different States;
4. differences in the amount and order of set-off of incurred expenses;
5. taxation of the same income or property on the basis of the criterion of residency in one State, and in accordance with the legislation on the source of income in the other State;
6. situations when the legislation of certain States does not have provisions stipulating set-off of certain types of taxes paid in the other concerned State (Babanin, Voronina, 2007: 34).

Most States proceed from the understanding that double taxation is an obstacle to international trade, free movement of capital and development

2 OECD Model Tax Convention on Income and on Capital, condensed version – 2010 and Key Tax Features of Member countries 2011 // Amsterdam, IBFD, 2011. P. 7.

of international markets. There are two ways for elimination of international double (multiple) taxation. The first way consists in the adoption of internal legislative measures by the State unilaterally. The second lies in the regulation of the problem of double taxation through the conclusion of international agreements.

Although unilateral measures to prevent international double taxation adopted by States are different, essentially, three types can be distinguished:

- the exemption of foreign-source income;
- the tax credit for foreign taxes paid on foreign-source income;
- the deduction from the taxable base of foreign taxes paid on foreign-source income (Lang, 2010: 26).

At the international level multilateral and bilateral double taxation conventions are concluded in order to eliminate international double (multiple) taxation. Such agreements define the limits within which each State is entitled to levy taxes on certain income and property.

Returning to the definition of international tax law it should be noted that a number of scientists do not support the existence of international tax law as a separate sub-branches of law. So, Professor R.A. Shepenko denotes the following reasons for disagreement with the existence of this sub-branch of law:

- international tax law does not have the main component - the element of the establishment of fiscal and regulatory payments;
- the discrepancy of methods (legal relations on the establishment and levying of taxes are of power and property nature while the States are equal in international legal relations);
- the review of educational and doctrinal practice does not testify in favor of the existence of such sub-branch of law.

The author makes a conclusion that „to all appearances, there are no grounds yet to talk about international tax law" (Shepenko, 2011: 106).

Recognizing certain viability of some of the above mentioned reasons, it seems justly to support the point of view of A.A. Shakhmametiev that the negative attitude in this question reflects an overly conservative approach which does not take into account trends of development of tax regulation to the full extent (Shakhmametyev, 2014: 148).

Thus, as evidenced by the foregoing, it seems reasonable to agree with a comprehensive understanding of international tax law as a set of international legal norms regulating cooperation of States on tax issues and provisions of national tax legislations regulating the relations with a foreign element.

It is also appropriate to agree with the above mentioned opinion that international taxation acts as preconditions of occurrence of special international legal norms. In addition to the adoption of unilateral measures aimed at regulating the issues of international taxation by the States, there is a need for a clear demarcation of tax jurisdiction of sovereign States on the basis of coordination of their positions and concluding special interstate agreements. As a matter of fact, this shifts legal relations directly related to international taxation on the level of international legal regulation (Merkulov, 2004: 91-102).

We can conclude that the subject of international tax law consists of international tax relations that include tax relations with a foreign element as well as international relations between States and international organizations in connection with the settlement of the issues of international taxation.

The first group of legal relations is based on power and subordination and develops between unequal subjects. Generally, imperative method is a method of regulation of such relations. So, in this case it is possible to consider international tax law as a sub-branch of financial law.

The second group of legal relations is the subject of public international law. Furthermore, at the present the understanding of international tax law only as a component part of public international law time is not rejected in the doctrine of foreign countries and supported by Russian scientists as well (Shakhmametyev, 2014: 156).

However, taking into consideration the above-mentioned subject and distinctive features of international tax law, it seems more reasonable considering international tax law as a complex sub-branch of law.

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STUDY ORDER OF TAX PROCESS CONCERNING VIOLATIONS OF TAX LEGISLATION IN THE FINANCE LAW SYSTEM IN BELARUS

Lilia Abramchik [1]

Abstract

For preparation of skilled professionals, who are fluent not only in material financial and legal norms, but also can carry out in accordance with the laws of financial (tax) procedures. What are very important to acquire the ability to use communication finance law with other branches of the law. Taking in the account rate of tax law in Republic of Belarus within the framework of existing curricula is only read by the student's choice or in a separate specialization, considering as a necessary to study in the course of conducting financial law about tax process for violations of tax legislation. Thus, the proceedings concerning tax offenses is part of the tax process, the content of which is to investigate the circumstances of the application of a tax offense and the offender to statutory measures of right to recover and punitive.

Proceedings of an administrative offense against the order of taxation can be defined as a special type of tax-procedural activity jurisdictional having phased structure, and is to detect tax offenses, its investigation, the application, if necessary, measures to ensure the proceedings, the proceedings and deciding, as well as the appeal (protest) is not an enforceable decision, carried authorities in the tax process for fiscal crimes within deadlines and on the basis of procedural rules.

We believe that the study of the material in the course will allow finance future lawyers obtain the necessary knowledge and skills to carry out legal procedures.

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Keywords

Financial law; tax procedure; financial law system; tax offense.

JEL Classification

H2, K34, K40

Financial law as a complex industry in modern conditions develops very intensively. For preparation of skilled professionals, who are fluent not only in material financial and legal norms, but also can carry out in accordance with the laws of financial (tax) procedures. What are very important to acquire the ability to use communication finance law with other branches of the law. Taking in the account rate of tax law in Republic of Belarus within the framework of existing curricula is only read by the student's choice or in a separate specialization, considering as a necessary to study in the course of conducting financial law about tax process for violations of tax legislation.

Tax (administrative) process in cases of tax offenses in terms of tax law is part of the general concept «tax law enforcement process», which in turn is included in the tax process.

Tax law enforcement process is regulated by the activities of state bodies and also aimed at the detection of violations of tax laws and their elimination in the form of enforcement responsibilities for mandatory payments and the prosecution, which includes activities and stakeholders (Abramchik, 2010: 62).

Procedural regulation of legal liability is a prerequisite of subsequent monitoring and objective verification of excitation, review and resolution of offense cases (Marchenko, 2001: 631).

Under the process is commonly understood set of consecutive actions committed to achieve a particular result or order of an activity, such as legislative, budget, land management processes, etc. Tax process it is not only the activities of public authorities in order to resolve individual cases in the area of tax administration and taxation, but above all, the order of tax realization and legal norms. Feature of the tax process is that it regulates not only

the jurisdictional activities according to address tax disputes and the use of coercive measures, but also the implementation of regulatory standards.

Tax process in Republic of Belarus is carried out according to the norms of two legislative acts: The Tax Code (TX) and Procedural Executive Code of Administrative Offences from 20th December , (the "**PECofAO**") which creates difficulties in the process of tax enforcement.

Tax (administrative) process is a set the order of Republic of Belarus PECofAO and its participants on administrative (tax) offense (Procedural Executive Code of Administrative Offences from 20th December, Art. 1.4).

From this certain position will be considered the conduct of administrative proceedings in cases concerning administrative offenses against the order of taxation in this section.

On the basis 2nd Part and4th Part of Art. 1.1 PECofAO throughout the country, the administrative process is carried out in accordance with the provisions of this Code. As a consequence, the same rules for the implementation of remedial activity in the case of an administrative offense shall apply irrespective of the nature of administrative offenses. Violation of the provisions in the conduct of administrative PECofAO process involves statutory responsibility and recognition of decisions taken by the administrative case, which doesn't have juridical power. (Procedural Executive Code of Administrative Offences from 20th December)

The main thing when deciding on the structure of the tax process is to find a criterion that would give an opportunity to highlight homogeneous group of administrative (tax) cases that would constitute the content of the respective industrytypes. Criterion could be the nature of the individual tax offenses arising in the field of taxation and fiscal control. In this case you should always remember that the use of taxacts legislation by analogy is not allowed. For tax process concearning violations of tax legislation essential features are the following:

- Implementing its mandate, the tax authorities have two functions: law enforcement and right to recovery;

- Procedural and legal relations in the course of proceedings on tax violations folded inside bodies relating to the subjects of tax control, for example, between the higher and lower-level inspections MNC and between regulatory and law enforcement authorities;
- The main subject in proceedings for tax offenses is the taxpayer who has not executed or improperly fulfilled their tax obligations. His role in the production is mostly passive. His opinion on the legality and objective assessment by the tax authorities, he expressed by reference to an act performed in his check. He becomes an active subject of production after getting the decision of the tax authority on the use of restorative measures and punitive concerning him. In the future, an active participant in the tax process, he will become when the administrative or judicial appeal the decision of the tax authority;
- Evidentiary base lawfulness of the actions and decisions of the tax authorities of tax forms on the stage production control. Before making the final inspection report, the results of control actions during the inspection checks are issued by relevant documents. Evidentiary basis is formed as the conclusions by specialists and experts, testimony and other materials;
- Directly in proceedings involving tax violations remains controversial question of the necessity of evidence by the taxpayer as his arguments he has already expressed upon presentation of explanations (explanations) in the audit report. But he will resort to evidence in the future, in an appeal against the decision of the tax authority on the application to him, in his opinion, unjustified sanctions.

Conditions and procedure for application of the liability for tax offenses must be considered in the context of the production stages in the case of tax violation, since the activities of tax authorities and entities liable evolves over time as a sequential series of related proceedings on the rights and obligations. (Karasev, 2004: 361)

Using the law enforcement practice of Inspection Ministry of Taxes and Duties in Republic of Belarus in Grodno region we found that the

implementation of control activities was done by the tax authorities of Grodno region for the twelve months 2012 it was made up to 7222 protocols on administrative (tax) offenses within the jurisdiction of the tax authorities.

In 2011 this figure was 7735 and in 2010 - 8498 protocols.

Most of the cases on administrative violations compiled by the protocols considered independently by inspections. According to the results of which the subjects of offenses brought to administrative responsibility in 4830 cases in 2012 to 5159 cases in 2011 and 5,259 cases in 2010.

Part of compiled officials inspections protocols aimed at the general and economic (commercial) courts: in 2012 general courts sent 117 cases and 598 cases was sent in the economic courts on administrative offenses.

Thus, in particular on the number of terminations of cases on administrative offenses concerning tax can be judged on the quality of tax process. From the total sum in 2012 around 307 cases ofterminated protocols was stopped. In 2011, 346 cases in total was stopped. In 2010, the total number of such cases was 545.

Tax process is conducted at the place of a tax offense. In order to ensure efficiency, objectivity and completeness of the tax process, it can be carried out at the place of discovery or detection of offenses based on the location of the tax authority, the leading tax process, as well as on the location of the tax payer organization, the place of residence (stay) an individual, tax payer.

In the tax process we can be distinguish five stages:

- Beginning of the tax process;
- Preparation of the case for review;
- Consideration of a tax deed;
- Challenge the decision (optional step);
- The execution of decisions imposing penalties.

At any of these stages of the process the person against whom the tax process has the right to challenge unlawful act or decision of the tax authority›s leading tax process and if there are grounds to challenge its officials.

Consider the content mentioned above in more details. *Beginning of the tax process*. The reason for the top tax (administrative) process can act in particular statement of the taxpayer.

However, in the practice of law enforcement, application of the taxpayer (organization or individual) on the tax offense or an official message of the tax authority cannot cause the beginning of the tax process. This is due, primarily, regulatory and practical constraints.

First, in case of a tax only on the application process taxpayer evidential consistency case concerning an administrative offense tax may be difficult at the time of the proceedings due to limited time to prepare the case for consideration. Second in Republic of Belarus there is a limit to unscheduled inspections of business entities, as according to the Presidential Decree number 510 On improving control (supervisory) activities in Belarus in order to conduct an unscheduled inspection can be given an unscheduled inspection which appointed in the presence of supervisory (supervisory) body of information, including from the public authority of a foreign state, an organization or individual, testifying perpetrated (perfect) violation of law only with submission of documents such violations or facts (internal training (official) documents containing indication of such violations or facts and justification for the test). In the absence of the applicant documents confirming facts or data breach, the applicant must provide written consent for testifying against such infringements or facts. Anonymous statement is not grounds for unscheduled inspections (Presidential Decree About improving control (supervision) in Republic of Belarus from 16th October, Art. 9.1).

Thus, the tax authorities tend to produce verification of the facts reflected in the statements of taxpayers, and if they are confirmed they make a report on the administration of the tax offense and begin the process of tax based on the direct detection of signs of a tax offense.

If there are grounds and sufficient evidence pointing to tax offenses, tax process begins.

The main procedural document, which begins tax (administrative) process in cases of tax offenses is an administrative offense. The protocol shall

be revealed for each offense, and shall be signed by the tax authority and taxpayer (individual or representative of a legal entity) in respect of which the tax is being process. Taxpayers in respect of whom the tax is being process, the right to make comments and give explanations on the content of the protocol, which must be recorded in the protocol. Copy of the report shall be served on receipt of tax payer or their representative against whom the tax process.

In case of refusal tax process participant to sign the protocol, the stamp is done in the record from which the person has refused to sign and shall be signed by a person of his compositions.

Since the protocol officials of tax authorities have the right to seize property, confiscate belongings and documents. However, note that these steps should be taken into consideration in the period of the audit in accordance with the rights granted by the tax authorities of the Tax Code.

Preparation of the case for review. Some authors do not distinguish this stage as a separate stage of the administrative (tax) process, and include a stage of the proceedings as a sub stage (Karasev, 2004: 362).

In cases where the protocol after the tax authority does not hold any legal proceedings (seizure, removal, inspection, surveys, etc.) compiled protocol is both protocol finalization of the case for review. Protocol with all the materials of the case within two days from the date of drawing transferable entity (-ies-) authorized to consider it.

If after the protocol tax authority made any procedural action, then begins the stage of preparing the case for consideration. This step on tax offenses can last up to two months after the protocol (Procedural Executive Code of Administrative Offences from 20th December, Art. Art.10.1).

After this period of preparation a case is completed, protocol on tax violation can be done.

In preparation case for review can be included facial challenge to the tax authority or the court for a hearing.

It should take in the mind, an important theoretical and practical matters related to the legal entity of procedural documents, preparation of which occurs at the beginning stages of the administrative (tax) process in the case

of tax violation and its preparation for consideration, namely the lack of enforcement of these instruments of nature. We believe that not only in practice, enforcement acts unreasonably mixed with other legal documents. The scientific literature also often all documents drawn up in the course of enforcement of procedural activities (protocols, protocols recesses acts inventory, etc.) are referred to law enforcement acts (individual acts). From the point of view of what protocols seizure of documents and items, inspection of territories, premises of the taxpayer, the questioning of witnesses shall be made in the course of enforcement of the tax authorities; it is tempting to assume their individual tax regulations. But analysis of the compliance of these documents featured individual fiscal instrument shows the opposite.

First, the procedural documents, though issued in the course of the tax enforcement process, the rules do not apply the tax law and do not decide on the merits tax case. Accounting record of the interrogation of the witness, the seizure of documents and objects, site inspection or premises of the taxpayer, his documents and items, the tax authority does not apply, and uses rules to follow and implement.

Secondly, no protocols proceedings or act-site tax inspection couldn't entail legal consequences for the onset of the taxpayer " (Abramchik, 2012: 151).

Stage of the proceedings is basic, because only here finally addressed the issue of the presence or absence of a tax offense, guilty of a particular person in the commission of such an offense. If there are circumstances that exclude the tax process and release from liability is determined by a measure of responsibility and shall issue a decision its application.

Consider the case it's to grasp the essence, to explore, to analyze it in order to make a correct and in accordance with the lawful order.

The cases on administrative offenses tax taxation procedure governed by procedural rules of Chapter 11 PECofAO.

The cases on administrative offenses made up of four sub-stages:

- Resolving issues with the direct preparation of the case for review (Articles 11.1 11.4PECofAO);
- Actual consideration (Articles 11.5-11.8 PECofAO);

- A decision is based on the results of the proceedings (Articles PECofAO 11.9-11.10);
- Listing the judgment and its entry into force (Articles 11.11-11.12 PECofAO).

Article 11.2 of PECofAO defined timeline within which should be considered a case of administrative tax violation after receipt by the judge, the official body leading the process, authorized to hear cases of tax offenses. For offenses against the order of taxation operates a total period of 15 days (Procedural Executive Code of Administrative Offences).

When considering the case of tax violation head of the tax authority (his deputy) must find out:

- whether actually committed a tax offense;
- guilty of whether a particular individual or entity (the taxpayer) to commit this particular offense;
- is subject to liability if a natural or legal person (age, tax capacity, tax capacity, tax personality, etc.);
- the presence of mitigating and aggravating circumstances;
- Whether due to injury;
- other circumstances relevant to the case.

The second sub-step is the actual consideration of the administrative case is governed by articles 11.5, 11.8 PECofAO.

Article 11.5 PECofAO determines the order of the proceedings on tax violation, which involves not only the specific procedural steps, but also the sequence in which they occurred presiding over the meeting of the collegial body, judge, tax officials, leading the process, authorized to hear cases of tax offenses.

It should be noted that Article. 11.5 PECofAO never mentioned such important proceedings as hearing explanations of the person, against whom the administrative process, other persons involved in the process, is not defined correctly in this announcement alright place the administrative offense and removal from the premises, which is considered the dede, witnesses (Kramnik, 2013: 16).

However, in a case should be considered all the evidence available to test materials: reports, explanations tested persons, witness statements, expert opinion attached to the protocol of the materials, as well as other documents. These proofs serve as a means to establish the facts of the case on which the heads (deputy) of the tax authorities establish the presence or absence of a tax offense, the guilty of the person in the commission of the offense and other circumstances relevant to the proper resolution of the case. Head or Deputy inspection MNC assesses this evidence at its discretion, based on a comprehensive and objective investigation of all the circumstances in their totality.

When considering the administrative prosecution for tax evasion tax authority should be clearly defined objective aspect of the offense set it subject structure and proven guilty of the offense of each subject. Otherwise the judgment of an administrative offense may be appealed in accordance with the law (Zhukovsky, 2012: 52).

Upon review of the administrative offense leader (or his deputy) the tax authority should issue a decision on the case.

You should also pay attention to the possibility of administrative offense release and administrative responsibility. In general, the Administrative Code provides six grounds for such exemption (Chapter 8 of the Administrative Code), but for offenses against the order of taxation often applicable only two of them, namely, exemption from liability for minor offenses (The Code of Administrative Offences, Art. 8.2.) and exemption from liability under the circumstances extenuating (The Code of Administrative Offences, Art. 8.3).

Statistics about discontinued cases for protocols carried by tax officials from Grodno region indicates a rather active application possibility of this method of the administrative leniency. So the total number of terminations in 2012, 91.5% of cases terminated on the grounds of Chapter 8 of the Administrative Code. For 2011, the figure was 92.8% for 2010 - 91.7%.

Thus, from these data it is clear that the exemption from liability on the grounds is not excluding the administrative process, and therefore not

related to the violation of the rules of reference, is dominant in the practice of the tax authorities, which seems to reflect a positive level of compliance with the above authorities legislation governing liability for tax offenses in Republic of Belarus.

Judgment in the case concerning an administrative offense is declared immediately after the termination of the proceedings. Copy of the decision is handed to the person against whom it was made. In the case of administrative proceedings was seen in the absence of the person against whom the case was conducted, a copy of the decision is sent to the specified person within three days by registered letter. Decree shall enter into force after 10 days. During this time, the authority tax decree can be appealed.

Violation of the provisions in the conduct of the tax PECofAO process involves statutory responsibility and recognition of decisions taken by the administrative case, null and void.

Decision to impose an administrative penalty shall be enforceable upon its entry into force, unless it is appealed to the established procedure. In case of appeal of the decision to impose an administrative penalty of its execution is performed after the decision on the complaint about leaving her unsatisfied.

Judgment in the case concerning an administrative offense against the order of taxation on the imposition of an administrative penalty is not enforceable if it had not been enforced within three months from the date of its entry into force.

Enforcement of the administrative penalty ends with surrounding the mark of the performance.

Especially the absence noteof competition principle in the administrative process that causes including lack necessarily present representative of the person who prepares the report in a case concerning an administrative tax violation. And only official who prepare the report (tax inspector) must prove the existence of grounds for application of administrative responsibility (Valdaycev, 2011: 106).

At the same time M.N. Marchenko emphasizes the importance of the principle of competition, and notes that the primary objective of competition are

not only special protection rights of a person, caught in the grip of the law enforcement agencies, but also the achievement of truth in the case of an offense (Marchenko˝, 2011: 631).

However, no evidence of the adversarial principle in the CAO, in our opinion, due to the desire of the Belarusian lawmakers setting administrative (tax) right to recover the process, to achieve compliance with the principle of procedural economy purely objective judgment in the case of an administrative offense, which would not be burdened with subjective assessments of facts actors .

Thus, the proceedings concerning tax offenses is part of the tax process, the content of which is to investigate the circumstances of the application of a tax offense and the offender to statutory measures of right to recover and punitive.

Proceedings of an administrative offense against the order of taxation can be defined as a special type of tax-procedural activity jurisdictional having phased structure, and is to detect tax offenses, its investigation, the application, if necessary, measures to ensure the proceedings, the proceedings and deciding, as well as the appeal (protest) is not an enforceable decision, carried authorities in the tax process for fiscal crimes within deadlines and on the basis of procedural rules.

We believe that the study of the material in the course will allow finance future lawyers obtain the necessary knowledge and skills to carry out legal procedures.

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THE SYSTEM FOR TAXATION ON INCOMES GENERATED BY NATURAL PERSONS FROM NON-AGRICULTURAL BUSINESS ACTIVITY IN POLAND

Robert Zieliński[1]

Abstract

The article discusses the forms of taxation on incomes generated by natural persons from non-agricultural business activity existing in the Polish tax system, lists advantages and disadvantages of each form and attempts to determine the attractiveness of the respective forms of taxation for natural persons – entrepreneurs.

Keywords

Personal Income; financial law system.

JEL Classification

H24, K34, K40

1 Introduction

Natural persons generating income from non-agricultural business activity may use one of four forms of taxation, currently in force in the Polish tax law system. These forms include taxation under the so-called general principles of taxation and two simplified forms of taxation. Taxation under the so-called general principles of taxation, which comprises two forms of tax burden: at progressive tax scale and at proportional tax scale using a flat – 19% tax rate (commonly called the flat tax rate), constitutes the main form of levying taxes on the income and has been regulated in the Personal Income Tax Act (Personal Income Tax Act, item 361). While the simplified forms of taxation are sanctioned by the Act on Lump-Sum Income

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Tax on Selected Incomes Earned by Individuals (hereinafter: "Lump-Sum Income Tax Act") and include the fixed amount tax and the lump-sum on selected revenues earned by individuals (in short: lump-sum on registered revenues). See Act on Lump-Sum Income Tax on Selected Incomes Earned by Individuals, item 930.

This publication aims to present the principles by which incomes are levied with the aforesaid forms of taxation, point out strengths and weaknesses of each form of taxation and make an attempt to determine their attractiveness for natural persons – entrepreneurs.

2 Taxation under the so-called general principles of taxation

Taxation under the so-called general principles of taxation is defined in Art. 4 (1) (8) the Lump-Sum Income Tax Act. Pursuant to its contents, personal income tax paid using the tax basis as referred to in Art. 26 of the Personal Income Tax Act and the tax scale as referred to in Art. 27 of the Personal Income Tax Act is to be considered as income tax levied under the general principles of taxation. It means that the notion of the so-called general principles of taxation primarily includes a tax assessment system, pursuant to which the tax due is calculated on incomes earned by taxpayers from various sources (in this case from non-agricultural business activity), reduced by tax deductible expenses and tax allowances at law according to principles generally applicable to all taxpayers, using progressive tax scale (Zieliński, 2012: 48). Natural persons generating incomes from non-agricultural business activity are subject to this form of taxation by virtue of law, unless they choose another form of levy available to them, within time limits as set forth by the applicable laws.

Taxation under the so-called general principles also occurs with when incomes earned by the taxpayers are levied with tax at a proportional tax scale using a flat, 19% tax rate. The described form of taxation has a facultative character, with means that if a taxpayer wants to enjoy it, he/she is required to lodge with a competent head of a tax office a petition to use this form of taxation. The petition is to be lodged by 20 January of a given fiscal year or, if the taxpayer commences his/her business activity within the fiscal year, prior to the day of its commencement, not later however than by the day of earning the first income.

In the tax law theory, taxation under the so-called general principles is unanimously said to be the most complicated form of taxation because it presumes levying taxes on real incomes generated by the taxpayers from business activity. To determine the amount of income the taxpayers are under obligation to maintain complete (books of accounts) or simplified (revenue and expense ledger) tax records[2].

A taxable income, which constitutes the basis of taxation under the general principles, is the difference between taxable revenues generated from business activity and tax deductible expenses[3] (Mastalski, 2004: 399). Pursuant to the general principle formulated in Art. 14(1) of the Personal Income

2 The duty to maintain books of accounts applies to, without limitation: natural persons, civil-law partnership of natural persons, registered partnership of natural persons and professional partnership, if their net revenues from the sale of goods, products and financial operations for the prior trading year amounted to at least the PLN equivalent of EUR 1.2 million.

3 In the reference literature, the attention is brought to the fact that the notion of income in the Polish tax law has a conventional nature, in the meaning that it is determined taking into account only revenues coming from sources listed by the legislator and reduced by tax deductible expenses, considered by the legislator to be deductible. Therefore, the taxable income considerably differs from the economic income, which constitutes a difference between all revenues generated by the taxpayer and expenses incurred by him; Cf. R. Zieliński, *Pojęcie dochodu podatkowego (The notion of taxable income)*, "Państwo i Prawo" 2009, No 10, p. 48 et seq value of the final stocktaking is higher than the value of the opening stocktaking, increase the tax basis by the resulting difference). Whereas the taxable income is determined by taxpayers maintaining the books of accounts by adjusting gross profit shown in the books of accounts and constituting the difference between revenues and expenses, pursuant to the regulations of the tax law, by items resulting from the books of accounts which, in the light of the tax regulations, increase or decrease the revenues and tax deductible expenses (e.g. income and revenues free from income tax).
Cf. Art. 14 (1e)-(1i) of the Personal Income Tax Act.
Moreover, apart from revenues from the sale of goods or provision of service, incomes from business activity also include, without limitation, revenues from the disposal of assets for consideration, exchange gains, contractual penalties received, interests on cash at bank accounts maintained in relation with the carried out business activity.
Moreover, taxpayers documenting the course of economic events in the revenue and expense ledger calculate the taxable income deducting from the earned revenues the tax deductible expenses and correcting the resulting amount by the so-called stocktaking differences (i.e. compare the opening inventories with inventories at the end of the period of settlement and, if the value of the final stocktaking is higher than the value of the opening stocktaking, increase the tax basis by the resulting difference). Whereas the taxable income is determined by taxpayers maintaining the books of accounts by adjusting gross profit shown in the books of accounts and constituting the difference between revenues and expenses, pursuant to the regulations of the tax law, by items resulting from the books of accounts which, in the light of the tax regulations, increase or decrease the revenues and tax deductible expenses (e.g. income and revenues free from income tax).

Tax Act, revenues from business activity are amounts due, even if they have not been actually received, excluding the value of returned goods, granted discounts and rebates.

Revenues from business activity are generated on the day when goods are issued, property rights are transferred or service is provided (or partially provided), which however cannot be after the day of the invoice or payment of the amount due. In some cases, the moment when revenues from business activity are generated is determined a little differently, primarily for services billed for in the so-called billing periods, defined by the parties (e.g. the supply of electricity or telecommunication services). The revenues are then generated at the end of the billing period defined in the contract or on the issued invoice, at least once a year. In other cases the date when revenues are generated is considered to be the day when payment is received (Cf. Art. 14 (1e)-(1i) of the Personal Income Tax Act). The above leads to a conclusion that taxpayers generating income from non-agricultural business activity have their revenues determined on accrual basis, which means that the income tax must also be paid when the taxpayer has not in fact received payment for the goods issued or service rendered[4].

To determine the basis of taxation, a taxpayer generating income from non-agricultural business activity reduces the thus generated revenues by tax deductible expenses. A prescriptive definition of the tax deductible expenses in given in Art. 22 (1) of the Personal Income Tax Act. Pursuant to the article, the tax deductible expenses are considered to include expenses incurred to generate revenues, maintain or secure the source of revenues, except for expenses listed in Art. 23 of the Personal Income Tax Act.

The tax law doctrine points out that the definition of tax deductible expenses employed in the aforesaid regulations comprises two main elements, creating a specific general clause (Mastalski, 2004: 399). The first element indicates certain positive features, which an expense incurred by the taxpayer must have, to be accepted as a tax deductible expense (a definitive character

4 Moreover, apart from revenues from the sale of goods or provision of service, incomes from business activity also include, without limitation, revenues from the disposal of assets for consideration, exchange gains, contractual penalties received, interests on cash at bank accounts maintained in relation with the carried out business activity.

of the expense, which has been actually incurred, in order to generate revenues, maintain or secure any sources of income, relation with business activity pursued by the taxpayer and undisputed records of the expense). Whereas, the second element is called a negative prerequisite and constitutes a condition under which expense incurred by the taxpayer cannot be listed in a catalogue given by the legislator in Art. 23(1) of the Personal Income Tax Act[5].

It should be emphasised that the definition of tax deductible expenses adopted in the Polish tax legislation, due to its general and vague nature, constitutes a source of countless problems for both taxpayers and tax authorities. They mainly concern difficulties with the classification of expenses into tax deductible expense categories. Due to the above it may practically happen that a given expense may be included under tax deductible expenses by one taxpayer, while it cannot constitute such expense for others, and vice versa. This situation brings a considerable uncertainty to business activity because taxpayers have no guarantee that an incurred expense, which has been shown as a tax deductible expense, would not be in the future challenged by tax authorities, within the course of the conducted tax audit.

Pursuant to the generally applicable principle, tax deductible expenses reduce revenues generated by the taxpayer only in the year they were incurred in (Art. 22 (4) of the Personal Income Tax Act). Different principles of settling tax deductible expenses over time have been defined for taxpayers required to keep books of accounts and taxpayers documenting the course of economic events in the revenue and expense ledger. They are also connected with the division of tax deductible expenses into the so-called direct costs and costs which are not directly connected with the revenues (the so-called indirect costs)[6]. In case of taxpayers keeping books of accounts, tax

5 The catalogue currently contains about 70 types of expenses which, by virtue of law, cannot constitute tax deductible expenses, even if they have been incurred in order to generate (secure or maintain the source) revenues and have been directly related with the carried out business activity. They include, without limitation: contractual penalties, compensation for faults of goods received, expenses connected with the purchase of tangible, intangible and financial assets, expenses for the payment of credits and loans, except for interests.

6 The notions are not straightforwardly defined in the Personal Income Tax Act. In the financial law doctrine, direct costs are unanimously deemed to include expenses which are closely (i.e. directly) connected with revenues earned by the business entity (e.g. expenses for the purchase of goods). Expenses related with the taxpayer's operation (e.g. the costs of insurance, costs of auditing financial statements, other costs of general administration) are considered to be other than directly connected with the revenues.

deductible expenses which are directly related with the generated revenues and were incurred in years prior to the fiscal year and in the given fiscal year, are deducted in the fiscal year the corresponding revenues were generated in. It means that an expense cannot be included into tax deductible expenses until the taxpayer records revenues connected with the incurred expense. An identical principle concerns tax deductible expenses directly related with the generated revenues, incurred after the end of the fiscal year the taxpayer generated the corresponding revenues in, but by the time the financial statement is drawn or, if the taxpayer is not under obligation to draw financial statement, by the day the annual tax return is lodged (i.e. by 30th April of the following fiscal year). Expenses incurred after the day of drawing up the financial statement or lodging the annual tax return, are deducted in the next fiscal year[7].

Tax deductible expenses, which are not directly related with revenues (i.e. indirect costs), primarily aimed at securing or maintaining the source of income, are deducted in the year they were incurred in. If they exceed the fiscal year and it is impossible to determine which part of the expense concerns the given fiscal year, a principle of proportional settlement of expenses with regard to the length of the period they concern, is applied[8]. The principle is applied to taxpayers keeping books of accounts and revenue and expense ledger on the so-called accrual basis. Whereas taxpayers keeping the revenue and expense ledger on cash basis include such expenses without proportional division in the year they were incurred.

It is worth drawing attention to the recently introduced regulations (in force since 1 January 2013) which correlate the possibility of including costs connected with the run business activity into tax deductible expenses with the fact of their actual settlement[9]. If the taxpayer has not paid the amount

7 The presented principles of deducting costs over time are also applicable for taxpayers maintaining revenue and expense ledger provided that continuously, every year, the ledger will be kept so that one could separate the tax deductible expenses concerning the given fiscal year only.

8 For example, a taxpayer incurred the costs of insuring trucks for the period of 18 months (from 1 July 2013 to 31 December 2014). The incurred costs are indirectly related with revenues and concern a period longer than the fiscal year (calendar year). Consequently, in 2013 the taxpayer is obliged to include in the tax deductible expenses an amount corresponding to 6/18 of the paid insurance premium and in 2014 an amount constituting 12/18 of the incurred insurance expense.

9 Act of 16 November 2012 on Reduction of Some of the Administrative Burden in the Economy, item 1342.

of the invoice (bill), contract or other document but included the incurred expenses in the tax bill, he/she is required to correct the tax deductible costs by the unpaid amount within 30 days from the date of payment of the amount. If the terms of payment agreed by the parties are longer than 60 days, the duty to adjust the tax deductible expenses by the unpaid amount rests with the taxpayer with the lapse of 90 days after the date when the amount was included into the tax deductible expenses. If the taxpayer settles the obligation after making the mentioned deduction, he/she is required to increase the tax deductible expenses by the amount of the previously made deduction in this month.

The aforesaid regulations are intended to increase the financial liquidity of entrepreneurs and reduce payment gridlocks in their activity[10], but their introduction has contributed to the increase of bureaucratic duties and has considerably complicated the issue of tax returns, in particular for entities which have a lot of cost invoices and do not pay their obligations regularly or have longer than 90 days terms of payment agreed[11].

The tax basis, determined as above, is then reduced by income tax deductions provided for in the applicable laws (Cf. Art. 26 and 26c of the Personal Income Tax Act). They include: social insurance contributions paid by the taxpayer in the fiscal year (her/his own, as well as family and household members assisting in the business)[12], donations made for purposes listed in the Personal Income Tax Act[13],

10 Cf. *Uzasadnienie do rządowego projektu ustawy o redukcji niektórych obciążeń administracyjnych w gospodarce (Explanation to the government draft act on the reduction of some of the administrative burden in the economy)*, parliamentary printed matter No 833.

11 *Jak sobie poradzić z korektą kosztów podatkowych (How to manage tax deductible expenses adjustments)*, Wolters Kluwer Polska, www.podatki.abc.com.pl, (available: 26.06.2014).

12 Natural persons carrying out business activity are compulsorily covered by the retirement, disability pension and accident insurance and voluntarily pay sickness insurance contributions.

13 Tax deductible donations include donations made to religious worship and public benefit organizations, donations resulting from execution by the taxpayers of voluntarily blood donation programmes, in the amount of the cash equivalent for the donated blood. The amount of the above mentioned deductions cannot exceed 6% of income generated in the fiscal year, reduced by social insurance contributions. Moreover, donations for charitable-care church activities resulting from laws regulating the relationship between the state and individual churches, e.g. the Act of 17 May 1989 on State Relations to the Catholic Church in the Republic of Poland (Official Gazette No 29, item 154 as amended) are deducted from the income in an unlimited amount.

rehabilitation expenses[14], Internet expenses[15], expenses incurred for the purchase of new technologies[16] and contributions to the Individual Retirement Account[17]. The amount of taxable income reduced by the aforesaid deductions is then subjected to taxation under progressive tax scale, presented in the below Table.

Tax basis (in PLN)		Tax amounts to
Over	Up to	
	85,528	18% of the basis minus PLN 556.02
85,528		32% of excess over PLN 85,528 plus PLN 14,839.02

Source: Art. 27 (1) of the Personal Income Tax Act.

14 Only taxpayers who are disabled or have a disabled person to support are entitled to the above deduction. The list of the resulting deductible expenses is relatively long and includes, without limitation: expenses on the adaptation and furnishing of apartments and residential buildings of the taxpayers, expenses on adaptation of motor vehicles for needs resulting from disability, spending on medicines (in the amount constituting, for each month, a difference between expenses actually incurred in the given month and the amount of PLN 100). For further reference see Art. 26 (7a) of the Personal Income Tax Act.

15 Taxpayers are entitled to enjoy this deduction provided that the expenses have not been previously included in the tax deductible expenses and their amount does not exceed PLN 760. Moreover, since 1 January 2013, the said deduction can be enjoyed only in two subsequent fiscal years, provided that the taxpayer did not enjoy the said deduction in a period prior to those two years.

16 Within the scope of the discussed deduction, taxpayers may deduct 50% of expenses incurred for the purchase of new technologies; new technologies being exclusively understood as technological know-how in the form of intangible assets, in particular the results of research and developmental works, allowing to manufacture new or improved products and services. The new technology cannot be applied worldwide longer than 5 years, which should be confirmed by the opinion of independent research unit, within the meaning of the Act on Science Funding Principles (Act of 30 April 2010 on the Science Funding Principles, Journal of Laws No 96, item 615 as amended). The deduction is made in a tax return for the fiscal year in which the taxpayer incurred expenses for the purchase of the new technology and, if the year showed loss or the amount of the generated income is lower than the amount of available deduction, the deduction is spread over 3 subsequent fiscal years.

17 Pursuant to Art. 13a of the Act of 20 April 2004 on Individual Retirement Accounts and Individual Retirement Security Accounts (Journal of Laws of 2004 No 116, item 1205, as amended) the deduction is limited and since 2014 it cannot exceed an amount corresponding to 1.2-times of the forecasted national average monthly salary for the given year, set forth in the budget law or preliminary budget law or their drafts, if the relevant laws have not been yet enacted (i.e. PLN **4495.20 in 2014).**

The taxpayer is entitled to reduce the thus determined tax amount by tax deductions provided for in the Personal Income Tax Act (Cf. Art. 27b-27g of the Personal Income Tax Act). They include: contributions to the general health insurance scheme paid directly by the taxpayer in the fiscal year[18], arenting allowance[19] and the so-called abolition allowance[20].

18 The deduction cannot exceed the equivalent of 7.75% of the contribution assessment basis, which is the declared amount, not lower than 75% of the average monthly wages and salaries in the enterprise sector in the 4th quarter of 2013, including revenue payments (PLN 4005.97 in 2014). It should be emphasised that since 1 January 2007 the amount of the contribution to the general health insurance is **9%** of its assessment basis, which means that the difference between the amount of contribution paid by the taxpayer and the deductible amount is not deducted from the tax and is financed from the taxpayer's own resources.

19 Taxpayers are entitled to the allowance on account of raising young children under parenting responsibility or legal custody, if the child resides in the parent's household or under foster care on the grounds of court ruling or agreement concluded with the staroste. The allowance can be also enjoyed by parents of adult disabled children and children up to 25 years of age provided that they are still studying. The discussed allowance has a progressive character, i.e. the amount of allowance depends on the number of the raised children. And so, in case of a single child the taxpayers are entitled to a deduction in the amount of PLN 1112.04 per annum (PLN 92.67 per month). An identical deduction is available in case of raising two children (PLN 1112.04 per each child per annum). If the taxpayer is raising three children, he is allowed to deduct PLN 1112.04 for the first and second child and PLN 1668.12 for the third child per year, whereas the allowance for the fourth and fifth child is PLN 2224.08. It should be added that the allowance is not available to parents of one child who stayed married for the entire fiscal year and single parents of one child, if their income is higher than PLN 112.000 in the fiscal year. Unmarried parents raising one child are not entitled to enjoy the allowance if their income is higher than PLN 56.000 in the fiscal year.

20 The objective of this allowance is to even out tax burden levied on natural persons generating income outside the Republic of Poland, resulting from differences in double taxation preventing methods. The discussed deduction is available to taxpayers subject to unlimited tax obligations who in the fiscal year earned outside the territory of the Republic of Poland raevenues falling under the proportional deduction principle. The taxpayer deducts from the tax the amount of difference between tax on revenues generated abroad using proportional deduction method, applying to those revenues the exemption with progression method.

As a matter of principle, the personal income tax is paid in the form of monthly advance tax payments[21]. The advance payments are calculated on cumulative basis, under which the amount of advance payment for the subsequent months constitutes a difference between tax due on income generated from the beginning of the year and the sum of the previously paid advances. The advance payments should be made by the 20th day of each month for the preceding month and by 20 January for the last month of the fiscal year. Upon the end of the fiscal year the taxpayers are under obligation to lodge the annual tax reporting statement, specifying the income (loss[22]) generated in the given fiscal year and make the final tax settlement by 30th April of the following fiscal year.

The second method of levying taxes on incomes of natural persons from business activity under the so-called general principles is taxation according to the proportional tax scale, using a 19% flat tax rate. To use this form of taxation, the taxpayer is required to lodge with a competent head of a tax office an appropriate petition. The petition is to be lodged by 20 January of a given fiscal year or, if the taxpayer commences his/her business activity

21 Apart from this, the taxpayer may also decide to use another method of calculation and payment of advance tax, i.e. quarterly advance payments or simplified flat advance system (the same advance paid every month). The first can be applied by the so-called small taxpayers (i.e. taxpayers whose revenues from sales including the amount of the output value added tax did not exceed in the prior trading year the amount of PLN equivalent of EUR 1.2 million) and by natural persons commencing business activity, however only in the first year of carrying out business activity and in the subsequent years, provided they are small taxpayers. The advance for the period of the first three quarters is payable by the 20th day of the month following the quarter it is paid for. The advance for the last quarter should be paid by the **20th day of the first month of the following fiscal year. The other form of calculation and payment of advance tax consists in the amount of advance tax paid every month being constant and amounting to** 1/12 of tax calculated using the current tax scale from income reported in the tax return lodged in the previous fiscal year or in the fiscal year preceding the given fiscal year by two years. The taxpayer is required to notify the head of the competitive tax office about the selected form of the income tax payments by 20 February of a given fiscal year or, if he commences business activity in the course of the fiscal year, prior to the day of its commencement, but no later than on the day of obtaining the first income.

22 Loss from the tax perspective is defined as a negative difference between the revenues and the tax deductible operational costs. Pursuant to the regulations in force, loss suffered in the fiscal year can be deducted from revenues earned from the same source in 5 subsequent fiscal years, but the amount of reduction in the given fiscal year cannot exceed 50% of the suffered loss (Cf. Art. 9 (3) of the Personal Income Tax Act).

within the fiscal year, prior to the day of its commencement, not later however than by the day of earning the first income.

The principles of taxation of natural persons' incomes from business activity using the proportional tax scale are actually identical with the previously described principles of levying the incomes with taxes under the progressive tax scale. A considerable difference concerns the loss of opportunity to enjoy almost all tax deductions, both from the tax basis and from the tax, provided for progressive taxation[23], the only exception being social insurance contributions and contributions to the general health insurance scheme. Moreover, tax is levied on income generated from business activity, but regardless of its amount, the proportional flat 19% tax rate, is always applied.

3 Legal construct of simplified forms of taxation on incomes generated by natural persons from business activity

In the Polish tax system there are currently two simplified forms of taxation on incomes generated by natural persons from business activity: the fixed-amount tax and the lump-sum on registered revenues[24] (Zieliński, 2012: 107-149).

The financial law doctrine considers simplified forms of taxation to be a more moderate form of taxes on incomes generated by natural persons from non-agricultural business activity with respect to the so-called general principles of taxation. Hence, the simplified forms of taxation are applied to profit (revenues) of economically weaker micro, small or medium-sized companies producing or providing services, in respect of which the application of complex income tax principles is not reasonably or economically justified.

23 Selection of the discussed taxation method additionally results in losing the possibility to lodge a joint tax return with a spouse or as a single parent. The taxpayers are also not entitled to use the amount of income free from taxation (in 2014 – PLN 3,091).

24 For more information refer to *The rules of levying simplified forms of taxation on incomes generated by natural persons from the non-agricultural business activity in Poland – author's assessment*, [in]: *Publicznyje finansy i nałogowoje prawo. Jerzegodnik. Wypusk 3. Preferencii w finansowom prawje stran Centralnoj i Wastocznoj Jewropy*, pod red. M. Karasjevy (Sentsovy), Wydawnictwo Państwowego Uniwersytetu w Woroneżu, Woroneż 2012, p. 144 et seq.

The fixed-amount tax constitutes the classic and simplest form of simplified taxation on incomes generated by natural persons from non-agricultural business activity. In this form, the amount of incomes generated by taxpayers does not affect the tax amount because it is known in advance at the beginning of the fiscal year. This form of taxation applies to natural persons generating incomes from non-agricultural business activity conducted individually or as a civil-law partnership[25]. Given the fact that the fixed-amount tax is an optional form of taxation, it can be used if the taxpayers observe terms and conditions of the Lump-Sum Income Tax Act. Firstly, the taxpayer files a petition for this form of taxation with a competent head of a tax office by 20 January of a given fiscal year. However, if the taxpayer begins to conduct his/her business activity within the fiscal year, the time limit for filing such petition expires before the day of its commencement. If the taxpayer's business activity has the form of a civil-law partnership, then the petition for the fixed-amount tax is lodged by one of the partnership's partners. Secondly, in the petition the taxpayer specifies a business activity levied with the fixed-amount tax. The number of business activities subject to the aforesaid form of taxation is quite wide. The Lump-Sum Income Tax Act provides for 11 categories of business activities subject to the fixed-amount tax, including more than 100 kinds of business activities (kinds of services or professions conducted by the self-employed)[26]. The category including the greatest number of such activities is service and production and service activities, that presently includes as many as 95 kinds of business activities, but most of them are craft services – some of them are "extinct professions" like milling, smithing, coopery or violin making.

25 Art. 860 Act of 23 April 1964 – the Civil Code (Journal of Laws No 16, item 93, as amended) provides that under the civil-law partnership contract partners commit themselves to to achieve a common economic purpose by conducting in a specific way, especially by pecuniary and in-kind contributions. The civil-law partnership does not have legal personality; hence it is not a legal entity. However, legal entities in the civil-law partnership are its partners.

26 They are as follows: production and service activities such as: retail trade of food, beverages, tobacco products and flowers; retail trade of non-food products; catering; transportation services provided by one vehicle; entertainment; home-made meals sold at apartments, and some professions conducted by the self-employed (health care and veterinary), home care for children and the sick, education and tutoring. The fixed-amount tax may also pertain to some services rendered by farmers, provided that they run farms, cf. appendices 3 and 4 to the Lump-Sum Income Tax Act.

Thirdly, in their business activity, they do not use the services of people other than those employed under employment contracts, nor do they use the services of other enterprises and plants, unless those services are specialist services[27]. Fourthly, the taxpayers subject to the fixed-amount tax cannot conduct any other non-agricultural business activities[28] and manufacture goods on which the excise duty is levied under separate laws and regulations. Fifthly, they practices business activities in Poland. Further,, they comply with the limits of wage workers as referred to in in the Lump-Sum Income Tax Act for individual kinds of business activities. Finally, the taxpayer's spouse is not involved in the same business activity as the taxpayer.

The amount of the income tax paid as the fixed-amount tax is determined in monthly amounts specified in the table appended to the Lump-Sum Income Tax Act (Cf. Appendix 3 to the Lump-Sum Income Tax Act). They are subject to external characteristics of potential profitability of a given business activity, such as the number of workers, the kind of business activity, and the number of residents at the place of the taxpayer's business activity[29]. The fixed-amount tax is established by a competent head of the tax office and is made separately for each fiscal year.

Taxpayers who are obliged to pay the fixed-amount tax do not have any tax credits, *id est* amounts deducted from the tax base or tax, but the amount of the tax paid sometimes may change due to social or economic reasons (Gomułowicz, 2010: 670). These reductions can be applied by virtue of the taxpayer's age, disability, full-time employment under an employment contract at another company and employment of disabled

27 Specialist services contain activities and works other than those covered by the registered activity, essential to make a product or provide a service in whole. These activities also include any accompanying services and works.

28 Except for electricity produced by water and wind energy plants with power output of 5,000 kilowatts and biogas production, revenues of which are levied under the so-called general principles.

29 Moreover, the fixed-amount tax may also be affected by factors, such as the number of car park spaces (for car park services), the number and kind of equipment owned or the number of places in given equipment (e.g. the number of cars at the racing track or the number of seats at the roundabout (for entertainment services), the number of meals sold daily (for meals sold at homes), and the number of hours allotted to services rendered monthly for professions conducted by the self-employed (e.g. dentists, nurses, midwives, or vets).

employees by the taxpayer[30]. In some cases, the law also provides for increases in the fixed-amount tax, for example when the business activity conducted by the taxpayer deviates from the average size so much that the rate specified in the law would be too low in comparison with business results, when the taxpayer employs his/her adult family members to pursue his or her business activity, and when the taxpayer terminates an employment contract with a graduate or a person who used to be unemployed before the date as referred to the Lump-Sum Income Tax Act[31].

The characteristic features of this form of taxation is that taxpayers are not obliged to keep a register of business operations, make advance tax payments and file tax returns[32]. They are only required to issue, upon the customer's request, bills and invoices for the sale of products and goods and the provision of services and to archive copies of these invoices for five fiscal years. A taxpayer who employs wage workers is also obliged to maintain and store at his/her registered office or business place the employment register and employee payroll register when the taxpayer remunerates his/her employees.

The income tax as the fixed-amount tax is paid, without prior call, for each month of the business activity into the bank account of the tax office within seven days from the beginning of each month for the preceding month and by 28 December of the fiscal year for December.

30 The rate of the fixed-amount tax reduced by 20% pertains to those taxpayers who are at least 60 years old or they have medical certificates on mild degree of disability on 1 January of a given fiscal year. Furthermore,, this tax is reduced by 10% for each disabled employee. The rate of the fixed-amount tax may be reduced by 80%, provided that the taxpayer is employed on a full time basis under an employment contract in another company.

31 The fixed-amount tax rates increased by 10% to 40% (reverse proportional relation to the general number of employees) apply to the taxpayer who employs adult family members in order to pursue his/her business activity and when the taxpayer terminates an employment contract with a person who used to be unemployed or a graduate, the current tax rate is increased by 50%. A similar result is when the scope of the business activity conducted by the taxpayer shows that the tax rate as referred to in the Lump-Sum Income Tax Act is unreasonably high.

32 However, the taxpayer is obliged to file a tax return, if within a fiscal year he/she reduced his/her income tax by the amount of g health insurance contributions. This tax return is filed by 31 January of the next fiscal year.

Another simplified form of taxation on incomes generated by natural persons from non-agricultural business activity in Poland is the so-called lump-sum on registered revenues[33]. This form is characteristic because it is not the lump-sum tax in its classic form, the aim of which is not to evaluate the tax basis, even the estimated one. In the registered lump-sum, the taxpayer registers revenues whose amount forms the basis for the tax.

This form of taxation applies to natural persons who generate revenues from non-agricultural business activity, including business activity in the form of civil-law partnerships or general partnerships of natural persons. Like the fixed-amount tax, the right to this form of taxation may be enjoyed by those taxpayers who comply with specific terms and conditions of the Lump-Sum Income Tax Act, providing by 20 January of a given fiscal year they file a petition to use this form of taxation with a competent head of the tax office[34] or that, in the preceding fiscal year, they did not exceed the income threshold (EUR 150,000) and – if they run a company – providing the sum of all revenues of the company's shareholders do not exceed this amount[35]. However, the second restriction only pertains to those taxpayers who pursued their business activities in the preceding fiscal year.

It is noteworthy that not all the taxpayers who observe the afore-mentioned criteria can use this form of taxation. It cannot be used *ex lege* by taxpayers who, in whole or in part, produce revenues from operating pharmacies, pawnshops or bureau de changes, or who pursue their business activities in trading parts and accessories for mechanical vehicles, render financial agency services, manufacture goods levied with the excise duty (except for electricity from renewable energy sources) or provide services relating to the recruitment of employees, advertising and detective or security services.

33 On 1 January 2005, the right to use the lump-sum form of tax was also granted to those taxpayers who produce revenues under rental, sub-rental, lease, sub-lease and other similar agreements, unless those agreements are considered by taxpayers to be part of the non-agricultural business activity and constitute a separate source of revenue.

34 If a taxpayer begins his/her business activity within the fiscal year, the deadline for filing this petition expires before the day of its commencement, but no later than on the day of generating the first income.

35 In 2014 amounts to PLN 633,450.

The tax base for the lump sum tax on registered revenues is the revenue, reduced by relevant tax deductions such as loss incurred, social insurance contributions, rehabilitation expenses, Internet expenses, donations granted by the taxpayer within the limits specified by the laws, and contributions to the Individual Retirement Account. In order to provide support for the amount of tax paid, the taxpayers have to maintain revenue accounts separately for each fiscal year. The determined income is then levied with a tax at proportional tax rates that are affected by the kind of business activity pursued by the taxpayer[36]. The 20% highest tax rate is levied on incomes generated by self-employed professionals specified in the Act on Self-Employed Professionals (e.g. doctors, dentists, paramedics, translators, interpreters, nurses or midwives). A 17% tax rate is levied on revenues generated from some service business activities (e.g. car rental agencies, hotels, wholesale agencies). An 8.5% tax rate concerns revenues from rentals, subrentals, leases or other similar agreements, as well as to revenues from service business activities specified in the Lump-Sum Income Tax Act, such as catering that includes selling alcoholic beverages with a minimum alcohol content of 1.5%. The lowest tax rates – 5.5% and 3% – pertain to revenues from manufacturing and construction activities and revenues from trading activities and catering services, respectively.

The tax determined on the basis of these tax rates is subsequently reduced by deductions as referred to in the Lump-Sum Income Tax Act (contributions to the general health insurance scheme equal to 7.75% of this contribution base, and the so-called abolition allowance) and subsequently is paid into the bank account of a competent tax office by the 20th day of the month following the preceding month, and the tax due for December is paid within a time limit specified for submitting the tax return, i.e. by 31 January of the following fiscal year.

36 The taxpayers, who generate revenues from business activities levied with various tax rates, calculate a tax due at a tax rate relevant to each of these kinds of business activity, if they keep revenue accounts under the applicable laws that specify the amount of incomes generated from each kind of business activity.

4 Conclusion

The forms of taxation on natural persons' incomes from non-agricultural business activity presented in this paper have both advantages and disadvantages. Taxation under the so-called general principles, as it allows the taxpayer to include the incurred expenses in the tax bill, seems to be particularly attractive for entities carrying our highly cost-consuming business activity (e.g. service provision). Another benefit connected with progressive taxation is that the allowed income deductions and tax deductions create a possibility to further reduce the tax burden. Moreover, the amount of the due tax can be reduced by making a joint tax return with a spouse or as a single parent. Whereas taxation under proportional tax scale is beneficial for taxpayers generating high incomes from business activity. If income generated in a fiscal year exceeds PLN 96,000, selection of this form of taxation (given no possibilities to enjoy tax allowances of lodging a joint tax return with a spouse), will bring quantifiable financial gains.

The key disadvantages of the aforesaid income tax settlement methods include: a need to maintain complicated records of business transactions for tax purposes and frequently amended normative regulations[37]. The said disadvantages cause the costs of running a business to unjustifiably increase and also considerably increase the risk of running the business. Another flaw of the proportional tax, which should also be mentioned, is that a taxpayer who runs several business activities is required to apply this form of taxation to incomes generated from all the types. Moreover, in case of proportional taxation, taxpayers generating incomes from business activity are not entitled to enjoy deduction for the purchase of new technologies and tax credits. Inability to enjoy those privileges has no factual justification and can be regarded as a clear sign of unequal treatment of entities carrying out business activity in Poland.

The key advantage of the fixed-amount tax is its simplicity. The taxpayers who pay income tax in this form are not obliged to maintain any tax documentation or submit any tax returns, which – in comparison with taxation

37 Over 20 years, the Personal Income Tax Act has had four consolidated texts and more than 100 amendments.

under the so-called general principles – considerably facilitates the taxpayer to conduct his/her business activity and reduces its costs. Another advantage of this form of taxation is that the tax is expressed in amounts not affected by any actual incomes. This solution motivates the taxpayers to act effectively through producing the highest incomes and reducing the cost of their business activity to the necessary minimum. Another advantage of this form of taxation is that that the taxpayer is allowed to employ a few persons as part of the same business activity. The taxpayer who selects the fixed-amount tax as the form of taxation significantly reduces the tax risk. Provided that the scope of his/her business activity is correctly determined and the number of employed persons is correctly reported, tax authorities cannot challenge the paid tax amounts (Poszwa, 2007: 50).

As far as advantages of the lump-sum on registered revenues are concerned, primarily it is necessary to mention the simplified documentation – in comparison with the taxation on the basis of the so-called general principles – which is to be kept by the taxpayer for taxation purposes. Another advantage of this form of taxation is quite low tax rates (3%, 5.5%, or 8.5%), but it is noteworthy that the use of such rates in practice does not always decrease the tax in relation to the taxation under the so-called general principles. The registered lump-sum is attractive only for those taxpayers who pursue low cost consuming business activity, i.e. a share of tax costs in relation to incomes does not exceed 50%.

Despite essential advantages, the simplified methods of taxation also have certain faults. The fixed-amount tax should be regarded as a form of taxation which is archaic and incompatible with the existing structure of entities. Its selection is also connected with the necessity to pay income tax when the carried out business activity brings losses. Moreover, in some cases, the fixed-amount tax – as the form of taxation on incomes generated from the non-agricultural business activity – results in much higher taxes than other forms of taxation. The main reason is that the fixed-amount tax specified in the Lump-Sum Income Act is too high and does not correspond to the current business conditions, particularly costs of business activity that

are rising at a fast pace (the main reason is the growth of regulatory liabilities of the entrepreneurs), technological development and changes of consumers' conduct (Zieliński, 2011: 352).

From among faults of the lump-sum on registered revenues one should list the too highly set highest tax rates (20% and 17%). It is easy to notice that the 20% tax rate is 2 percentage points higher than the income tax rate paid under the so-called general principles as a result of the first bracket of the progressive tax scale (18%) and 1 percentage point higher than the flat tax rate (19%). Moreover, due to the fact that the lump-sum on registered revenues pertains to revenue, not profit, generated from business activity, in each case the 17% tax rate levied on this form of taxation makes the tax higher than the one calculated under the so-called general principles of taxation. This situation contradicts the idea and fundamental principles of the simplified forms of taxation, which constitute a preferential form of taxation to the taxpayers.

The above analysis makes it clear that the selection of optimal form of taxation on income from non-agricultural business activity is not easy and requires certain refined economic calculations. Some taxpayers will benefit from simplified forms of taxation, while others will have their fiscal burdens reduced (due to the possibility to deduct the tax deductible expenses) by selecting taxation under the so-called general principles. Taxation under the so-called general principles should be similarly assessed. If the decisive criterion of selecting this form of taxation is income generated from business activity, when it exceeds PLN 96,000 the proportional taxation will be beneficial. The situation changes in favour of progressive taxation when the taxpayer gains from enjoying tax deductions or possibility of lodging joint tax returns with a spouse.

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AGREEMENTS IN POLISH TAX LAW

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Abstract

In this article are presented examples of such agreements as well legal problems connected with applying them, especially the problem of binding power of such agreements in the Polish tax law. That is why it seems, that the institution of the tax agreements should be regulated in the Polish tax law in a more detailed manner. It requires also a consequent legal regulation and adjustment.

Keywords

Tax Law; agreements.

JEL Classification

K34

1 Introduction

Tax obligation as kind of public duty cannot be created as consequence of agreement. However, it must be formed imperiously and one-sidedly. It was the reason that the idea of agreements in public law wasn't accepted in the theory of administrative law and tax law for a long time. Only the twentieth century theory of tax law started to emphasize necessity of making agreements in tax law. Therefore these days the public character of tax

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law isn't an obstacle to this. It's although the impassable limit for tax law agreements is taxable event described in a tax law act, whose realization creates a tax obligation. Agreements make in the Polish tax law differ from "typical" defined agreements known in any other legal systems. Such agreements existing in foreign legal systems (public contracts) are substitutes for decisions - they are alternative forms of legal solution to a tax decision. The object of an agreement in the Polish tax law is different, because according to the Polish constitutional and tax law tax agreements can only precede tax decisions. It makes that the agreements in the Polish tax law can be described as the element of a tax procedure which precedes a tax decision. They are consequence of negotiations carried on between the taxpayer and the tax authority before making a tax decision in a tax matter. Only such agreements are directly regulated or silently tolerated in the Polish tax law (formal and informal agreements). These agreements can be made in numerous points of tax proceedings: before a tax assessment, during a tax assessment or after a tax assessment. Their subject can be legal matters as well facts, which are important for a tax assessment.

In this article are presented examples of such agreements as well legal problems connected with applying them, especially the problem of binding power of such agreements in the Polish tax law. That is why it seems, that the institution of the tax agreements should be regulated in the Polish tax law in a more detailed manner. It requires also a consequent legal regulation and adjustment.

2 Agreement in tax law

The notion "agreement in tax law" already at a first sight sounds inacceptable, impossible to reconcile with the foundations of this branch of law. Tax law, just like administrative law, belongs to public law. Tax obligation as kind of public duty cannot be created as consequence of agreement. However, it must be formed imperiously and one–sidedly. It was the reason that the idea of agreements in public law wasn't accepted in the theory of administrative law and tax law for a long time. O. Mayer – father of modern administrative law - claimed that any other activity of administration than imperative may not be approved. In his opinion the State should act one–sidedly. Therefore,

the only possibility for consensual activity of administration is entering civil law agreements (Mayer, 1888: 1). Also J. Isensee located agreements as the form of activity of the tax administration on the outskirts of law and refused his approval for its use in tax law (Isensee, 1976: 191). This belief was typical for the theory of administrative and tax law in the ninetieth century. It had to be changed under influence of the twentieth century theory of law. It should be pointed that two significant theories emphasized the necessity of agreements in law. These are the Theory of Communicative Action (Jürgen Habermas) and the Theory of Law as an Autopoietic System (Gunther Teubner).

It seems, that in the consequence of these theories, twentieth century theory of tax law started to emphasize necessity of making agreements in tax law. The public character of tax law is not an obstacle to this. R. Seer accurately affirms, that the administration is only directed by the law, rather than strictly bound (Seer, 1996: 168). The same author is of opinion that tax law isn't an order given by legislator to parties of tax law relationship which can be fulfilled only in one method. However, tax law act opens the space for specifying which can be achieved by tax authorities not only one–sidedly (imperiously) but also bilaterally (consensually) (Seer, 2000: 702-703). It means that the impassable limit for tax law agreements is taxable event described in a tax law act, whose realisation creates a tax obligation. Tax law agreements can't build shape of taxation by consensual actions. They can't determine the tax liability instead of fulfilment of the taxable event.

Such conditions and limits for making agreements in the tax law formed in the theory of German tax law are currently preconditions for using this kind of bilaterally (consensually) method of activity of administration also in the Polish tax law. According to the Polish Constitution the imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be done by means of statute only (Art.217 of the Constitution of Republic of Poland from 2. April 1997 (The Journal of Laws No. 78, pos. 483 – with changes)). The necessity of imposing taxes in tax acts is also emphasized in the Polish Act of Rules for Taxation (Act of Rules for Taxation

(Ordynacja podatkowa) from 29. August 1997 (The Journal of Laws from 2012, pos. 749 – with changes)). According to the Art. 6 of this statute, tax is a statutory, free-of-charge, mandatory, and non-returnable payment made to the State Treasury, province (voievodeship), district or commune pursuant to a tax act. However, legal definitions of the tax obligation and of the tax liability include the condition that both tax obligation and tax liability are fully determined by fulfilment of the chargeable event. According to the Art. 4 of the Polish Act of Rules for Taxation tax obligation is a non-specific mandatory duty arising from tax acts to make payments in the event of circumstances defined therein while tax liability is the liability of a taxpayer, arising from his tax obligation, to pay to the State Treasury, province (voievodeship), district or commune, tax whose amount and date and place of payment are defined in the provisions of tax law (Art. 5 of the Act of Rules for Taxation (Ordynacja podatkowa)).

All these regulations enable to articulate the conditions for making agreements in the Polish tax law. Their base is a statement that the only method of creation of tax liability is a fulfilment of the chargeable event set up in the tax act by the taxpayer. This is a necessary legal condition for the tax liability to come into being. Therefore the tax liabilities couldn't be determined by agreements between the tax revenue offices and tax payers. It's also impossible to make agreements which result is changing of the subject or object of taxation as well as the amount of the tax or the date of payment. Any such agreements would not be binding (not valid) according to the tax law. An agreement between a taxpayer and a third person could be binding only on an area of the civil law.

Of course, it doesn't mean that the agreements in the Polish tax law are entirely inacceptable. It's possible to make such agreements which do not change a scope of taxation defined in a tax law act. Such agreements are acceptable although an institution of a tax agreement as a form of an activity of the administration isn't regulated in the Polish Act of Rules for Taxation. Agreements make in the Polish tax law differ from "typical" defined agreements known in any other legal systems. Such agreements existing in foreign legal systems (public contracts) are substitutes for decisions - they are alternative forms of legal solution to a tax decision. The object of an agreement

in the Polish tax law is different, because according to the Polish constitutional and tax law tax agreements can only precede tax decisions. It makes that the agreements in the Polish tax law can be described as the element of a tax procedure which precedes a tax decision. They are consequence of negotiations carried on between the taxpayer and the tax authority before making a tax decision in a tax matter. Only such agreements are directly regulated or silently tolerated in the Polish tax law (formal and informal agreements). These agreements can be made in numerous points of tax proceedings: before a tax assessment, during a tax assessment or after a tax assessment. Their subject can be legal matters as well facts, which are important for a tax assessment.

An example of an informal agreement in the Polish tax law is the regulation included in the Polish inheritance and gift tax act (Inheritance and gift tax act from 28. July 1983 (The Journal of Laws from 2009, No. 93, pos. 768)). It's connected with establishing the value of a tax base in this case. According to the art. 8 section 4 of the Polish inheritance and gift tax act, if the value of the acquired tangible property or property rights is not determined by the acquirer, or if the value determined by the acquirer does not correspond to the market value according to the opinion of the head of a tax office, that authority will call the acquirer to determine, increase, or reduce that value by the prescribed date (at least 14 days from the date of the notification being served), specifying that value based on its own preliminary assessment. This regulation opens the space to negotiations between taxpayer and tax authorities. In practice, after official call to determine, increase or decrease of tax base value, the taxpayer leads negotiations with the tax authorities, which subject is acceptable value of a tax base. The prescribed date for changing of declared value of tax base is modified (prolonged) by the tax authorities during negotiations, if needed.

Another example of agreements in the Polish tax law (this time – a legally regulated agreements) are transfer pricing agreements regulated in the Polish Act of Rules for Taxation. According to the art. 20a and 20b of this legal act it is possible to make the unilateral, bilateral and multilateral agreements. The subject of unilateral agreement is confirmation by the minister of finance, at the request of a domestic entity, the correctness of selection

and application of a transaction price determination method between affiliated domestic entities, between a domestic entity affiliated to a foreign entity and that foreign entity, or between a domestic entity affiliated to a foreign entity and other domestic entities affiliated to the same foreign entity. It has to be emphasized that the authority competent in matters of arrangements, at the request of a domestic entity and having received the consent of a tax authority competent for a foreign entity affiliated to the applicant, recognizes the correctness of the selection and application of a transaction price determination method between a domestic entity affiliated to a foreign entity and that foreign entity. It is a bilateral arrangement regulated in art. 20 b § 1 of the Polish Act of Rules for Taxation. If an arrangement concerns foreign entities from more than one state, conclusion of that multilateral arrangement requires the consent of tax authorities of states, competent for the foreign entities, with which a transaction is to be conducted (Art. 20 b § 2 of the Polish Act of Rules for Taxation).

According to the art. 20 f of the Polish Act of Rules for Taxation, the party applying for conclusion of the transfer pricing arrangement shall declare (among the others) the proposed transaction price determination method, in particular one of the methods referred to in the provisions on corporate income tax or provisions on personal income tax. However, the minister of finance accepts it in his decision regarding an arrangement[2]. Sometimes the doubts arise as to the nature of such agreement. It is so because the whole - initiated by the taxpayer - proceedings in the matter of the settlement of transfer prices is concluded by the release of the decision through the proper organ (minister of finance). In the opinion of K. J. Stanik i K. Winiarski, two judges of the Supreme Administrative Court, one-sided form of the settlement supports the view that there is no legal equality of the participants of the legal relation between the tax payer and public authority (minister of finance) (Stanik, Winiarski, 2011: 127).

It's not easy to agree with this opinion. Not every agreement in the public law (in the administrative law or in the tax law) must be a public contract.

[2] According to the art. 20i § 1 of the Polish Act of Rules for Taxation A decision is issued in cases involving confirmation of the correctness of selection and application of a transaction price determination method between affiliated entities, hereinafter referred to as a "decision regarding an arrangement".

It is pointed out in the theory of administrative law that various categories of consensual activity of administration exist. One of these are agreements made by the party of proceedings and organ, which precede the decision. A transfer pricing agreement should be listed among this category of agreements. It must be also emphasised that as it was pointed in this article, such agreements are acceptable in Polish tax law.

Another example of regulated agreements in Polish tax law is the expiry of tax liability in the consequence of transfer of title to tangible property or property rights to the benefit of subject entitled from the title of the tax (the taxes creditor – State, province, district or commune) - Art. 66 of the Polish Act of Rules for Taxation. This regulation is interesting, because when the tax creditor is the State the expiry of tax liability is a result of making two agreements. The first of them is a civil agreement between a taxpayer and a major of the district, which object is transfer of property or property rights. Simultaneously the law requires the acceptance of it by the tax organ. It causes necessity to come to an agreement between a major of the district and a competent head of a customs office.

An important question connected with the issue of making tax agreements is the problem of a binding power of such deals. It's clear not only in case of transfer pricing agreements but also in case of another agreements made before, during or after a tax proceeding. The transfer pricing agreements accepted in a tax decision are binding only for the minister of finance who is bound by his own decision. However they aren't binding for a party, especially for a taxpayer. This is because no legally enforceable duty is set up in such agreement. Therefore, the taxpayer can braak off such agreement without any consequences (Siemieniako, 2009: 41-42). Therefore, it can be considered a proposal to shape transfer pricing agreements as a public (administrative) agreements, who would be binding also for a tax payer.

Similar problem is connected with earlier presented agreements made on the ground of inheritance and gift tax. As it was emphasised, such agreements are connected with valuation of a tax base. There is no regulation on binding power of such agreements in the Polish tax law, not only for a tax payer but also for a tax organ. It makes that tax authorities may ignore

such settlements while issuing their decisions. That is why it seems, that the institution of the tax agreements should be regulated in the Polish tax law in a more detailed manner.

3 Conclusion

All of these examples convince that agreements aren't the institution alien to the tax law. At the same time it is no doubt that some elements of it require the more detailed and consequent legal regulation and adjustment.

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E-TAX ADMINISTRATION IN THE CONTEMPORARY POLISH SYSTEM OF FINANCIAL LAW

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Abstract

Increasingly important role in the functioning of the tax administration is played by ICT solutions and tools. The result is that the new concepts of transformation of the tax administration lead to major trend which is the consolidation of information systems, building new infrastructure and providing services to taxpayers. Contemporary tax administration aims to make it easier for all taxpayers to voluntarily pay the tax. Computerization of tax administration changes its character by balancing the imperious nature instruments used with the service tools offered to taxpayers. At the same time implementing solutions influences the organizational structure of tax administration in Poland.

The aim of this paper is to present the main directions of change in the area of e-tax administration in Poland, arising both from the legislative changes (amendments to the Tax Ordinance Act) and the implementation of strategic objectives (the e-Tax). The author also indicates the benefits as well as risks arising from the operation of the e-government system of financial law.

Key words

E-tax administration; tax proceedings; tax; public administration.

JEL Classification

H20, K40, H83

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1 Introduction

Tax administration is involved in the implementation of tax obligations as a party to an active relationship for tax purposes, acting in the name and on behalf of the creditor tax, which is a public law entity. The tax authorities are therefore entitled to apply to entities liable to pay the tax claims arising from that relationship, to enforce the provision, as well as to communicate to each public entity tax amounts due to them. Indisputable is therefore its important position in the system of tax administration of financial law, which in the process of public levies uses so-called the power to impose administrative regulations (Teszner, 2012: 649).

At the same time the entire public administration has acquired changes resulting from the progress of civilization and the digital revolution. Thanks to it, more and more goods and services are based on information and are provided by means of electronic communication (Mituś, 2013: 110). The term «e-government» (dedicated to EU Member States by the European Commission) means that the public administration in the process of exchange of information and public service uses solutions of information and communication technology (ICT) - Commission Regulation (EU) No 821/2010, p. 1. The use of new technologies by the administration is usually associated with the changes taking place in the organizational area, acquisition of new skills to improve public services and strengthened citizen involvement in democratic processes (Grodzka, 2007: 1).

The process of evolution towards e-government also involved the tax administration. The factors contributing to the transformation include:

adoption by the legislature so-called self-calculation as the primary method of execution of tax liabilities by the taxpayer (payer),

trends in organizational and functional model of tax administration in some European countries (Teszner, 2012: 376-378), in order to increase the provision of its services to taxpayers by providing tools and support to facilitate the calculation and payment of the tax.

As a result, a progressive increase in the use of the tax administration of its business solutions and ICT tools makes in the latest concepts of transformation of the tax administration (Transformation in Polish Tax Administration,

2012: 7) key trend the consolidation and centralization of systems, construction of new infrastructure and offering new services to taxpayers. Contemporary tax administration should primarily facilitate taxpayers to voluntarily pay the tax, and only in the absence of their compliance with the provision of coercive measures. Computerization of the tax administration thus changes its character by balancing the imperious nature instruments used with the tools offered to taxpayers of a service. At the same time offering taxpayers of tools for the implementation of a voluntary extension of tax liabilities enforces centralized and uniform system of electronic information processing and control instruments (Teszner, 2013: 572). Their implementation cannot remain without effect on the organizational structure of tax administration in Poland (Teszner, 2012: 414). The target model of this administration to be achieved will be a result of the implementation of 2015 e-Taxation Programme, under which will be implemented three projects, i.e. e-declarations-2, e-taxes, e-registration.[2] Legislative changes are also expected.

The purpose of this paper is to present the main directions of changes in the area of e-tax administration and an indication of the benefits and the risks and hazards associated with the operation of the system of financial law.

2 The legal framework for the implementation of e-government tax

In Poland, the legal solutions of e-government appeared recently. The legal framework for its development was defined by normative acts (laws and implementing regulations). One of the most important regulations that are crucial for the implementation of e-government in Poland is the Act of 17th February 2005: Computerization of entities performing public tasks (hereinafter: u.i.d.p.r.z.p.) - The text of one. Journal of Laws of 2014. pos. 1114. It sets out the basic requirements for ICT systems and the principles of the ePUAP (Electronic Platform of Public Administration Services) central repository and document models. Moreover, implementing regulations

2 The assumptions computerization of the tax administration in Poland were presented by the Ministry of Finance on a website project - http://www.epodatki.mf.gov.pl.

issued under this Act (regulations) explain how the preparation and delivery of writings in the form of electronic documents, terms and conditions of use of the electronic platform of public administration (setting up accounts on ePUAP, providing directory services by public bodies and the nature of these services), a way to share the data collected in a public register.

Important changes for the implementation and dissemination of e-tax administration has put the amendment of u.i.d.p.r.z.p. of 10th January 2014 (The Act of 10 January 2014. amending the Law on computerization of entities performing public tasks and certain other acts (Journal of Laws of 2014., pos. 183)), which introduced from 11th May 2014 important changes in the Tax Ordinance (The Act of 29 August 1997. Tax Ordinance (consolidated text. Journal of Laws 2012. pos. 749, as amended.) - further invoked as op.). The scope of these changes will be presented later in this paper. Already, it should be emphasized that they are directed not only to extend the capabilities of communicating with taxpayers' tax authorities in the field of voluntary implementation of their commitments. Introduced solutions provide for the possibility of communicating by the tax authority with the taxpayer with his/her consent, by means of electronic communication, including the settlement of tax matters in the form of an electronic document, and the introduction of e-service. Computerization of the tax administration has thus broader meaning than e-tax administration. It covers a method of implementation of the activities of the tax administration using tools, including:

- analysis and verification of the correctness of e-declaration,
- carrying out the so-called e-checks by the tax authorities and tax inspection authorities,
- issue of interpretation of tax law,
- conducting tax issues using the communication system of the tax authority.
- issuing decisions in the form of an electronic document and delivery to the box attached to the taxpayer's tax portal.

The shape of e-tax administration in Poland is also affected by regulations which do not relate solely to public administration. It should be mentioned,

for example the Law of 18th September 2001: Electronic signature (Journal of Laws of 2013., pos. 262), which specifies the conditions and legal consequences of its use, as well as the rules for the provision of certification services and rules for supervising the providers of these services.

It should also be noted that in the area of e-government exist and are important strategic documents and software. These should include, among others:

- "Digital Agenda for Europe" - a program of development of information society in the European Union in the years 2010-2015 (one of the programs of the European Commission in the framework of economic reform strategy Europe 2020);
- Strategy "Better Government 2020";
- "The Integrated National Informatization" - adopted Resolution No. 1/2014 of the Council of Ministers of 8th January 2014[3].

In the latter document, in accordance with the directions of the development of e-services identified by the European Commission, as a priority for the implementation of recognized public e-services in 10 areas of the public administration are presented, particularly in the area of "business activities, including public procurement" and also "settlement of tax and customs service". Directions of development of e-government tax included in the Program of Integrated Computerization States shall designate the implementation of the following services:

- **Electronic invoicing in public administration** - providing a platform for entrepreneurs to issuing e-invoices for government and administration that receive such invoices and integration with financial – accounting software systems;
- **Electronic communication with the taxpayer by the Tax Portal** - providing taxpayers the possibility of submitting and peeling of documents in electronic form and access to prepayments and casework;
- **A full insight into the electronic files of the tax** - the introduction of electronic design data reports for tax books and accounting documents (including e-invoicing) for all types of operators. Such

3 Published on the website of the Ministry of Administration and Digitization, https://mac.gov.pl/files/pzip_-_uchwala_rm.pdf.

a solution is to shorten the time of a tax audit and reduce their burden. Businesses have the opportunity to get insight into the electronic case file, and efficient communication with the tax authorities;

- Enable **the transmission, storage and processing of tax returns and applications in electronic form,**
- **To provide electronic equipment for progression to tax information;**
- **To allow the automatic exchange of information by electronic means** between the Central Database of tax administration and other units of state administration;
- **Ensuring the availability of services** through infrastructure services in the cloud computing model;
- **Improve relations with the taxpayer of excise and customs** (Account of the taxpayer, knowledge portal), including service on the border;
- Increasing the efficiency and performance of service by the taxpayer in the office, by the use of processes connected with the economic customs procedures (automatization of tasks from entering goods for business until its completion).

3 Instruments dedicated to e- tax administration in the Tax Ordinance

3.1 General Notes

Based on the Act of 10th January 2014, amending the Law on computerization of entities performing public tasks and other laws, at the same time changes have been introduced in the Code of Administrative Procedure, the Tax Ordinance and the Law on the proceedings before the administrative courts (The Act of 30 August 2002., Law on proceedings before administrative courts (t. one. Journal of Laws 2012., pos. 270, as amended)). Their goal was to create instruments to use to create, develop and improve the functioning of ePUAP and the introduction of the legislation on administrative procedures and tax solutions for facilitating the provision of e-services, and improve the process of settling administrative matters.

3.2 Tax Portal

Under the changes to the tax law, solutions related to the launch and operation of the so-called Tax Portal should be mentioned. In accordance with Art. 3 point 14 of the Tax Ordinance is the computerized system of tax administration used to contact the tax authorities and taxpayers, payers and tax collectors, and their successors and third parties, in particular to bring applications, filing and service of pleadings tax authorities by means of electronic communication.

In connection with the start-up, important powers were granted to the Minister of Finance. The office is supposed to ensure the functioning of the tax portal and is the administrator of the persons using this website for the purposes of legal regulations under the protection of personal data (Article. 14 § 4 op). The Minister of Finance has also been vested with powers to issue implementing regulations defining:

- scope and conditions of use of the tax portal;
- types of cases that can be dealt with using the tax portal, including the need for a gradual dissemination of the electronic form of contacts with the tax authorities and the nature of these cases.

The Minister of Finance has also the possibility, by regulation, to specify the tax authorities, which do things using the tax portal, with a view to improve offices work and taxpayer service. This means that not all tax administrations will get things done using the tax portal and only those, which will be indicated by the Minister of Finance, however the course does not exclude the possibility of indicating all of them.

The formal launch of the Tax Portal on 18th August 2014[4] was not associated with the launch of full access to the accounts of taxpayers, payers or tax collectors. It turned out that there is only part of the system (the free-of-charge) that allows the submission of tax returns electronically, informing about changes in tax regulations, containing a calendar of important deadlines, access to interactive forms and traditional print, as well as instructions for filling them. Logged in part of the portal does not work, as a direct channel of communication with the tax authorities, and access to tax data by individual account. Therefore there are not available to taxpayers as scheduled,

4 Tax Portal is available at: http://www.finanse.mf.gov.pl/web/wp/pp.

despite earlier announcements, opportunities and receiving electronic submission of statements to the tax authorities, review of submitted and the status of ongoing cases. The Minister of Finance also issued implementing regulations on the start day of the tax portal, which are relevant to the scope and terms of the tax portal as well as the types of cases handled by using this tool. The draft regulations were designed and are ready to implement[5]. They show that in the first place with the use of the portal users will be able to tax matters concerning the conveyance tax, flat-rate income tax in the form of a tax card, estate tax and gift tax (including the submission of the declaration and the service of documents on the tax authorities). These are the taxes on a relatively simple design, which are county-level communities income, although collected and transmitted by the tax authorities. The deadline to achieve full functionality of the portal tax is therefore not definitively known.

It should be noted, however, the launch and operation of the tax portal correctly in the context of the solutions concerning certification of filing the tax return electronically. From art. 3a § 2 of the Tax Ordinance is apparent that the confirmation of the declaration by electronic means shall be in the form of an electronic document by:

- tax authority; or
- electronic box data communications system of tax administration; or
- tax portal.

Important, from the point of view of the functioning of the tax portal, is also the identification of people submitting electronic tax returns and benefiting from individual accounts. The provisions of the Tax Code were introduced in the above range of uniform solutions identifying taxpayers, payers, collectors, their successors and third parties on tax portal. According to Art. 3f § 1 of the Tax Ordinance there are two ways accepted to identify these people, i.e. of use:

- **Qualified certificate** with the principles laid down in the Act of 18th September 2001: Electronic signature,
- **Profile trusted ePUAP** within the meaning of Art. 3 point 15 u.i.d.p.r.z.p.

5 Available on the website of the Government Legislation Centre: http://legislacja.rcl.gov.pl.

3.3 "Electronic" tax cases solution

In art. 126 of the Tax Ordinance expanded forms of settlement of tax matters are pointing next to the current one in writing so-called "electronic document". Explaining the concept of art. 3 point 13 of the Tax Ordinance referenced directly to its understanding contained in Art. 3 point 2 u.i.d.p.r.z.p. the electronic document must therefore constitute an individual semantic set of data arranged in a specific internal structure and stored on a data carrier. It should be emphasized that both forms of settling the matter of taxation is deemed to be equivalent, the tax authority cannot choose between them. This means that for the settlement of tax matters and notification of the decision in the form of an electronic document the taxpayer must agree to, otherwise the action of the tax authorities should be regarded as ineffective. This principle follows directly from Art. 3e § 1 of the Tax Ordinance, according to which the tax authority may apply to the taxpayer, payer or tax collector for consent to service of documents in the form of an electronic document in all tax matters handled by the authority.

Settlement of tax matters in the form of an electronic document includes not only conducting tax that ends the tax decision, but also issuing individual interpretation of tax law. Evidenced by the explicit reference to the art. 126 of the Tax Ordinance included in the amended Article 14 h of the Tax Ordinance. Any doubts were also removed in the art. 14c § 4 of the Tax Ordinance regulating signing individual interpretations issued in the form of an electronic document. Such an interpretation should be accompanied by a secure electronic signature verified by a valid qualified certificate. Therefore, the same rules as for the signature are adopted of the tax and the provisions issued in the form of an electronic document (art. 210 § 1 point 8 of the Tax Ordinance and art. 217 § 1 point 7 of the Tax Ordinance).

It should also be noted that the possibility of settlement of tax matters by way of an electronic document is a reference to the general principle of tax proceedings expressed in art. 125 § 1 of the Tax Ordinance, obliging the tax authorities for a thorough and rapid action on the use of the simplest possible measures to deal with the case. The literature correctly points

out that the phrase "using the simplest means" may be, in terms of communication with the site authority, understood as the use of information technology (Kościuk, Modrzejewski, 2013: 189).

3.4 E - delivery

Regardless of the principle expressed in Art. 3e § 1 of the Tax Ordinance on the need for prior occurrence of the tax authorities to the taxpayer for consent to service of documents in the form of an electronic document were adopted in art. 144a and Art. 146 of the Tax Ordinance regulations concerning service of letters by means of electronic communication. This is a clear departure from the service of writings by paper. To deliver the letter in electronic form, the tax authority must first prepare such a letter in the form of an electronic document. It uses an electronic form, used to prepare and generate an electronic document in accordance with the corresponding model of an electronic document (article. 3 paragraphs 25 and 25 u.i.d.p.r.z.p.). Mere service of a document by means of electronic communication will be possible under the conditions laid down in Art. 144a § 1 point 1 of the Tax Ordinance, i.e. if a party to the proceedings:

1. will submit application in the form of an electronic document through the electronic box of tax authority or tax portal;
2. requests a service using electronic means of communication and indicate the tax authority electronic address;
3. consents to the service of documents by electronic means and indicate the tax authority electronic address.

In situations where consent to e-delivery occurs, the tax authority, such withdrawal can make by means of electronic communication and be sent to the email address on its website or on tax. It cannot be excluded that the rule laid down in Art. 144a of the Tax Ordinance could lead to a situation where in one case does not occur on all parties to send them electronic documents. Thus the proceedings will operate the documents in paper form and electronically. It should be emphasized that each of these documents is the original (none of them will be a copy of the other). The responsibility of the tax authority is, however, to ensure the identity of the content

of such documents. In this case, the electronic document and the original document is the same document, copies of which operate on different media (paper and electronic) (Pietrasz, 2013: 860).

In order to notify the document in the form of an electronic document, the tax authority shall send to the electronic address of the addressee a notice that includes:

1. information that the recipient can pick up the letter in the form of an electronic document;
2. indication of the e-mail address from which the recipient can download the letter and under which should make acknowledgment of receipt of the letter;
3. instruction on how to receive the letter and in particular how to identify the electronic address specified in the IT system of the tax authority, and information about the requirement to sign the official receipt.

In case of failure to collect the writings in the form of an electronic document, the tax authority shall, after the expiry of seven days from the date of dispatch of the notice, send a re-notice of possible revocation of the letter. Subsequent failure to collect the letter causes so-called e-delivery fiction, i.e. notification shall be made after the expiry of 14 days from the date of dispatch of the first notice. In the case of electronic document recognition as delivered in the above form, the tax authority is obliged to allow the taxpayer access to the contents of the letter in the form of an electronic document for at least three months from the date of acceptance letter in the form of an electronic document as delivered, and information about the date of service. The consequences of not collecting the writings in the form of an electronic document by taxpayer, tax collector should be instructed by the tax authority at the stage of consent to the electronic form of mail delivery (Art. 3e § 2 of the Tax Ordinance). In addition, service of documents in this form is not final and does not extend to the entire proceedings. The party of tax proceedings has the right to cancel the service letters by means of electronic communication. In this case, the tax authority shall serve a document in the manner specified for writing in a form other than the form of an electronic document. Consequently, this means a return to service in the traditional written form.

3.5 Sharing case files

The implementation of the principle of active participation of the parties in the proceedings imposes on the tax authorities the need to ensure the party, at any stage of the proceedings, and after its completion, inspect the case file, make notes, copies or duplicates. These operations are usually carried out at the premises of the tax authority in the presence of an employee of that body. But there is no obstacle to make the file available for viewing by using ICT tools. This purpose serves the solutions adopted in art. 178 § 4 of the Tax Ordinance where tax authority can provide a website to make these steps in the computer system, the identification of the party with the qualified certificate, or a trusted profile ePUAP (art. 20a paragraph 1 u.i.d.p.r.z.p.).

3.6 Tax Control

E-government instruments can also be used during the initialization of a tax audit. As a general rule (with the exceptions set out in Art. 282c of the Tax Ordinance) tax authorities are obliged to notify the controlled entity of its intention to initiate a tax audit. Such notice may also be issued in the form of an electronic document and delivered to the mailbox entity for tax portal. In accordance with Art. 282b § 4 of the Tax Ordinance notice of its intention to initiate a tax audit includes:

1. designation of authority;
2. date and place of issue;
3. controlled designation;
4. indication of the scope of control;
5. instruction on the right to file a correction statement;
6. signature of the person authorized to notice, and if the notice is issued in the form of an electronic document - secure electronic signature verified by a valid qualified certificate.

4 E-government and organizational changes - structural tax administration in Poland

Undoubtedly important roles in e-government perform electronic services provided to entities outside the administration. Tax administration is not the

exception in this respect. On the contrary, here you can also speak of a true invasion of ICT in the internal areas of the administration, especially at field levels of the organization, referred to as e-government or e-office (Monarcha-Matlak, 2008: 318). Technologies used in the information society cannot be treated only as means of public administration relief and allows the flow of information, but an important part of administrative reforms (including tax administration).

In support of the e-Tax implemented by the Ministry of Finance to the end of 2015 it was emphasized that the main reason for its implementation and its component projects is the need to modernize the way of performance of tax administration, which since the restoration of a functioning in current organizational structure in 1982 did not undergone major changes in terms of business systems, but only for a systemic nature. There is therefore a need for an overall transformation of the collection system due to the emergence of new tax obligations or new taxes.

It should be emphasized, therefore, that the same naming project contains a logical error. It is not a fact, we might expect, „The concept of transformation of the Polish tax administration", but the concept of the transformation of the system of tax collection by the tax administration. Therefore relates largely not on constitutionally-organizational system of this administration in connection with the performance of tasks, but rather on how to implement individual tasks using their dedicated tools, or tools specific to e-government.

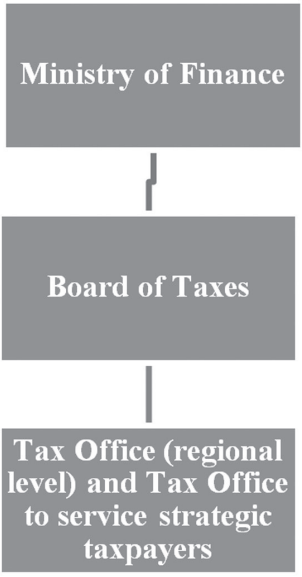
The aim achieved has to be improved public service by the tax administration. The basic target effects of the program indicate: improving the flow of information between tax administrations and taxpayers, comprehensive services offered to taxpayers with a preference of electronic forms, the creation of individual accounts of taxpayers on a special website with the ability to log on and check the status of settlements, providing the account information on arrears in paying taxes, check electronically stage for settling cases the taxpayer with the tax, filing a tax return by the tax administration with the possibility of viewing and generating by the taxpayer.

In support of the e-Taxation, among factors that greatly reduce the efficiency of the tax administration the organizational structure was indicated,

which is not sufficiently flexible and difficult to adapt the units to new challenges and tasks. The authors of the program suggest is to create an operating model of Polish tax administration by identifying the fundamental flaws of current units of the administration and then by integrating and standardizing business processes. Effect achieved is to improve the coordination and supervision of the tax administration units, increasing the speed and quality of information processing by providing IT support and reducing its operating costs.

The biggest concern, from the point of view of the complexity of change raises the omission of customs and fiscal control authorities. Developed under the concept of e-Tax transformation of the Polish tax administration does not include other segments because the tax authorities in Poland dealing with the assessment, drawing and control of tax claims, in particular customs administrations, fiscal control authorities and the tax authorities of municipalities pursuing taxes and surcharges locally. Thus exclusively Ministry of Finance and tax chambers and offices are included.

Reported solutions rely on a quest to the organizational structure of tax administration based on the diagram:



It is proposed that the structure of the target retaining the current division between the three levels of the organization to implement the tax administration will strive in transition. The target model is to achieve functional structure, in which the activities and tasks will be combined in processes and process groups based on features aimed at meeting the needs of visitors.

The question arises, if it keeps the current structure of tax administration in line with the target model, why pursue it and set as a goal to achieve? It should be noted that a much more radical, even revolutionary change led solutions included in version 3.0 Concept of transformation of the Polish tax administration from 17.06.2011, assuming: a) elimination of the tax offices and heads of tax offices deprivation status of bodies of first instance; b) the establishment Directors of Tax Chambers instance tax authority in the province; c) the establishment of delegations of tax chambers at the local level with the use of human resources and infrastructure from liquidated tax offices; d) the appointment of a separate treasury chambers cells and conclusive in the second instance - as a guarantee of the implementation of the principle of two instances. Legitimacy of the solutions presented deserved criticism and raised serious constitutional concerns. It is doubtful that the concentration within the chambers of the fiscal functions of two bodies will secure observance of two instances. In addition, it is hard to justify depriving the tax office functions of the tax authority and the creation of delegations tax chambers in the field, which would take some of its features. The heads of tax offices are the best aware of the needs of individual taxpayers, have knowledge of the fulfilment by them of tax obligations and are able to respond to date in case of irregularities (Kosikowski, 2011: 348). Instead of complete liquidation, there is a need to consider reduction of 400 tax offices (including 20 specialized use of taxpayers' particular category). The decision as to whether some of them should be eliminated or retained should be solidly supported by analysis and the level of efficiency of functioning of the individual units.

More flexible operation of tax administration is to encourage the change of the jurisdiction of local authorities instance in certain cases. In some cases, „the tax authority of first instance will be any tax office" is located in the province. It's about simple things, like certification of arrears of taxes,

which amount will be gradually was increased along with - as indicated - „the growing maturity of the tax administration in the target model." Little things can be taken care of throughout the country at any office. So far the list of such cases has not been formulated, and the matter of issuing a certificate of arrears has been indicated, for example. Their gradual increase cannot take place without legislative changes. It is also impossible not to notice identifying the authors of program the tax authority of the office, instead of the manager of the office, contrary to the solutions adopted in art. 13 of the Tax Ordinance and science of administrative law.

The target model is to obtain the functional structure that allows the pooling of resources of the tax administration (specialization) by centralizing them in one resort and regionalization in a few or several centres. Functioning in the Tax Offices to Support Strategic Entities (e.g. those having turnover exceeding 1 billion zł) enable efficient and effective service to interested parties, requiring specific competence on the part of the tax administration. It should be emphasized that currently 20 tax offices already operates in the structure of the administration, handling of special categories of taxpayers, at least one in each province (in Warsaw - 3). The program does not explain whether this number will be maintained and how the entity will be considered a *strategic* entity. It is doubtful whether the tax administration has this specific competence in the use of special categories of taxpayers ever reached. Creating a special tax offices Poland in 2005 already assumed specialization and the handling of large taxpayers by industry and this has been unsuccessful, despite the significant outflow of skilled tax office specialized offices. Furthermore, the too high level of income limit, when followed by a change of the office from the ordinary to the specialized and imprecise regulations contained in the Act on tax offices and chambers regarding the tax year in which the change in the properties followed, resulted in the initial period of change from the ordinary office for specialized by small number of taxpayers.

There will also be changes in the internal organizational structure of the Ministry of Finance, tax chambers and tax offices. At the regional level, tax offices are planned for the creation of cells. Risk management and treasury chambers - the cells responsible for planning control, planning,

execution, execution risk assessment, conduct and supervision over the flow of documents and cases. It seems that these tasks are already implemented in the cells implementing a tax inspection and enforcement authorities in cells and in cells of treasury chambers supervisors.

In line with the e-Tax, a new unit will also be created, not found previously in the organizational structure of tax administration. This is due to the implementation of the aims of the program and the expected outcome, i.e. improving the efficiency of tax administration as a result of integrated activities and standardization. The purpose of the settlement - units directly subordinate to the Minister of Finance - will feature the centre of the implementation of financial and accounting services for the entire tax administration.

Another newly created unit will be Mail Service Centre, responsible for activities related to the preparation and service of documents on paper (centralization and automation of processes related to service of documents). In this framework will be created digitization and archiving centres, designed to allow parties submit a document to any unit of the tax administration in the province. The basic document used by the tax administration will be an electronic document without having to store the paper version for more than 30 days. The establishment of regional centres of digitization will beget the need to isolate these organizational units of the current structure of tax chambers.

Analysis of the above goals and objectives of the e-Tax leads to the question, for who is this reform and are we sure it is for taxpayers? The main IT products of the project are:

- Centralized System Abstraction and distribution of taxes - by creating folders stakeholders, including all tax data, financial and operational collected by the tax authorities on a particular subject and permanently archived. This folder will include all tax procedures, and enforcement proceedings and criminal tax. In addition, an account will be created taxpayer, the taxpayer made available through the Internet.
- Central Database;
- Internal Information Exchange System;

- IT Management System;
- System Service Affairs and Labour Processes.

The product of the area of law is an amendment to the Act - Tax Ordinance and implementing regulations - there are as yet no known proposals in this area, except for the above analyzed. Solutions were developed for the amendment of the law on tax offices and chambers which aim is consolidation at the regional level, auxiliary processes implemented in the tax offices and chambers, transformation chambers and subordinate tax offices into one entity acting as budgetary authority, which means the actual subordination of employees of tax offices directors of Chambers, and "release" the employees of the possibility of referral to other tasks.[6] The proposed legislative changes are negatively judged, because in the authors' opinion, archaic and amended many times law on tax offices and chambers should be replaced by a completely new act.

As it can be concluded from the above, the design of information e-Taxes are tools dedicated for tax administration in the process of collecting and processing information on the size and collection of taxes, taxpayers, but however, it does not offer any meaningful service. Such services are in the projects like e-Statements and e-Registration (for example significantly shorten the time of NIP registration, single window, providing services to generate pre-filled declarations for some taxpayers, support the correction statement, the current exchange of information and answers to questions).

5 Summary

The above findings show that the technologies operating in the information society cannot be treated as until recently, as a means of administration relief and allowing communication and flow of information. Currently, they constitute an important element of the implemented reforms of the public administration. Modernization of the individual segments of the public administration in the tax administration must take into account the tools. The basic condition becomes, however, that the changes implemented

6 Draft Law amending the Law on Customs Service, the law on tax offices and chambers and certain other acts (version dated 25 July 2014.), access: http://legislacja.rcl.gov.pl.

in the individual segments of the tax administration are taking into account all aspects of the business, corporate administration and effectiveness of a systemic character and respect the established principles of the law of this administration. The concept of the reform of the tax administration must take into account the particular nature of constitutional norms and be preceded by an analysis of legal acts relevant to the functioning of the administration. It cannot be treated in a nonchalant manner and particularly on two instances of tax proceedings, discharging the guarantee for the parties to the proceedings of the tax, but also relevant from the point of view of the structure of the tax authorities and their functional properties, by introducing solutions seemingly protecting it.

It also highlights still unsatisfactory state of implementation of e-government solutions, which do not use the same administration. This is due to certainty of attachment to traditional paper documents, mental barrier of citizens, which is the result of a lack convince citizens of the impossibility of resolving the case on the Internet, or concerns about the security of information transmitted. You should also pay attention to the lack of clear information campaign to encourage taxpayers to interact with the tax administration. Finally, it should be noted the concern of the risks when using information technology as a result of which may be incurred damage (loss). They can be caused by human error, deliberate action of government employees as well as external attacks. To secure the development of e-tax administration and protect the security of personal data of taxpayers (protected secret stamp duty) is particularly important to the security of networks and security of information transmitted, stored and processed in these networks.

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ABUSE OF LAW – INFLUENCE OF CASE LAW OF COURT OF JUSTICE OF THE EUROPEAN UNION ON THE TAXATION IN THE CZECH REPUBLIC

Hana Skalická[1]

Abstract

This contribution deals with the abuse of tax law concept as it was defined in case law of the Court of Justice of the European Union and by Czech courts. The main aim of the contribution is to confirm or disprove the hypothesis that abuse of law concept as it was introduced by Czech courts is not in line with case law of the Court of Justice of the European Union, and to determine how it can influence Czech taxation.

Both the jurisprudence of the Court of Justice of the European Union and Czech highest courts is analysed. For the sake of clarity, the case law in all chapters is divided into value added tax area and direct taxation. There are highlighted the different conditions of abuse of value added tax law and direct tax law as defined by the Court of Justice of the European Union, and its application, resp. non-application to Czech case law.

The paper uses standard methods of scientific work, as methods of description, synthesis, deduction and induction and also comparative analysis. It is a partial output of project of Internal Grant Agency of SKODA AUTO Univer sity no. IGA/2012/06: "Abuse of law versus legal optimization of tax liability".

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Key words

Abuse of law; tax law; tax avoidance; jurisprudence.

JEL Classification

K34, H87

1 Introduction

For years, abuse of law is known as civil law concept, typically when someone executes his subjective law to unjustified detriment of other person or society. Such behaviour does not benefit from legal protection.

Is this typically private law concept applicable to tax law, i.e. the branch of public law? Even if abuse of tax law is not defined by Czech tax law, it is used as one of general anti-avoidance rules to challenge tax liability. Abuse of law is mentioned only in Civil Code, Art. 8 as follows: "Obvious abuse of law does not benefit from legal protection". As a consequence of Czech abuse of tax law concept, additional tax may be imposed including penalties. Such behaviour may have also criminal consequences.

Abuse of tax law has been subject to large development by case law of the Court of Justice of the European Union. The aim of this article is to analyse the most important case law of the Court of Justice of the European Union and based on this analyses to provide an overview of recent trends in this case law and try to define the conditions of abuse of tax law. Then, compare these conditions with Czech case law of the highest courts (mostly of the Supreme Administrative Court and Czech Constitutional Court), and to identify the differences between conditions of abuse of tax law of Court of Justice of the European Union and Czech courts (if any). Finally, examine the impact of case of the Court of Justice of the European Union to Czech taxation.

The paper uses standard methods of scientific work. Firstly, the method of description is used, to describe the definition of abuse of law in legal theory. Then, comparative analysis is used to discuss the differences between the case law of the Court of Justice of the European Union and Czech courts.

Finally, the method of synthesis, deduction and induction is used, when looking for influence of case law of the Court of Justice of the European Union to Czech taxation.

This is a partial output of project of Internal Grant Agency of SKODA AUTO University no. IGA/2012/06: "Abuse of law versus legal optimization of tax liability".

In the European Union, a lot of scientific work has already been done (e.g. De Broe, 2008; Jiménez, 2012: 4-5; Prebble, Z., Prebble, J., 2008:4; Peteva, 2009: 483, Pistone, 2010: 7-8; Schwarz, 2008: 7; Weber, 2013: 7-8). However, comparing to wide scale of foreign literature, in the Czech Republic only minor articles have been published (e.g. Nováková, Lichovský, 2008: 4; Burda, 2009: 4; Skalická, 2011: 6, Skalická, 2012; Skalická, 2013: 13). Also with regard to the topic (influence of case law of court of justice of the European Union to the taxation in the Czech Republic) most references in this paper are references directly to case law of Court of Justice of the European Union and Czech courts.

2 The concept of abuse of tax law

Abuse of tax law forms one of general anti-avoidance rules[2] (more information can be found in Skalická, 2013). However, the term abuse of tax law is not satisfactorily defined neither in any source of law of the European Union, nor in the law of the Czech Republic.

In (Prebble, Prebble, 2008: 4) abuse of law or fraus legis is defined as: "Civil law doctrine, not restricted to tax law, which is broadly equivalent to the substance over form doctrine often referred to in common law systems. Although the specific criteria vary from country to country, its essence is that the purpose or intention of the legislators prevails over the actual form of a transaction or series of transactions if this form is not specifically contemplated by the law and the same economic results could have been obtained in another manner. Criteria for its application usually involve a degree of artificiality or abnormality and/or (in a tax context)

2 In the Czech Republic, among general anti-avoidance rules belong abuse of law and substance over form rule, and among specific anti-avoidance rules belong transfer pricing and thin capitalization.

a tax avoidance motive. As such, it may be seen as a means of combating tax avoidance or tax evasion. The result of applying the doctrine is typically that the private law form of a transaction or transactions is ignored and substituted by a form that is consistent with economic reality. In a treaty context, such an approach is sometimes referred as fraus tractatus or fraus pactis".

As it will be stated later in this article, this definition is inaccurate and not applicable in the Czech Republic. In the Czech Republic, it is divided between substance over form rule and abuse of law[3]. The substance over form rule is defined in Tax Procedure Code, Art. 8/3 as follows: "The tax authority takes into account the actual content of the legal act or other facts relevant for tax administration". In authors 'opinion, Czech definition of substance over form reminds the definition of abuse of law under Prebble, Z., and Prebble, J. as cited above.

However, the above cited definition of Prebble, Z. and Prebble J. is contained in glossary of IBFD (Larking, 2009). Therefore, if anyone from the world will look to IBFD glossary (both written and internet version), he will find just this definition. Therefore, it is not surprising, that the meaning of abuse of tax law is contentious.

3 Abuse of law in case law of Court of Justice of the European Union

3.1 Cases from various areas of law

Although Court of Justice of the European Union refers to abuse of law for more than 30 years, it never recognized abuse as an autonomous concept of the EU law, as it has done explicitly for other concepts such as the concept of "worker" and various legal definitions under secondary EU law (Peteva, 2009: 483).

Before we will look to case law of abuse of tax law, the following earlier decisions from others areas of law will be examined. The reason is that the

3 From the earliest decisions regarding abuse of law (e.g. the Supreme Administrative Court: 1 Afs 107/2004 and 1 Afs 35/2007) follows, that the tax administrator challenged the tax treatment applied by the taxpayer firstly by the substance over form rule. However, both the Regional and the Supreme Administrative Court held that it should not be challenged by substance over form rule, but by abuse of law concept.

later decisions of Court of Justice of the European Union very often refer just to the case law mentioned in this chapter, so we can better understand the whole concept of abuse of tax law.

The Court of Justice of the European Union in the case C-367/96 dealt with the interpretation of Article 25 of the Second Council Directive 77/91/EEC of13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, and on the abusive exercise of a right arising from a provision of the European Union law. The court in par. 22 ruled that: "Although the Court cannot substitute its assessment for that of a national court, which is the only forum competent to establish the facts of the case before it, it must be pointed out that the application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States … In particular, it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it."

Another important case is the case of Court of Justice of the European Union C212/97, which dealt with freedom of establishment, in particular with establishment of a branch by a company not carrying on any actual business. The court held that: „It is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, undercover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law … However, although, in such circumstances, the national courts may, case by case, take account - on the basis of objective evidence - of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those

provisions (*Paletta II*, paragraph 25). … The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary. … That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty."

Next, in the case of Court of Justice of the European Union: C-110/99, which dealt with export refunds on agricultural products, the court in paragraphs 52 and 53 held that: „A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, *inter alia*, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country."

From the above mentioned decisions we can deduce that:

- To conclude that some situation constitutes abuse of right, two tests must be performed: objective test (that there are objective circumstances in which the purpose of particular provision of EU law cannot be attained), and subjective test (the person has intention to abuse law),
- The national courts do not have competence to alter the scope of provisions of EU law or to compromise the objectives pursued by it.

3.2 Cases from tax law – value added tax

Court of Justice of the European Union has applied above mentioned objective and subjective tests also in tax cases.

First was the case C-255/02 (Halifax Plc). The court ruled the following: "To be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage

As regards the second element, whereby the transactions concerned must essentially seek to obtain a tax advantage, it must be borne in mind that it is the responsibility of the national court to determine the real substance and significance of the transactions concerned. In so doing, it may take account of the purely artificial nature of those transactions and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden (see, to that effect, *Emsland Stärke*, paragraph 58)".

From this quotation we can see, that apart from the application of objective and subjective test as stated in case C-110/99, another condition to find transaction abusive is that tax advantage is obtained. Moreover, when executing the subjective test, the national court should look to artificiality of the transaction and its economic nature.

There were discussions whether the essential aim, as it was mentioned in case C-255/02 above means the sole purpose of the transaction or the main aim of the transaction. The source of these discussions we can find in opinion of advocate general to this case, where he mentioned that: "It also provides a safeguard for those instances where the sole purpose of the activity might be to diminish tax liability but where that purpose is actually a result of a choice between different tax regimes that the Community legislature

intended to leave open. Therefore, where there is no contradiction between recognition of the claim made by the taxable person and the aims and results pursued by the legal provision invoked, no abuse can be asserted".

The problematic of the aim of the transaction was later specified in the case of Court of Justice of the European Union C-425/06 as follows: "The Sixth Directive must be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue." Therefore, the court held that situation is abusive when the principal aim of the transaction is to obtain tax advantage, not only its sole purpose.

These conclusions were later confirmed in the case of Court of Justice of the European Union C-103/09: "First, notwithstanding formal application of the conditions laid down in the relevant provisions of the Sixth Directive and in the national legislation transposing it, the transactions concerned must result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions (see *Halifax and Others*, paragraph 74, and *Part Service*, paragraph 42). Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. The prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages (see *Halifax and Others,* paragraph 75, and *Part Service*, paragraph 42)".

In the case C-277/09 Court of Justice of the European Union referred to previous case law regarding value added tax mentioned above and moreover it looked to artificiality as follows: "… As the national court has observed, the characteristics of the transactions at issue in the main proceedings and the nature of the relations between the companies that carried out those transactions contain nothing to suggest an artificial arrangement that does not reflect economic reality and the sole aim of which is to obtain a tax advantage … In those circumstances, the fact that services were supplied to a company established in one Member State by a company established in another Member State, and that the terms of the transactions carried out

were chosen on the basis of factors specific to the economic operators concerned, cannot be regarded as constituting an abuse of rights. RBSD in fact provided the services at issue in the course of a genuine economic activity."

Therefore, from the above mentioned judgments we can conclude that in area of value added tax, abuse of law will be constituted if:

- A transaction is contrary to the objective of a provision of VAT Directive or any other source of EU law in the area of value added tax (objective test), and
- The principal aim of the transaction is obtaining of tax advantage; the transaction is artificial or does not reflect economic reality (subjective test).

3.3 Cases from tax law – direct taxes

As we will see, the conditions of abuse of tax law in direct taxes area the court didn´t defined in the same way as in the case of value added tax.

One of the most important decisions in the direct taxes area is the decision of the Court of Justice of the European Union: C-196/04 (Cadbury Schweppes). It dealt with freedom of establishment, in particular whether law on controlled foreign companies may restrict freedom of establishment. Similarly to the legislation in area of value added tax, the court mentioned both objective and subjective test of abuse of law. However, there are some differences in content of test in direct tax area comparing to value added tax.

The court held that: "It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory." Finding about wholly artificial structure: "must be based on objective factors which are ascertainable by third parties with regard, in particular, to the extent to which the CFC physically exists in terms of premises, staff and equipment. In this case, it is for the national court to determine whether, as maintained by the United Kingdom Government, the motive

test, as defined by the legislation on CFCs, lends itself to an interpretation which enables the taxation provided for by that legislation to be restricted to wholly artificial arrangements or whether, on the contrary, the criteria on which that test is based mean that, where none of the exceptions laid down by that legislation applies and the intention to obtain a reduction in United Kingdom tax is central to the reasons for incorporating the CFC, the resident parent company comes within the scope of application of that legislation, despite the absence of objective evidence such as to indicate the existence of an arrangement of that nature."

The advocate general in his opinion to this case mentioned more criterions which should be applied to ascertain whether there is abuse of tax law. However, the court didn´t follow advocate general in these two criterions, even they can be of importance:

> (i) The genuine nature of the activity provided by the subsidiary – i.e. the competence of the subsidiary´s staff in relation to the services provided and the level of decision-making in carrying out those services,
>
> (ii) The economic value of that activity with regard to the parent company and the entire group.

Next, the Court of Justice of the European Union in case C-524/04 dealt with thin capitalization rules in the United Kingdom. The court ruled that: "… Legislation of a Member State may be justified by the need to combat abusive practices where it provides that interest paid by a resident subsidiary to a non-resident parent company is to be treated as a distribution only if, and in so far as, it exceeds what those companies would have agreed upon on an arm's-length basis, that is to say, the commercial terms which those parties would have accepted if they had not formed part of the same group of companies. The fact that a resident company has been granted a loan by a nonresident company on terms which do not correspond to those which would have been agreed upon at arm's length constitutes, for the Member State in which the borrowing company is resident, an objective element which can be independently verified in order to determine whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax

legislation of that Member State. In that regard, the question is whether, had there been an arm's-length relationship between the companies concerned, the loan would not have been granted or would have been granted for a different amount or at a different rate of interest."

Another case from the area of direct taxation dealt with Merger Directive. The Court of Justice of the European Union in this case C-126/10 held that: "Furthermore, it should be noted that Article 11(1)(a) of Directive 90/434 reflects the general principle of EU law that abuse of rights is prohibited. The application of EU legislation may not be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by that law (see, to that effect, Case C212/97 *Centros* [1999] ECR I1459, paragraph 24; Case C255/02 *Halifax and Others* [2006] ECR I1609, paragraphs 68 and 69; and *Kofoed*, paragraph 38)."

What we can conclude from above mentioned decisions? The conditions for abuse of tax law in the case of direct taxes are the following:

- With regard to the fact that direct taxes are harmonized only in very little extent, so there is almost no secondary EU law, the objective test is mostly based on interpretation of EU freedoms (in tax area mainly the right of establishment). Only Court of Justice of the European Union has jurisdiction to such interpretation.
- Under subjective test in direct taxes, there is abuse of tax law if the particular situation/transaction presents: "wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory." (Court of Justice of the European Union, C-196/04). Next, the physical presence of premises, staff and equipment should also be considered when examining the abuse of direct tax law.
- Moreover, of importance also could be the genuine nature of the activity provided by the subsidiary and the economic value of that activity with regard to the parent company and the entire group (as mentioned in opinion of advocate general, even if the court hasn´t followed him in this part).

4 Abuse of law in case law of Czech courts

4.1 Direct tax case law

The first decision on abuse of tax law in the Czech Republic is decision of the Supreme Administrative Court: 1 Afs 107/2004 as of 10. 11. 2005. It is the decision from the area of personal income tax, which dealt with possibility to reduce the tax base of individual by the value of gifts donated to civic association. The problem was that this civic association was formed only by family members and that this association financed only the needs of family members. The tax administrator challenged this reducing of tax base based on substance over form rule. However, the Supreme Administrative Court held that it is not substance over form rule[4], but that it is abuse of law. It stated that: "Abuse of law is situation, when someone executes his subjective law to unjustified detriment of other person or society; such behaviour leading to forbidden result is only seemingly permitted. Objective law does not know behaviour which is legal and at the same time illegal; with regard to the fact that from the principle lex specialis derogate legi generali it implies that prohibition of abuse of law is stronger than permission provided by law (see Knapp, V: Teorie práva (Theory of law, 1995). Therefore, such behavior is not execution of law, but illegal act, so the court will not provide its protection. … This particular situation presents abuse of subjective public right to deduction of amount of gift from tax base in the sense of article 15/8 of Income Tax Act." (authors´translation)

In this judgment, the Supreme Administrative Court made no reference to case law of the Court of Justice of the European Union[5].

The taxpayer didn´t agree with this judgment, so he submitted constitutional complaint to the Czech Constitutional Court. The Constitutional Court in the decision no. II. ÚS 2714/07 as of 6 August 2008[6] confirmed the decision of the Supreme Administrative Court and held that this situation pres-

4 As defined in Tax Procedure Code, for details please see part 2 of this contribution.

5 This judgment was issued earlier than first tax case of Court of Justice of the European Union (case C-255/02 was issued as of 21. 2.2006). However, there was a lot of abuse of law cases from other areas of law, where the court could find inspiration (e.g. judgments mentioned in part 3.1 of this contribution).

6 I.e. after 2,5 years after issue of the judgment of the Supreme Administrative Court.

ents abuse of law. It ruled that: "Although the financial law does not explicitly define abuse of law principle, it does not mean that in this area of law abuse of law or circumvention of law could occur, respectively that behaviour that shows signs of abuse of law could not be identified as such, and adequate legal consequences drawn. … Legal doctrine defines abusive (abuse iuris) behaviour as seemingly permitted, by which should be achieved the illegal result; specific case of abuse of rights is bullying behaviour (bullying law execution) that lies in the fact that someone is exercising his right with the intention to cause disproportionate harm to another. … From the principle *lex specialis derogat generali* it implies that the ban of abuse of law is stronger than the permission provided by law. Therefore, if certain legal act some kind of behavior allows and the other (assuming that it is in the above sense abused) prohibits it, such behavior is in fact not the exercise of the right, but the infringement." (authors´ translation)

The Constitutional Court referred to the following case law of the Court of Justice of the European Union: C-63/04 (Centralan Property Ltd), C-110/99 (Emsland-Stärke) and C-255/02 (Halifax plc.). It implies that to direct tax situation the court applied two cases from value added tax area and one regarding export refunds on agricultural products.[7]

Next case, where the Supreme Administrative Court held that it is abuse of tax law, is the case no. 1 Afs 35/2007 as of 17 December 2007. This case dealt with back-to-back leasing of the company, i.e. with corporate income tax. The Supreme Administrative Court referred to the judgment of the Court of Justice of the European Union: C-255/02 (Halifax plc.), the case regarding value added tax. The reference to this case was, however, very brief: "The abuse of law presents situation, when from all objective circumstances follows that the main purpose of the transaction is, despite formal observance of the conditions of relevant legislation, obtaining of tax advantage which is contrary to the objective pursued by the legislation. Thorough

[7] This case was later confirmed by the Supreme Administrative Court in judgment 5 Afs 58/2011, where the facts were almost the same as in the original case (only members of the civic association were not exclusively family members, but these "foreign" members were only minor). The Court held that that such situation is abuse of tax law. Even if it dealt with personal income tax, it used abuse of law test mentioned in value added tax case law of the Court of Justice of the European Union: C-255/02 (Halifax Plc) and case regarding export refunds on agriculture products: C-110/99 (Emsland-Stärke).

analysis of the cited judgment of the Court of Justice of the European Union and the Opinion of Advocate General was done by the Supreme Administrative Court in the judgment no. 2 Afs 178/2005 as of 23. 8. 2006[8]" (authors 'translation) We can see that, even though this case deals with corporate income tax, the court applied conditions of abuse of law for value added tax.

In author´s opinion, the application of principles of abuse of law defined by the Court of Justice of the European Union for value added tax to direct tax cases in the Czech Republic is not correct. As mentioned above, there are different conditions for abuse of law in value added tax area and area of direct taxes defined by the Court of Justice of the European Union. The application of principles of value added tax to direct tax law case requires deep analysis of the law, which Czech court didn´t perform. Czech court only very briefly referred to the case C-255/02. However, Czech courts are not the only ones who act in like this. Italian courts also applied principles of abuse of law in area of value added tax to direct tax cases (Pistone, 2010: 7 – 8). Prof. Pistone is also of the opinion that this is not in line with the European law, in particular he mentioned that: "Although the author supports, in principle, the need to expand the abuse of law theory to the entire tax domain, based on the argument that the settled case law of the ECJ provides that no one can rely on EU law for abusive or fraudulent purposes, the author rejects the idea that such a conclusion can be reached by a national court, especially one acting as court of last instance, as an unresolved issue of EU law cannot be dealt with simply by reading such a principle into the law; rather it requires a more thorough interpretation of EU law, which is not for national court to do."

4.2 Value added tax case law

The first case, where Supreme Administrative Court assessed the abuse of tax law is case no. 2 Afs 178/2005. It dealt with value added tax on imported goods before the Czech Republic joined the European Union. The court held that this is not abuse of law. In this decision, the court made a wide reference to case of the Court of Justice of the European Union

8 This is mentioned in the part 4.2 of this article.

C-255/02 (Halifax plc.) and cited also from the opinion of advocate general to this case. The author appreciates that the Supreme Administrative Court used, with regard to approximation of Czech legislation to the European law), case law of the Court of Justice of the European Union to situation which happened soon before Czech Republic joined the European Union. The court extensively referred to the opinion of advocate general to this case (par. 84 – 89), even to the parts which were not fully followed by the Court of Justice of the European Union in the judgment[9]: "1. Objective analysis of abuse of law has to be balanced against the principles of legal certainty and protection of legitimate expectations (these principles are in Czech law defined in Art. 1/1 of the Constitution of the Czech Republic, indirectly arise also from Art. 2/2 of the Deed of Fundamental Rights and Freedoms), so the taxpayer is entitled to know in advance his tax position, and from this reason he has to have right to rely on the plain meaning of the words of laws on value added tax. 2. Taxpayers may choose to structure their business so as to limit their tax liability. A trader's choice between exempt transactions and taxable transactions may be based on a range of factors, including tax considerations relating to the VAT system. There is no legal obligation to run a business in such a way as to maximize tax revenue for the State. The basic principle is that of the freedom to opt for the least taxed route to conduct business in order to minimize costs. On the other hand, such freedom of choice exists only within the scope of the legal possibilities provided for by the VAT regime. The normative goal of the principle of prohibition of abuse within the VAT system is precisely that of defining the realm of choices that the common VAT rules have left open to taxable persons. Such a definition must take into account the principles of legal certainty and of the protection of taxpayers' legitimate expectations. The scope of the interpretative principle prohibiting abuse of the VAT rules must be defined in such a way as not to affect legitimate trade. Such potential negative impact is, however, prevented if the prohibition of abuse is construed as meaning that the right claimed by a taxable person is excluded only when the relevant economic activity carried out has no other objective

9 The part about the sole purpose (as stated advocate general) and essential aim (as stated the court), for details please refer to part 3.2 of this contribution.

explanation than to create that claim against the tax authorities and recognition of the right would conflict with the purposes and results envisaged by the relevant provisions of the common system of VAT. Economic activity of that kind, even if not unlawful, deserves no protection from the Community law principles of legal certainty and protection of legitimate expectations because its only likely purpose is that of subverting the aims of the legal system itself. The prohibition of abuse, as a principle of interpretation, is no longer relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages against tax authorities. In such circumstances, to interpret a legal provision as not conferring such an advantage on the basis of an unwritten general principle would grant an excessively broad discretion to tax authorities in deciding which of the purposes of a given transaction ought to be considered predominant. It would introduce a high degree of uncertainty regarding legitimate choices made by economic operators and would affect economic activities which clearly deserve protection, provided that they are, at least to some extent, accounted for by ordinary business aims." (authors´ translation)

Very similar case to the above mentioned are the cases no. 7 Afs 54/2006, 7 Afs 55/2006 as of 19 December 2007 (joined cases) and 2 Afs 40/2007 as of 21 October 2008, which dealt with import of bank machines and credit cards. The court referred to the own judgment no. 2 Afs 178/2005 and cited from him a lot (mentioned above). Moreover, the court mentioned regarding fraud behaviour also the following cases of the Court of Justice of the European Union: C-439/04 (Axel Kittel), C-354/03 (Optigen Ltd), C-355/03 (Fulcrum Electronics Ltd) and C-484/03 (Bond House). However, the Supreme Administrative Court "just" mentioned these decisions, it didn´t analysed them at all.

In all about mentioned value added tax cases the Supreme Administrative Court held that those situations didn´t present abuse of law. However, in the decisions no. 5 Afs 61/2008 as of 27 November 2008 and 2 Afs 83/2010 as of 26 January 2011 the Supreme Administrative Court held that there is abuse of tax law. The cases dealt with the artificial created transactions in order to claim deduction on value added tax. The court

refers again to its previous case law mentioned above. Regarding case law of the Court of Justice of the European Union it refers to case C-255/02 (Halifax Plc), and also C-425/06 (Part Service), C-98/98 (Midland Bank), C-16/00 (Cibo Participations). However, in any of these decisions, deeper analysis of case law of the Court of Justice of the European Union was not done, nor any case was referred for preliminary ruling to the Court of Justice of the European Union (although it is up to Court of Justice of the European Union decide perform the objective test, national courts are allowed to perform subjective test).

The Supreme Administrative Court held that the situation presents abuse of law also in the case no. 8 Afs 43/2013 as of 28 January 2014. It relates to VAT deduction in fraudulent chain of companies set up in order to claim VAT deductions. The court referred to its previous cases (1 Afs 107/2004, 2 Afs 178/2005, 1 Afs 35/2007, 5 Afs 61/2008 – i.e. references both to direct taxes and value added tax) and cases of Court of Justice of the European Union C-255/02 Halifax and C-354/03, C-355/03 and C-484/03 – Optigen. Again, the Supreme Administrative Court "only" referred to these decisions, it didn´t analysed them in the judgment.

5 Conclusion

Even though direct taxes are not almost harmonized by law, the Court of Justice of the European Union affects the direct taxation significantly by its case law as negative legislator.

Regarding abuse of law concept, the Court of Justice of the European Union defined conditions of abuse of law both for value added tax on one hand and direct taxes on the other hand. Although these conditions differ, Czech courts mostly do not distinguish between them. Both Supreme Administrative Court and the Constitutional Court of the Czech Republic apply principles of abuse of law in value added tax to direct tax cases. In author´s opinion, this is not excluded (even in the area of direct taxation, which is not much harmonized), but such application requires deeper analysis of the law which wasn´t done in any of above mentioned cases.

Next, Czech courts usually perform only subjective test with absence of objective test. This is correct, because the Court of Justice of the European Union

held that the only court which has the jurisdiction to perform objective test is the Court of Justice. National courts should refer the matter to the Court of Justice of the European Union as preliminary ruling. Because value added tax is harmonized in the level of the European Union, there is a space for submitting preliminary questions to the Court of Justice of the European Union. Finally, the references of Czech courts to the jurisprudence of Court of Justice of the European Union are very limited and no deep analysis is contained in the judgments. The references are both in direct tax cases and value added tax cases are most often only to cases regarding value added tax (C-255/02 and C-425/06).

It implies that Czech courts created own abuse of tax law concept. It can be seen that they inspire in the Court of Justice of the European Union regarding value added tax case law, but they apply this case law to all areas of tax law including direct taxes. Therefore, in authors 'opinion, the abuse of tax law concept is not in the Czech Republic satisfactorily neither defined, nor applied. It will be up on Czech courts to clarify this issue in more detail.

Notwithstanding this unsatisfactory definition, Czech courts and even tax administrators, use abuse of law concept for challenging tax treatment more and more often. It is a question, whether the taxpayer can succeed in any of European courts (i.e. Court of Justice of the European Union or Court of Human Rights and Freedoms) in the situation when: (i) Czech law contains no definition of abuse of tax law, and (ii) the decisions of courts are of so vague justification.

The main aim of the contribution is to confirm or disprove the hypothesis that abuse of law doctrine as it was introduced by Czech courts is not in line with case law of the Court of Justice of the European Union and to determine how it influenced Czech taxation. As stated above, this aim was fulfilled and this hypothesis confirmed.

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THE NEW ANTI ABUSE RULE IN SLOVAK TAX LAW: STRENGTENING OF LEGAL CERTAINTY?[1]

Anna Romanova[2]

Abstract

This contribution deals with a new anti-abuse rule introduced into Slovak tax legislation aimed at preventing tax avoidance achieved by arrangements without economic substance in order to escape the tax duty. Author will analyze the adopted legislation and changes it brings in order to assess whether this new legislation makes the identification of abuse of law in tax matters more precise and whether it contributes to increase of the quality of the legislation. Especially the methods of analysis, synthesis, comparison and historical methods will be applied.

Key words

Tax; law; EU; case law; abuse; procedure.

JEL Classification

K34, K42

1 Introduction

Since 1st January 2014, a new anti-abuse rule aimed at preventing taxpayers benefiting from artificial arrangements without economic substance has been introduced into Slovak tax legislation. The then provision of Art.

1 The paper represents a partial output from the implementation of project VEGA No. 1/1170/12 "*The impact of tax policy of the EU on national legislation in the Slovak Republic*".

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3 par. 6 of the Act no. 563/2009 Coll., on tax administration (The Code of Tax Procedure) and on change and amendment of certain laws, as amended (hereinafter only "*Code of Tax Procedure*") stating that: "*If, within the administration of taxes, a special regulation is applicable, only the actual content of the legal action or other fact essential for assessment or collection of a tax shall be taken into consideration.*" has been supplemented by a new regulation, as follows: "*A legal action or other facts essential for identification, assessment or collection of a tax without an economic substance and resulting into a purpose-built tax avoidance or acquisition of such tax benefit to which the taxpayer would not be otherwise entitled or resulting into a purpose-built reduction in tax liability shall be disregarded within administration of taxes.*"

The principles of tax administration have always been the matter of analysis of the professionals and representatives of jurisprudence (see: Vernarský, 2013; Molitoris, 2013; Lang, 2010; Babčák, 2010; Vernarský, 2009; Šefl, 2009; Bujňáková, 2005). Nevertheless, the principle of abuse of law has not been clearly enacted in the Slovak tax legislation, until now. As. De la Feria mentions, the principle of abuse of rights is more or less recognised by various countries (de la Feria, 2008: 1), however, this concept and the comprehensiveness of its elaboration varies a lot and as she concludes, we may recognise the creation of a general principle of abuse of law based on the Court of Justice of the European union (hereinafter only "ECJ") case law in tax matters (de la Feria, 2008: 22). Do we then need to enact it in the domestic legislation?

The mentioned change in the Slovak tax law does not have any direct "ancestors" in the legislation, though, and has rather been only mentioned by tax professionals than analysed in depth (Buláková, 2014: 3). The aim of this article is therefore to analyse the adopted legislation and the reasons that led into such a change and assess the outcomes of the amendment to the former legislation. We will also use the comparison with the situation in the Czech Republic due to a high level of similarities of both legal orders. Hence, especially the methods of analysis, synthesis, comparison and historical methods will be applied.

We will try to conclude whether the assumption that the new legislation makes, on the one hand, the identification of abuse of law in tax matters

more precise, and on the other hand, creates inappropriately wide uncertainty regarding the proper interpretation thereof will be confirmed.

2 Former regulation and the reasons for the amendment

The new provision supplements the standard substance over form principle[3] applied even within the former regulation. As Karfikova stresses, a disguised qualification of certain activities or associated actions cannot be considered as relevant for assessment or collection of a tax in the tax proceeding because it is only the true content thereof that is crucial in this regard (Bakeš, 2009: 260). This means that under this provision, if taxpayers or other persons pretend a legal relationship or a fact in order to achieve a more favourable tax result, it will be the covered relationship not the covering one that will be treated as genuine. This re-qualification by the tax administrator must, however, be proved and reasoned within the reasoning of the decision of tax administrator (Highest Administrative Court of the Czech Republic: 5 Afs 29/2003 – 85).

According to the above, the Slovak tax law regulation has already contained some sort of general "anti-abuse" rule enabling the tax administrators not take into consideration the action of a taxpayer targeted at circumvention of law by pretending a legal relationship or a matter of fact. What are then the reasons for strengthening the then regulation? As the Explanatory report to the Act no. 435/2013 Coll. (hereinafter only "*Explanatory report*") states on the page 7, the above provision of Art. 3 of the Code of Tax Procedure has been amended on the grounds of:

- initiative of Slovak republic in fight against tax frauds (see more: Kočiš, 2012) taking into consideration especially the measures proposed by the Analysis of the payments for goods, services and other forms of payments made by taxpayers for the benefit of persons established in non-cooperative and off-shore jurisdictions, as well as

[3] Also known as principle of actual content of an legal action, the principle of material truth (Kobík, Kohoutková, 2010: 54), the principle of authenticity of tax proceedings (Balko, 2010: 404), the principle of informality (Babčák, 2010: 390), or the principle of objective truth (Mrkývka, 2004: 45).

- Commission recommendation of 6 December 2012 on aggressive tax planning (C(2012) 8806 final) (hereinafter only "*Recommendation*") whereby the European Commission, in order to counteract aggressive tax planning practices which fall outside the scope of specific anti-avoidance rules of the Member States, encourages in Art. 4.2 and seq. the Member States to introduce the following clause in their national legislation: "*An artificial arrangement or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit shall be ignored. National authorities shall treat these arrangements for tax purposes by reference to their economic substance*."

3 The new clause

The newly adopted provision covers these situations:

a) legal actions or other facts without economic substance with the result of a purpose-built tax avoidance;
b) legal actions or other facts without economic substance with the result of a purpose-built acquisition of such tax benefit to which the taxpayer would not be otherwise entitled;
c) legal actions or other facts without economic substance with the result of a purpose-built reduction in tax liability.

As we see, there are several criterions to be met if particular action is to be subject under this provision:

1. legal actions or other facts with
2. no economic substance at all; and
3. the result, that is either tax avoidance, acquisition of inappropriate tax benefit or reduction in tax liability; as well as, that
4. any of the above results was achieved on purpose.

Even despite the fact, that the new clause was adopted on the basis of the Recommendation´s anti-abuse clause, the wording of the two of them does not truly match and given the fact that the case law in Slovak republic has only dealt with the abuse of law based n the former provision, the interpretation of new provision and its application may be quite ambiguous.

The Recommendation further in Art. 4.3 to 4.7 provides the states with a guidance regarding the interpretation of the recommended provision.

However, we are of the opinion that such an interpretation as given by the Recommendation may be fully used by the applying authorities only on condition that the (newly) adopted legislation truly mirrors the wording of the clause thereby provided, and therefore, the proposed interpretation cannot be just taken without any reflections and potential differences have to be taken into consideration.

Ad 1) legal actions or other facts

The new clause counts with various types of behaviour that create an artificial arrangement, comprising *legal actions or other facts essential for identification, assessment or collection of a tax,* meaning that it does need to be only a contract or unilateral action. The provision is wide enough to cover any situation lacking economic substance aimed at unwanted tax optimalisation. In this regard, the list of possible arrangements provided by Art. 4.3 of the Recommendation including transactions, schemes, actions, operations, agreements, grants, understandings, promises, undertakings or events is fully usable to imagine what kind of behaviour will be covered by the clause.

Ad 2) the lack of economic substance

The second criterion is the lack of economic substance in the legal relationship or transaction. The wording of the clause is rather strict and thus may only be interpreted that in case of presence of at least any economic reason of the actions or structures these may not be qualified as in breach of the anti-abuse clause. Nevertheless, it is hard to conclude what extent of actual economic substance in particular case will be classified by a tax administrator as enough to acknowledge the presence of economic substance of an operation/relationship.

Contrary to the Slovak clause, the Recommendation speaks of "artificial arrangements" and, according to its Art. 4.4, the lack of commercial substance is considered as a distinguishing feature of such an artificial arrangement. The Recommendation further contains a set of features referring to artificiality of an arrangement if at least one of them is at presence, comprising:

a) *the legal characterisation of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole;*

b) *the arrangement or series of arrangements is carried out in a manner which would not ordinarily be employed in what is expected to be a reasonable business conduct;*

c) *the arrangement or series of arrangements includes elements which have the effect of offsetting or cancelling each other transactions concluded are circular in nature;*

d) *the arrangement or series of arrangements results in a significant tax benefit but this is not reflected in the business risks undertaken by the taxpayer or its cash flows;*

e) *the expected pre-tax profit is insignificant in comparison to the amount of the expected tax benefit.*

We assume that since the lack of economic substance actually means artificiality, the Slovak tax administrators may use these guidelines to identify the artificiality, thus the lack of the economic substance as the first criterion.

Ad 3) the result

The emphasis is on the result as an objective state. If the arrangement results in one of the three expected events – tax avoidance, acquisition of inappropriate tax benefit or reduction in tax liability, then the criterion is met. The achievement of this result is the matter of judgment of tax administrator. In this respect, the most reasonable way to come into conclusion is comparison of the result under the structure used by the taxpayer and one that would be achieved if such a structure had not been used. This is also the idea of the Recommendation in Art. 4.7: *„In determining whether an arrangement or series of arrangements has led to a tax benefit as referred to in point 4.2, national authorities are invited to compare the amount of tax due by a taxpayer, having regard to those arrangement(s), with the amount that the same taxpayer would owe under the same circumstances in the absence of the arrangement(s).".* Nevertheless, such a comparison may only be done if it had been concluded that the arrangements are artificial. Otherwise this would mean undue restriction of taxpayer´s right to choose the most favourable tax regime.

There should be mentioned that the provision does not give a plain answer to the question whether the above result (or one of three) is meant to be understand as one among other results achieved, but we assume that this is the correct interpretation and that presence of other results (of non-tax character) will not touch the one predicted by the provision.

Ad 4) the purpose

Within all the presumed results of the artificial behaviour of the taxpayer under the new clause, there is a common feature of a purpose either to avoid paying the tax in full or in part or to obtain an inappropriate tax benefit. This purpose, however, is not further characterised. It is neither characterised as the Recommendation´s "*essential purpose*" (meaning the most important but not the only purpose), nor as the sole purpose. What kind of purpose is it then?

According to the Explanatory report, the aim of the new provision is to: "*enable tax authorities to disregard within administration of taxes e.g. artificial transactions and structures created for the purpose of an undesired tax optimalisation even in case that such an optimalisation is* ***not the sole purpose*** *of the transactions and structures.*" As we compare the actual wording "*A legal action... ...resulting into a* ***targeted/purpose-built*** *tax avoidance...*" and the declared explanation *"...in case that such an optimalisation* ***is not the sole purpose****..."*, we can see that these do not truly match.

What is the correct interpretation of the statutory provision? We already mentioned the interpretation given by the Report showing the aim of the provision meaning that the aim of the legislator was to cover the situations where there is, among other aims, also an aim of unwanted tax optimalisation. This is an important source of interpretation, however, we cannot forget about the rule the if the reasoning of a Report does not correspond to the actual wording of a statutory provision, the "wanted" way of interpretation may not be used as a means of correcting the "wrong" wording of a statute (see also: Constitutional Court of the Czech Republic: I. US 22/99: *„the court by using an anti-constitutional interpretation "in dubio pro fisco" interpreted the provision of Art. 20 par. 6 letter g) of Act on inheritance tax, gift tax and tax on transfer of real property as amended by Act. No. 73/1994 Coll. to detriment of the holder of fundamental rights and freedoms and, thus, had broken the fundamental principles of relationship between the state and an individual. In a legal state, the court must not rectify the errors of the legislator in wording of a piece of the legislation by such an interpretation that will cause the adjustment of an constitutionally conformable but for the state unprofitable legislation.*"). Therefore, we have to support this interpretation by another method of interpretation.

Using the linguistic interpretation method, the wording "…*resulting into a purpose-built avoidance*…" indicates that the meaning of purpose may be seen in a wider sense. The legislator used neither any word to limit the purpose, e.g. "only/solely/fully for purpose of" nor any word plainly indicating the possibility of variety of purposes (e.g. mainly for purpose, for essential purpose) which in our view indicates that the legislator did not want to restrict the interpretation and cover situations in which there will be this one purpose-built result with no respect to other results or other purposes. Therefore, we are of the opinion that there may be even other purposes along with the one targeted at tax liability.

The next question is proving of purpose, meaning whether there is an assumption of purpose being present given the circumstances of the structure with or without the possibility of exculpation or whether the purpose must be proved by tax administrator. Well, if the former, it might be too harsh for the taxpayer and if the latter, the provision might become less efficient.

Given the reasoning of Art. 4.5 of the Report, "*for the purposes of point 4.2, the purpose of an arrangement or series of arrangements consists in avoiding taxation where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit and purpose of the tax provisions that would otherwise apply*". The Report has chosen the objective principle with the presumption of presence of the purpose given the circumstances. In our viewpoint, such an interpretation of the anti-abuse clause is, however, not as obvious since the Slovak legislation is not providing us with a straight evidence of this approach, however, we are of the opinion that it is the objective result that is stressed and that the existence of purpose (i.e. the subjective intention to circumvent certain provisions of tax legislation) should be found on the grounds of objective facts indicating this intention. This is because in absence of a straight wording, we have to look at the purpose of the provision and the interpretation that is most objective.

4 Was there a true need for amendment of former provision?

In this place, we would like to analyse whether it was possible to disregard the artificial arrangements targeted by the new clause even by the former but still applicable principle of substance over form. This principle has generally been applied in situations where there was any discrepancy between the actual intention of the taxpayer and/or other subject under a duty stated by provisions of tax laws and the manifestation of an alleged will. If the parties were willing to obtain an inappropriate tax advantage by simulation of what they actually wanted, the tax administrator had (and still has) the right to pre-qualify their formal act or other alleged fact into acts or facts that according their true will should have been performed and apply appropriate tax regime. This principle is used even in case that it is in favour of the taxpayer[4] because what really matters is the existence of genuine transactions with a real economic reason (Rumana, 2013: 20) and its proper identification is decisive for application of a proper tax provision (Supreme Court of the Slovak republic: 3 SžoKS 89/2006).

Looking at various decisions of the Supreme Court of Slovak Republic, we can see that disregarding of an artificial transaction is fully available even on the basis of former provision, i.e. the "standard" substance over form principle. The court states within his reasoning of the decision that: "*In addition, it may be said that even the Supreme Court considers the tax transaction as artificial lacking a business purpose (also called the cause or in English business purpose) which is incorporated in the principle of finding of economic substance (actual content) of tax transaction on which our tax law is founded given the Art. 2 par. 6 of Act no. 511/1992 Coll. on administration of taxes and fees*[5]*. In the case at issue, the tax transaction as a system of legal relationships is absenting the economic substance of repeating of such an economic activity. The recognition of business purpose of tax transactions*

4 E.g.: if there is fulfillment of a duty (or consideration) under an agreement, a consequent finding that the agreement is invalid does not influence the deductibility of the expenses already incurred, because what matters is the actuality of the performance of the action (Constitutional Court of the Slovak Republic: I. US 241/07-44).

5 Although the judgment is referring to the provision of the former act regulating the tax procedure, the wording of the mentioned substance over form principle was the same as it is in the current Code of Tax Procedure.

is an important means of interpretation of tax legislation and subsumption of tax transaction under the legal regime of one particular provision of law: A single-acting concurrence is impossible in this case and, hence, only one regime can be determined based on discretion" (Supreme Court of the Slovak Republic: 3 Sžf/45/2010, p. 5). Well, maybe such an approach is influenced by the case law of ECJ, nevertheless, the court is not referring to any of the ECJ decisions but it is specifically referring to the domestic principle of substance over form. Therefore, we are of the strong opinion, that the new anti-abuse clause can be covered even by the former provision of the Code of Tax Procedure. The reason for that is that within the principle of finding the actual content of a legal action (i.e. substance over form) the genuine relations have to be discovered and absence of economic purpose, i.e. artificiality of the arrangements indicates that the actual intention of taxpayer is incoherent with the structure of transactions carried out. In our view, the substance over form principle is broader than the new anti-abuse clause since it covers not only artificial structures with no economic reason but even structures having economic reason, however, such reason is in conflict with the intent of a person or with actual content of the legal relationship[6]. As M. Kopřiva stated regarding the principle of finding the actual content of a legal action, "*this principle is accompanied by prohibition of circumvention of law and prohibition of abuse of law. The pure fact that the provision of law is not using the notion "abuse of law" directly does not mean that such abuse cannot occur and that its legal consequences cannot be derived from its wording*" (Kopřiva, 2013: 39). By words of the Supreme court of the Czech republic: „A*buse of law is a situation in which someone exercises their subjective right to undue detriment of another person or the society; such a behaviour by which an illegal result is achieved is only apparently permitted. Such behaviour is apparently permitted because the objective law does not recognise a behaviour that is permitted and prohibited at the same time. Since based on the principle of lex specialis derogat legi generali can be concluded that prohibition of abuse of law is stronger than the permission by the law,*

6 E.g. in cases of statutory representatives of companies providing "their" companies with services or works identical with the scope of business of "their" companies (which normally should be subsumed under the performance of their office) which they invoice to the company to escape the regime of dependant work in favour of regime relevant for conduit of business to be able to deduct tax expenses which they are not allowed to apply under the former regime (See also: Supreme Administrative Court of the Czech Republic: 5 Afs 81/2004; Constitutional Court of the Czech Republic: IV. US 385/04).

such a behaviour is not the exercise of right but the infringement of law (see Knapp, V.: Teorie práva, Praha: C. H. Beck, 1995, 184-185). The court shall not grant protection to such exercise of right that is actually an abuse of law" (Supreme court of the Czech republic: 1 Afs 107/2004-48).

Based on the then domestic legislation and the ECJ case law, we can recognise a wide doctrine on abuse of tax law built predominantly by the Czech court (Supreme court of the Czech republic: 1 Afs 107/2004-48 in connection with the Constitutional court of the Czech republic: III. US 374/06, Supreme court of the Czech republic: 5 Afs 61/2008-80, Supreme court of the Czech republic: 2 Afs 178/2005) which is given the analogical regulation fully applicable to Slovak cases.

What does actually the new clause mean then? It seems to us that on the ground of the above it means the specification of a particular case under the former provision. This amendment has its sense not only for tax administrator, providing them with a specific structure of an abusive scheme with certain features, but also for the taxpayer and other persons by strict and more or less precise description of an unwanted behaviour they should be aware of. The right and at the same time the menace of disregard of an artificial structure by tax administrator is now truly obvious and not more somehow hidden behind the blanket of the former substance over form principle, which should undoubtedly positive effect in regard of the principle of predictability of law and legal expectations (see also: Šefl, 2009: 9).

5 Some conclusions regarding the application

An issue that should not be forgotten, however, is the practical application of the new provision. As we pointed out in art. 3 hereof, there is a wide space for the discretion of tax administrators since the wording of the new clause is not as plain is it could have been. Since the principles of procedure of evidence divide the burden of proof between the taxpayer and the tax administrator in the way that the tax administrator shall prove the facts on actions decisive for proper assessment of a tax taken towards the taxpayer (Code of Tax Procedure, Art 24/3), it will be the tax administrator

to prove that the tax due on the basis of structure declared by the taxpayer is abusive, hence, that the criteria for the use for the clause are met (see also: Rumana, 2013: 51, the same: Kopřiva, 2013: 39). On the other hand, the existence of economic reality in the arrangement questioned by the tax administrator is to be proved by the taxpayer (see also: Rumana, 2013: 51).

One may be curious why the legislator has chosen such an unclear wording, particularly when there are so many ways or patterns that provide for a much more definite way of expressing such a rule. A nice example may be even Art. 80 of the Proposal for Council Directive on common consolidated corporate tax base [COM(2011) 121 final]: *"Artificial transactions carried out for the sole purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base. The first paragraph shall not apply to genuine commercial activities where the taxpayer is able to choose between two or more possible transactions which have the same commercial result but which produce different taxable amounts."*

The fundamental matter will be the conclusion of existence of real economic substance, i.e. either artificiality or genuineness. Bearing in mind the *Halifax* (ECJ: C-255/02) and especially *Part Service Srl* (ECJ: C-425/06) cases, the taxpayers are not required to choose the best-for-state regime on condition that they retain a genuine commercial reason of the chosen structure. Since we concluded that there is an uncertainty about the proper interpretation of possible existence of more results and more purposes, we have to bear in mind that such an interpretation as we suggested in Art. 3 hereof must still observe the principles of administration of taxes (Code of Tax Procedure, Art 3) and generally must not break the rights of taxpayers. Even since we are of the opinion that the new clause enables the tax administrator to interpret it in a wider sense, we also think that where the provision counts with existence of other results and other purposes, it should follow standard ECJ based interpretation of anti-abuse doctrine followed by our courts, like in the already mentioned decision of Supreme Court of the Slovak Republic in case 3 Sžf/45/2010 and mainly the decisions of Czech courts, where the

doctrine is more developed[7]. The reasoning of the Supreme administrative court of the Czech Republic concluded that "*the essential purpose of the transaction in terms of Halifax case is such an other aim which, compared to other potential aims, is so incomparably more important that it overwhelms and marginalises the others to such an extent that these other aims do not need to be to be taken into consideration when searching for the business reason of the transaction*" (Supreme administrative court of the Czech Republic: 2 Afs 178/2005). The same reasoning contains the Recommendation in Art. 4.6: *"For the purposes of point 4.2, a given purpose is to be considered essential where any other purpose that is or could be attributed to the arrangement or series of arrangements appears at most negligible, in view of all the circumstances of the case."* Despite the broad formulation of our clause and not mentioning the "essential" purpose, we are of the opinion that in case where there are several targets of the taxpayer and the tax-oriented being one of them but only marginal, lateral and non-decisive, the interpretation should be in favour of the taxpayer since otherwise it would lack the proportionality and true aim of the clause, e.g. fighting the abuse of law not the persecution of taxpayers for exercising of their rights.

We have to express a conviction that the clause as enacted imposes a "burden" on tax administrator to take a really sensible approach when considering the fulfillment of the criteria and show their ability to use the discretion in an appropriate way. In such cases, it may be concluded that it is not the provision of law that might be in breach of Constitution, but it is the matter of the provision to be interpreted conformably with the Constitution.

Since the above mentioned interpretation leaves a wide space for "abuse" of this provision by tax administrators, it should not be forgotten that the reasons and evidence of tax administrator for qualification of a result as being abusive must be satisfactory (Code of Tax Procedure, Art 24/3) and the taxpayer must be provided with a real possibility to overrule the evidence of tax administrator by providing their own relevant evidence.

[7] We can use the comparison with the Czech case law on the basis that the wording of the substance-over-form principle in Czech legislation (Act no. 280/2009 Coll., the code of tax procedure, as amended) is in the substance the same as in Slovak republic – see: *"If, within the administration of taxes, a special regulation is applicable, only the actual content of the legal action or other fact essential for assessment or collection of a tax shall be taken into consideration." (Code of Tax Procedure, Art. 3/6) and "tax administrator is following the actual content of the legal action or other fact essential for administration of taxes"* (Code of Tax Procedure CZ, Art. 8/3).

6 Conclusion

The Slovak legislator adopted a new anti abuse clause with a clear aim: prevent further abuse of law and find another means of fight against tax avoidance and tax frauds. This effort was mainly based on the Commission recommendation of 6 December 2012 on aggressive tax planning encouraging the states to adopt a similar clause into their domestic law. We use the word "similar" on purpose since the wording of a newly adopted Slovak clause does not truly match the one contained in the Recommendation.

Moreover, we are of the opinion, that the new provision, as adopted, is of a rather vague wording. It definitely is not adopted in a way it was recommended by the Recommendation despite being said that this was the pattern for this change. In our view it enables a very broad interpretation and, as a result, it is capable of causing various interpretation problems within its practical application.

The Code of Tax Procedure has already contained a standard substance-over-form principle. An interesting fact is that the case law of the Slovak and the Czech courts shows that tax administrators had fully been capable of disregarding artificial arrangements for the purposes of administration of taxes even on the grounds of the former substance-over-form principle. What is then the contribution of the new clause?

Well, the newly adopted rule definitely makes the former provision more specific and from the viewpoint of both taxpayers and tax administrators makes clear that it is aimed at fighting artificial arrangements, which is a positive aspect. Hence, we consider this to be a positive contribution regarding the principle of legal certainty. Nevertheless, we do not consider this positive effect to be as huge as it is presented to be, since there is also the mentioned apprehension regarding the scope and interpretation of the clause. Therefore, we have to conclude that our hypothesis that the new legislation makes, on the one hand, the identification of abuse of law in tax matters more precise, and on the other hand, creates inappropriately wide uncertainty regarding the proper interpretation thereof is, in our view, confirmed.

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INSTITUTIONS OF CIVIL LAW WITHIN TAX LAW ON THE EXAMPLE OF THE MATERIAL SCOPE OF INHERITANCE AND GIFT TAX

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Abstract

The main aim of the contribution is to discuss areas of overlap reveal relations between civil and tax law. As an example, institutions of Civil Code – inheritances and gifts will be discussed. Thorough analysis proved that there is a close relationship between tax law and civil law. It stems primarily from assigning tax consequences to civil law operations.

Key words

Tax; law.

JEL Classification

K34, K11

1 Introduction

Law is most often defined as a set of standards of conduct (Wielka Encyklopedia Prawa, ed. Holyst: 2005, 721). Positivist concepts consider as law only those standards of conduct that have been adequately established or recognized by appropriate authorities of the state and the realization of which is secured by the state through the threat of coercion (Michalska, Wronkowska, 1983: 5; Redelbach, Wronkowska, Ziembiński, 1992: 95).

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Importance is held by the division of the system of law into branches of law, namely a systematic assignment of legal standards of a given branch, which in turn pronouncedly simplifies the application of particular standards.

This process is performed on the basis of certain criteria, among which most frequently the following are mentioned (Michalska, Wronkowska, 1983: 5; Redelbach, Wronkowska, Ziembiński, 1992: 95):

- subject-matter,
- entity,
- method of regulation,
- prevailing principles,
- functions of regulation.

2 Division of the system of law into branches of law

Tax law is increasingly recognized as a separate branch of law, which in turn is the basis for the analysis of interdependencies between it and the civil law.

The criterion of the subject-matter - allows establishing the type of social relations regulated by legal standards. It is characteristic of tax law that it regulates relations whose content is the obligation imposed on the entity in the form of a tax performance to the benefit of the state or to another public law relation. Thus, there are always two parties: the party entitled to demand a performance and the party obliged to comply with this provision. One can therefore use a claim that tax law regulates social relations related to non-equivalent shifting of cash means between these entities (Gomułowicz, Małecki, 2000: 103). It is worth emphasizing that social relations regulated by tax law standards are created by the will of the standard-giving authority, not the actors participating in them, thus they are thetic (constituted) relations (Mastalski, 1998:12). The object of regulation here is often „the financial side" of a relationship resulting on the ground of civil law, and more precisely speaking, the obligation of payment of cash performances in relation to the occurrence of an event governed by provisions of civil law.

The criterion of the entity determines the specificity of the relationship between entities of a given legal relationship. Undoubtedly, a tax law

relationship has the nature of a liability, and the position of the entitled entity is stronger than that of the entity liable. Another criterion allowing for assigning a legal standard to a particular branch of law is the criterion of prevailing principles. Rules for constructing tax regulations are, in fact, certain patterns, postulates by which a rational legislator creating these regulations should be guided. They have been formulated in the doctrine and some of them are permanent. The following principles, inter alia, should be noted: convenience, inexpensiveness, reliability, uniformity of taxation (A. Smith), or: economic, justice, tax management (A. Wagner) principles. Today a leading role in shaping tax principles is also played by the doctrine and case law, of the Polish Constitutional Tribunal in particular.

Important for distinguishing the tax law as distinct from other branches of the law, is the criterion of the method of regulation. In the tax law this is an administration and law method characterized by subjection of one entity to another (Mastalski, 2000: 7). Speaking of the method of regulation one cannot ignore legislative specifics concerning the creation of tax laws. According to the Constitution of the Republic of Poland (Act of 2 April 1997. The Constitution of the Republic of Poland. Journal of Laws of 1997, No. 78, item 483 as amended) everyone is obliged to incur burdens and public performances, including taxes, as specified in the statute, the statute in turn must specify entities and subject-matter of taxation and tax rates, rules for granting tax reliefs and remissions and determine the categories of entities exempt from tax. A draft tax bill cannot be considered as urgent.

The criterion by which the systemisation of legal standards into branches of law is carried out is the criterion of the functions of regulation. The primary, though not the only, function of taxation is to redistribute, i.e. transfer, certain pecuniary values in the taxpayer -state direction.

Analysis of the above criteria allows formulating a conclusion of a noticeable relationship between them. One can see certain characteristic elements, repeated regardless of the angle of analysis of standards accepted as the standards of tax law. There always arises the question of the power of the state, out of which arises the non-equivalence of entities and the specific nature of relations between entities. It can therefore be concluded that

decisive importance should be attributed to two criteria: the subject-matter and method of regulation, reserving a complementary role for the remaining criteria.

The specificity of the tax law is also reflected in its extremely rapid development. The importance of this branch of law is also constantly increasing.

3 Institutions of civil law within the material scope of inheritance and gift tax

The autonomy of the tax law, even though it determines the position of this law in the entire system, is not absolute. In every case individual branches of law are interrelated, which applies equally to the characterized branches. When it comes to the tax law, its closest relationship is the one with the civil law where the relationship is determined by the subject-matter of a legal regulation, and with the administrative law - the relationship here is determined by the method of regulation, and with the constitutional law (Mastalski, 1994: 250).

Relations with the civil law occur mainly with respect to such structural elements of tax as the entity and the subject-matter.

In turn, a tax where those links are particularly evident is the inheritance and gift tax regulated by the Law on inheritance and gift tax (Act of 28 July 1983 on inheritance and gift tax, Consolidated text, Journal of Laws of 2009, No. 93, item 768 as amended). The subject of subsequent analysis was, therefore, only those provisions of the Law that are directly related to the prescribed topic.

The personal scope of the Law was set out in art. 1 of the Law, under which subject to taxation are only natural persons purchasing property in the manner specified by the legislature(Chustecka, 1995: 8). The concept of a natural person is, in turn, one of those fundamental to civil law. In accordance with Art. 8 CC (Act of 23 April 1964. The Civil Code, Consolidated text, Journal of Laws of 2014, item 121) a natural person is every person from the moment of birth. On a side note it should be noted that in all acts

belonging to matters of a specific tax law, setting out the personal scope of acts is done applying terms used in civil law, even though the legislature has the possibility to create specific entities for the purposes of tax law.

A characteristic underlying the designation of the material (subject-matter) scope of tax is the adoption of the rule according to which events which legislature associates with the obligation to pay taxes are free-of-charge material increments. In this context it should also be noted that the title of the Law itself is inadequate to its material scope, which is by far wider.

The following titles to acquisition are taxable (Kacymirow, B. Kordasiewicz, 1990: 74 – 75; Wierzbicki, A. Werner, 2010: 198):

1. succession, particular legacy, subsequent legacy, absolute legacy, testamentary instruction;
2. donation, donor's instruction;
3. usucaption (acquisitive prescription);
4. free-of-charge cancellation of co-ownership;
5. legitim, if the entitled did not receive it in the form of a donation made by a testator or by way of succession or in the form of legacy;
6. free of charge: annuity, usufruct and easement;
7. acquisition of rights to savings contribution based on an instruction by contribution in case of death;
8. purchase of shares pursuant to an instruction of a participant of an open investment fund or a specialized open investment fund in the event of his death.

As apparent from the above, the material (subject-matter) scope of the Law is directly correlated with institutions of the civil law. Taxable are primarily civil law acts, provided they are free of charge in their nature.

It should be emphasized though that the legislature, pointing to the institutions of civil law, does not modify them for the purposes of tax law. Therefore, when interpreting the provisions of the Law on inheritance and gift tax, one must take into account the provisions of the Civil Code.

Primary importance in this regard is held by the concept of succession. The interpretation here must be done on the basis of the provisions of Book Four of the Civil Code. Significant here is article 922 CC, under which the rights and obligations of the deceased pass, upon his death, on one or several

persons. Succession is, according to this provision, the total of rights and obligations of the deceased passing on a specific person or persons. As indicated, this provision does not form a precise definition of tax but formulates general guidelines on which the decision on whether a given right or obligation forms part of succession is to be based (Piątowski, Witczak, Kawalko, 2009: 49)

Succession also includes such rights and obligations that did not exist at the time of the testator's death (Skowrońska – Bocian, 1997: 2).

However, succession does not cover the rights and obligations of the deceased that are strictly and personally related to him, or rights which, on his death, pass to specific persons irrespective of whether they are heirs.

The amount of inheritance tax is decided by, among others, assets of the estate. Therefore, the civil law institution of indisputable importance in the tax law is „opening of the succession." Succession is open on death of the testator. The moment of death determines therefore the composition of the estate. Besides, on the day of opening of the succession the directory of heirs is determined (Skowrońska – Bocian, 2003: 34).

According to the rules of civil law estate is acquired by an heir on opening of the succession. Characteristic here therefore is to link the acquisition of the estate with the time of death of the testator and not with the submission of any statement by the heir, or obtaining a ruling of a relevant authority. Entry to the total of rights and obligations of the deceased follows from the law. This effect also occurs in the absence of the heir's awareness of the fact of the death of the testator and that he acquired inheritance. This is not, however, a definitive acquisition; the heir may, for instance reject the estate. A moment of death, and at the same time the opening of succession is determined on the basis of a death certificate (Kaltenbeg – Skarbek, Żurek, 2007: 26).

On the basis of the Civil Code two parallel ways of succession are in force: statutory and testamentary, where primacy has been granted to testamentary succession. From the point of view of the law on inheritance and gift tax the source of title to succession is nor relevant.

The subject-matter scope of the Law discussed also covers institutions related to succession, which are: particular legacy and instruction.

Particular legacy is a testamentary disposition under which the testator obliges a statutory or testamentary heir to make a specific property performance for the benefit of a given person. It is also possible to encumber the legatee with a particular legacy (subsequent legacy). Characteristics of a particular legacy are therefore: the possibility of establishing only in the will and by the testator (Doliwa, 2010: 82) of a pecuniary nature of the performance, the individualization of the legatee (Skowrońska – Bocian, 2003: 141). A bank legacy in not a particular legacy within the meaning of the Civil Code (Wójcik, Zoll, 2009: 374; Witczak, Kawałko, 2010: 63).

In his will, drawn up in the form of a notarial deed, the testator may, however, decide that a specific person acquires the object of the legacy (as defined in the Civil Code) at the time the succession is opened. It is an absolute legacy.

The testator may also in his will impose on an heir or a legatee the obligation to carry out a specific action or to refrain from carrying out a specific action without making anyone a creditor. It is a testamentary instruction. The essence of this institution is manifested, among others, in the following characteristics: it results from the will, the resulting legal relationship is a natural obligation (there is no creditor within the meaning of liability law), the purpose of an instruction is to mandate specific behaviour - any granting of benefits to someone stays in the background, failure to implement the instruction does not create compensation liability. An instruction may have a pecuniary or a non-pecuniary nature (Skowrońska – Bocian, 2003:152).

In the process of applying the law on inheritance and gift tax one must also fully respect the civil law institution of the declaration of succession, which, however, does not directly concern the scope of the Law and therefore was excluded from further consideration.

A taxable title of acquisition related to succession is the legitim (provided the entitled did not receive it in the form of a donation made by the testator or by title to succession or in the form of a legacy). Legal basis of the indicated institution is set out in Art. 991 CC on the basis of which, the descendants, spouse and parents of the deceased who would be named to inherit under the law, if permanently without the capacity to work or if the entitled

descendant is a minor – to two-thirds of the value of the share in the estate which would fall to him in the case of statutory (intestate) succession, and in other the cases – to one half the value of that share (legitim). If an entitled person has not received the legitim due to him in the form of a donation made by the testator, or by being named to inherit, or in the form of a legacy, he is entitled to a claim against the heir for payment of a sum of money needed to cover or supplement the legitim. The legitim, therefore, forms a specific restriction on the testamentary freedom(Księżak, 2010: 46 et seq), and its essence is brought down to the right to demand payment of a certain pecuniary amount. The obligation to pay arises upon the death of the testator and constitutes a succession debt (E. Skowrońska – Bocian, 2003:161).

A civil law title of acquisition of property and property rights, resulting in tax effects, is, as indicated, a donation. In accordance with Art. 888 CC, by a donation contract, the donor commits to make a free-of-charge performance to the donee at the cost of his property. Donation is a nominate contract and also in a situation where the donor unilaterally undertakes to provide a free-of-charge performance, not imposing any obligations on the donee (Bieniek, Ciepła, Dmowski, Gudowski, Kołakowski, Sychowicz, Wiśniewski, Żuławska, 2003: 669). The most important feature of this contract is its free-of-charge nature (Brzeszczyńska, 1997: 230; A. Piotrowski, Darowizna a podatek dochodowy, 1995: 1). The performance is to enrich the donee, and the carrying out of the performance by the donor must result in a reduction in, or absence of increase in his property (Czachórski, 1994: 389). The very free-of-charge nature of the performance does not prejudge the recognition of it as a donation contract (Brzeszczyńska, 2004:16 et seq). In the light of the provisions of the CC a free-of-charge increment is not a donation when the obligation to implement it follows from a contract governed by other provisions of the Code. A waiver of a right not yet acquired or which has been acquired in such a way that, if waived, the right is deemed not to have been acquired.

It should also be noted that the effectiveness of the donation, assessed on the basis of civil law standards is a condition of entering into a tax and law relationship. At the same time, it is assumed that the subsequent cancelling of a donation does not compromise the already resulting tax

obligation (Judgement of the Supreme Administrative Court of 11 May 1993, IIISA 209/ 93, POP 1997, No. 5, item 26; judgement of the Supreme Administrative Court of 12 January 1998, I SA/Lu 1/97, LEX No. 31767).

A donation contract may be, under the disposition of Art. 893 CC, conditioned by an instruction which in turn has legal - tax consequences. The essence of this institution is imposing by the donor of an obligation on the donee to act of refrain from acting in a specified manner without making anyone a creditor.

As already indicated, the scope of the Law also extends over other institutions of civil law, such as annuity, usufruct and easement, provided they are free of charge.

Annuity referred to here is a civil law contract. A free-of-charge nature is an attribute of contractual annuity, which is an institution of Book Three of the Civil Code. Under this contract, one party commits to another party to make certain periodical performances in money or in fungibles. Annuity established without pay can be talked of when the entity committing to annuity performances does not receive in return of this obligation any equivalent from the other party (or the person for whom the annuity is established) (Bieniek, Ciepła, Dmowski, Gudowski, Kołakowski, Sychowicz, Wiśniewski, Żuławska, 2003: 722). This institution in present socio-economic relations plays a minor role. It is replaced by other defined contracts fulfilling similar functions, in particular insurance contracts and life annuity contracts (Bieniek, Ciepła, Dmowski, Gudowski, Kołakowski, Sychowicz, Wiśniewski, Żuławska, 2003: 715-716).

Usufruct is a limited real right consisting in the right to use a thing and to collect and retain its profits. The subject of usufruct can cover movable property, immovable property and a transferable right. Usufruct cannot, however, be established for a specific asset of the estate (e.g. inheritance). A characteristic feature of this right is a directory of different obligation relations interconnected with the usufruct under the law, unless the parties otherwise agree. The limits of acceptable modifications are, however, determined the nature of the usufruct and the content of user rights (Rudnicki, 2003: 439-440).

Easement as an institution of civil law is always associated with real estate. Due to its purpose, economic function and regulation mode, easement is divided into easement appurtenant (predial servitude) and easement in gross (personal servitude). Both categories of easement encumber real estate for the benefit of a natural person or a legal person who is the owner of other real estate. Easement in gross, in turn, encumber real estate solely for the benefit of a natural person, regardless of whether he is the owner of other real estate, except that relevant provisions of easement appurtenant are applied to it, with maintaining distinctions arising from the nature of easement in gross (personal servitude).

The essence and basic function of easement appurtenant is to facilitate the use of one real estate (dominant estate) by increasing its usefulness at the expense of the encumbered estate (servient estate). A distinction is made here between active (affirmative) and passive (negative) easement. This classification is made on the basis of a distinction of whether the owner is allowed to use in a certain way other real estate (affirmative easements) or whether the real estate owner is limited in the exercise of his rights of ownership. Easement appurtenant may not consist in the obligation of the owner of the servient real estate to a specific action in the interest of or on behalf of the owner of the dominant real estate (Bieniek, Rudnicki, 2004: 431-432).

Therefore, it needs to be indicated that the acquisition of easements free of charge is subject to inheritance and gift tax only if the easement is has an individual character, because only this type of easement is of a personal nature(Response of the Minister of Finance No. PL-834/85/JB/06/PDJC-345/06/39/07 of 26 January 2007 on the letter from the President of the National Council of Notaries on the amendments introduced by the Act of 16 November 2006 amending the law on inheritance and gift lax and the law on tax in civil law transactions, www.mf.gov.pl; a decision on the interpretation of the tax law of 12 July 2007, PM-436/2/2007, www.mf.gov.pl.).

The material (subject-matter) scope of the inheritance and gift tax also covers acquisition of property by adverse possession (usacaption). It is a way of acquisition of property through the passage of time, and therefore the

owner cannot claim to have his ownership rights established by adverse possession only because it is difficult for him to prove his right (Rudnicki, 2003: 185). What is important at the same time is the distinction on the basis of the Civil Code between adverse possession of real-estate and movables.

And therefore: the possessor of real estate who is not the real estate owner acquires ownership if he possesses the real estate uninterruptedly for twenty years as an owner-like possessor, unless he gained possession in bad faith. After the lapse of thirty years, the possessor of real estate acquires ownership even if he gained possession in bad faith. Good faith of owner-like possessor entails his justified belief, under certain circumstances, that he is entitled to the right to own the item, which he actually performs (Gordon, Łopuski, Nesterowicz, Piasecki, Rembieliński, Stecki, Winiarz, 1989: 167).

By way of adverse possession, it is also possible to acquire ownership of movable property. The period of possession is then three years but each case requires good faith of the possessor. It should also be noted that under the law on inheritance and gift tax taxation rules for the acquisition of property by way of adverse possession were defined differently than in other free-of-charge increments. This is manifested in withdrawing from conditioning the tax amount on the assignment to a tax group and in the application of a fixed interest rate. Therefore is should be construed that characteristics of adverse possession directly affect the regulations of tax law.

Subject to inheritance and gift tax is also free-of-charge cancellation of co-ownership. The concept of co-ownership is defined in art. 195 of the Civil Code, according to which several persons can be entitled to the ownership of the same thing. Thus, it is indicated that co-ownership is characterized by three features: the unity of the subject-matter, the multiplicity of actors and the indivisibility of the shared right (Dadańska, Filipiak, 2009: 79). At the same time, the following distinction is made: fractional co-ownership and joint co-ownership. The latter may, however, arise only in specific cases on the basis of provisions on relations from which it stems. The most common example of joint co-ownership is spousal joint property. It is also a share of partners to a civil law partnership in the ownership of the property brought by them to the company (Rudnicki, Rudnicki, 2009: 286).

Rules for cancellation of (fractional) co-ownership were defined in the provisions of the Civil Code. Essential importance in this regard should be attributed to the principle according to which each co-owner may demand the cancellation of co-ownership. This can be done by agreement or through litigation. It is important here though that the provisions of the Civil Code do not regulate a contractual cancelation of co-ownership, which leads a conclusion about the autonomy of will of the parties in this regard, taking into account only those constraints stemming from the law. It should also be taken into account that such an agreement should be signed by all co-owners and must contain all materially and personally important provisions, namely: specify the way of cancellation of co-ownership, it must contain statements of the transfer of shares or provisions concerning pay-offs and supplementary payments and the time for performing them (Rudnicki, 2003: 288; Gniewek, 2007: 473-474).

For the purposes of tax law five groups of cancellation of co-ownerships are named:

- agreements giving rise to the obligation of „real" pay-offs/supplementary payments – payable, subject to tax on civil law transactions:
- agreements giving rise to the obligation of „token charge" pay-offs – free-of-charge, resulting in the rise of the obligation to pay inheritance and gift tax, but whose tax consequences are not entirely transparent,
- payable agreements, „without pay-offs or supplementary payments", where each co-owner receives a physical part of the property, not subject to tax on civil law transactions and not resulting in the rise of the obligation to pay inheritance and gift tax,
- free-of-charge agreements, resulting in the rise of the obligation to pay inheritance and gift tax,
- agreements which involve both a pay-off and free-of-charge cancellation, resulting in the obligation to pay both inheritance and gift tax and tax on civil law transactions (Watrakiewicz, 2003: 74; Czerski, 2010: 28).

Therefore, it can be assumed that as a result of free-of-charge cancellation of co-ownership of real estate – the tax obligation in the inheritance and gift tax, borne by the buyer, will only arise in the case of acquisition of real

estate property greater than the value of the share in the co-ownership. The tax base then will be the market value of the part of real estate acquired above the share in this real estate attributable to the buyer before the cancellation of co-ownership (Judgement of the Provincial Administrative Court of 12 February 2007, III SA/Wa 2980/06, LEX No. 316685).

4 Conclusion

In conclusion, it should be assumed that even though civil law is private law and tax law is a public law and there are differences in all criteria on which the assignment of standards to a given branch of law are made, there is a close relationship between tax law and civil law.

It stems primarily from assigning tax consequences to civil law operations. The interpretation of tax law standards should therefore be consistent with the character of a civil law institution, unless modified for the purposes of tax law. The interpretation of tax laws should therefore take into account the rules developed by the doctrine and practice of civil law.

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TAX LAW PROBLEMS RESULTING FROM LEGAL SUCCESSION UNDER POLISH LAW: FINDINGS AND CHALLENGES

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Abstract

The article deals with transmission of the tax rights and tax obligations of a deceased to his or her heirs in terms of Polish tax law. The author presents some findings, further research problems and research directions related to that topic.

Key words

Tax; law; heir; legal succession.

JEL Classification

K34, K10

1 Introduction

One of the problems which needs more scientific attention is the legal succession in tax law relating to the natural persons' tax rights and tax obligations. This article deals with transmission of the tax rights and tax obligations of the deceased to his heirs.

The issues connected therewith require special attention in scientific context due to their universality and the intrusiveness of tax law. In spite of that, the heirs' succession to tax liability has been thus far in Poland the subject of research and scientific thought only occasionally.

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There were some publications which have admittedly dealt with the topic in general. I refer here to applicable fragments of commentaries on the Tax Ordinance (Tax Ordinance Act – Commentary - Adamiak, Borkowski, Mastalski, Zubrzycki, 2005; Babiarz, Dauter, Gruszczyński, Hauser, Kabat, Niezgódka-Medek, 2006; Brzezinski, Kalinowski, Masternak, Olesinska, Orlowski, Dzwonkowski, 2007: 794).

One of the most important and recent Polish publications that should be noted, is a dissertation by S. Babiarz that discussed the legal position of taxpayer's heirs (Babiarz, 2013).[2]

Interesting findings concerning the legal position of a taxpayer's heir were presented also in short studies (e.g. Babiarz, 2006; Babiarz, 2007; Babiarz, 2008; Babiarz, 2010; Mariański 1998; Mariański 2003; Mączyński, 2001; Nita, 2011).

Some basic findings (of rather narrow scope) concerning the legal succession of taxpayer's heirs were presented in the short study Legal Succession in Tax Law (Brzezinski, Olesinska, 2009: 281–285). I published also two other articles: Tax Procedure with the Participation of Taxpayer's Heirs (Olesińska, 2008: 22-31) and Personal Income Tax Settlement after the Death of Taxpayer (Olesińska, 2008: 67-77). Within those articles I indicated several complexities, inconsistencies and overregulation in the Tax Ordinance Act, which lead to the situation in which judicial bodies apply the law with simplifications absent in the regulations in force. I also pointed out, that transferring of several legal solutions from civil law into tax law, does not cohere with the tax law relationship.

Some case law of administrative courts concerning heirs as legal successors of a taxpayer was the source of several detailed analyses done by me, especially in the form of glosses. Firstly, I indicated that position of jurisdiction is incorrect in several aspects. Secondly, I tried to seek the sources of abovementioned errors within the broader perspective. Taking into account previous, fragmentary conclusions it seems, that attempts to apply norms to heirs, which are proper to determine the situation of taxpayer, not his

2 It was defended in November 2013 in the Faculty of Law and Administration at the University of Łódź. We need to appreciate the author's contribution to the development of this discipline. But, there are still wide areas to explore.

legal successors, might be the cause of some errors (*Gloss* to the judgment of Regional Administrative Court in Gdansk of 14th October, 2008:708-710). The source of other judicial errors might be found – as I tried to demonstrate – in the fact, that courts tend to ignore the construction of creation and determining the amount of the tax obligation, which stems from the tax law and, therefore, interpret the death of a taxpayer as an act which distorts those mechanisms (Olesińska: Gloss to the judgment of Supreme Administrative Court of 27th July 2006, 2006: 136-139; Olesińska: Gloss to the judgment of Supreme Administrative Court of 24th October 2007, 2008: 537-541). Thus, hitherto findings may lead to a conclusion that in case law there is a specific confusion of legal regimes, which regulate legal position of taxpayer and heirs, who have the status of his legal successors. It is one of the hypothesis, which needs to be verified.

Despite of abovementioned studies, the research area is still fully open to its exploration because the studies published thus far were mainly partial, fragmentary and contributory. The existing results of research and current knowledge about this issue leave us greatly unsatisfied. The research area being the issue of succession to tax rights and obligations by taxpayer's heirs still awaits its reorganization, full exploration and comprehensive study from numerous points of view.

The work was financially supported by the Polish National Science Centre (Grant DEC-2013/11/B/HS5/03580).

2 Some remarks about legal succession of heir in Polish tax law

The death of each natural person initiates the issue of succession to their rights and obligations also in the scope of taxes. Almost each adult is a taxpayer. The most often, they pay at least the income tax. Pursuant to the Polish tax law, a man's death is not a neutral event but it triggers the necessity of closing or continuing the tax relations between such a person and the state. The institution of legal succession in the event of death of a natural person appeared in the Polish tax law as late as in 1998, that is when the Tax Ordinance Act (The Tax Ordinance act (*Ordynacja podatkowa*) of 29 August

1997 (consolidated text: J.L of 2012, item 749, with subsequent amendments). became effective. In such a way, the legislator filled in the noticeable gap in legal regulations which - in spite of obvious need - had not earlier provided for a situation in the area of tax law when the fact that the legal existence of one entity ceases (a man's death) would involve the substitution of another entity for this entity (a legal successor). The provision of such succession has been a rule in the area of private law. Yet, in the scope of tax relations, it has been a novelty.

The institution of legal succession in tax law obtained a permanent place in the Polish legal system, it became its necessary element that has been applied intensively and on a large scale. The regulation provided for in art. 97-106 of the Tax Ordinance Act 1997 has been continuously improved by the legislator, which is evidenced by a considerable number of amendments to the Tax Ordinance Act in that scope. Despite of this, the regulation is far from being perfect (Babiarz, 2013; Nita, 2011, Olesińska, 2008, 2009).

There are many issues which deserve scientific attention. Some observations are briefly presented below. They are worth of further discussion. Comparative research and study would be useful as well. Comparative research should make it possible to define the characteristics of model institution of legal succession, which may become a point of departure for evaluating whether and to what degree the Polish solutions are far from or close to such a model. It will be possible to identify the weak and strong points of Polish solutions and thus making a diagnosis which may become a point of departure for the legislator when undertaking legislative activities, if any. The comparative analysis would allow to determine whether regulations implemented in other countries are expanded and casuistic, as it is in Poland, or whether in other systems one may find more simple and universal solutions.

Legal succession in the event of natural person' death requires an autonomous regulation concerning the rights and obligations regulated by the tax law provisions. A tax regulation that is appropriately formulated cannot be replaced by any other norms of private (inheritance) law even if the legislator passing tax laws decides that such norms are appropriately applied to tax rights and obligations (through referring to them). In spite

of noticeable deficiencies of the effective tax regulation, it is therefore impossible to restore the legal situation when Polish tax law did not regulate at all the legal succession in the event of natural person's death.

The legislator cannot formulate the rules of succession in the area of tax regulation without any consideration of civil law structures. But, in my opinion, the scope of references to civil law that we are dealing at present in the Polish tax system is inappropriately defined. The regulation of taxpayer's heirs' succession, included in tax law and modeled on the private law regulations, adopts civil law solutions too unquestioningly in some areas while tax relations sometimes require greater separation from the civil law model and introduction of own and original solutions (e.g. the heirs' right to tax overpayment not repaid to the deceased during the deceased's life which has been regulated in Article 105 Tax Ordinance Act 1997).[3] However, there arises a question about the degree of autonomy in relation to private law that should be displayed by such regulations on tax law relations which originate from the circumstances that are traditionally considered as the events which have mainly effects in the scope of civil law (death, inheritance).

In my opinion, Polish tax law does not include relevant adjustment mechanisms which - in the event of amendments to civil law - automatically give the possibility of further application of the effective tax law provisions regulating the heirs' succession to tax liability. At present, whenever private law is amended, it necessarily brings - in many cases - the amendments to tax law to harmonize and adjust it in the area of regulation of the heirs' succession to tax liability. As an example one could mention Article 106 of Tax Ordinance Act, which still does not cover all the types of legacy referred to in the Polish Civil Code after it has been amended.

There are some key problems which have to be recognized and solved by the legislator when designing the legal succession of natural persons in tax law. First of all, the normative effects produced by the death of a natural person in the sphere of their rights and obligations regulated by the tax

3 On the contrary, there is a lack of regulations in some other areas. For example, according to Article 98 § 1 Tax Ordinance Act, the provisions of the Civil Code apply to the heir's liability for deceased's tax obligations, but there is no rule which says how to deal with deceased's tax rights (other than tax overpayment or refund).

law provisions must be define precisely. The general principle that all the tax rights and tax obligations of the deceased should be transmitted to his heirs is not accepted by the Polish legislator. The rights and obligations which are to be transferred are characterized by the legislator in some way, but, on the other hand, there are still some doubts in practice how the legislator's intention should be identified. The analysis of the scope of the heirs' succession to tax liability indicates that the scope of rights and obligations passed to them has been specified by the legislator on the basis of the criteria which are unclear and raise serious doubts in the judicature (e.g. property/non-property rights and obligations as detailed in Article 97 of Tax Ordinance Act) on the one hand, and on the other hand - on the basis of criteria that have not been considered enough, are accidental and exclude some rights and obligations in the scope of succession without any justification, or - on the contrary - cause that some rights and obligations of the deceased are passed to the heirs in spite of the general feeling that they are not justified enough in terms of axiology. In the event of several heirs, an additional problem involves the difficulties with identifying the entity which assumes the deceased's indivisible rights. There is a need to rebuild the legislation to eliminate ambiguity.

The procedure being applicable to the cases in the scope of the taxpayer' heirs' succession to tax liability is too elaborate and complicated (Olesińska, 2008). It should be simplified by eliminating for instance the necessity of conducting separate proceedings and the fact that there are several decisions issued in some cases concerning just one heir. The analysis of judicature provides a number of examples of such pathologies - they need to be identified and organized, and then it is necessary to define the directions of necessary changes and try to define the optimum model of proceedings in that scope.

The manner of assigning the deceased's rights and obligations to their heirs is not automatic in vast majority of cases but requires a tax authority to issue an official decision (Article 100, 104 of Tax Ordinance Act). Tax authority shall decide in separate decisions on the scope of tax liability of the particular heir, and moreover sometimes even in separate decisions issued in different taxes. Such a solution requires considerable involvement of both tax

bodies and heirs in formal procedures. In the event when there is no dispute in this scope between a tax body and an heir, it seems recommendable to establish the mechanisms reducing the necessity of the heir's contact with the tax authority to the minimum.

The concept used as a basis by the legislator passing tax laws when it established the institution of the heirs' succession to tax liability is not coherent enough to become the grounds for detailed solutions. The solutions in the scope of substantive law lean towards its civil law model, and the procedural solutions, which are produced only for the needs of succession to tax liability, turned out to be so much permeated with the specificity of each tax and are so much based on case law that in fact they set up a barrier to the correct functioning of the institution. The application of both civil law and tax law, which is unavoidable in the area of the heirs' succession, had a partially paralysing effect.

The transfer of some civil law structures (e.g. joint and several liability of debtors - heirs) to the context of tax law should be assessed as unsuccessful because the model of joint and several liability established in private law admittedly may be applicable to the sphere of tax relations but its transfer to the tax context was not associated with providing tax bodies with appropriate instruments which give them the opportunity to use such an institution in an effective way. Thus, the practice reveals procedural deviations and the institution - which was originally supposed to increase the scope of protection of the creditor's (here: state's) interest - hinders and even precludes on more than one occasion the possibility of claiming the fulfillment of the deceased taxpayer's tax obligations from the heirs by the state.

The analysis of judicature shows that the regulation concerning the heirs' succession to tax liability is not applied to some areas by tax bodies in compliance with the letter of law but in a significantly modified i.e. simplified form (especially in personal income tax). Since the practice is different from the normative model, then it is necessary to firstly precisely identify this area of contesting the legal regulation, and secondly - to define the causes of such a phenomena (whether it arises from the lack of knowledge and understanding of the regulation or rather from the fact that the regulation is incompatible with the needs and social realities or is in conflict with

other regulations). Then, it is necessary to attempt to diagnose this situation: whether it triggers the need for legislative changes or whether the manner of applying some solutions developed in practice yet differing from the normative model may be considered the status quo which does not require any interference by the legislator.

One of the key aspects of the heirs' succession to tax liability is their liability for the deceased taxpayer's tax arrears. The analysis of the structure of the regulation and the observation of its functioning leads to the conclusion that there are fundamental deficiencies both in the scope of protection of a tax beneficiary (state i.e. *Skarb Państwa*, local community i.e. *municipality*) that tries to satisfy its tax claims after the taxpayer's death, and in the scope of liability and protection of an heir.

Many detailed questions concerning the heirs' succession to tax liability have not been satisfactorily answered yet. For example, the following issues are still awaiting their thorough analysis:

- whether and in what scope the heirs can request a tax authority to verify the correctness of the deceased's tax settlements (the right to adjust tax declarations, etc.), and - symmetrically
- whether and in what scope the tax authority may verify - after the death of a taxpayer - whether he/she correctly fulfilled their tax obligations and whether and in what scope and manner they may hold the heirs responsible for the legal consequences of discovered irregularities, if any;
- whether and in what scope the law gives the possibility of taxing the income coming from the sources not disclosed after the taxpayer's death and thus - of dealing with the consequences for such taxpayer's heirs, etc.

3 Conclusion

Legal succession, including the heirs' succession to tax liability and tax rights, is one of the areas of the Polish tax law that is hardly identified and studied in scientific terms. There are still wide areas to explore. Some problems were

mentioned above, but many research problems, that is substantive law issues and procedural issues, which are new and have not been handled yet will be probably discovered in the course of further research.

The Polish legal regulation of the heirs' succession to tax liability is far from being perfect. Over a decade of its applicability has not led to giving it a satisfactory form in spite of several amendments. Therefore it seems that due to insufficient effectiveness of the existing – partial and fragmentary - activities, it should be completely restructured based on the verification of the former assumptions which were the basis for its present normative form. Instead of this, the Polish government recently announced the beginning of a legislative process to make only some detailed changes in that area.[4] But the overall shape and principles on which the regulation is based remain intact.

It seems interesting and important to answer the question how the succession - which has been an institution characteristic of private law for hundreds years - functions after its transferring to the context of public law relations.

It appears that we have witnessed the end of the "trial period" giving the possibility of answering such questions as whether the spread of civil law model to public law has been successful, whether this process has already ended, or whether the solutions are still *in statu nascendi*.

The interference of tax law norms in the sphere of property causes that the relations regulated by the tax law provisions are considered to have an exceptional potential for conflict. In the context of succession, such conflicts may be really serious as tax law - in many cases - attributes the negative legal consequences of the deceased's activities to their heirs who view themselves as the entities that should not be affected by negative results of events which were beyond their control and were not profitable for them. Each mistake made by the legislator passing tax laws and each pathological phenomenon occurring in practice in this scope is evaluated especially negatively by the society, which translates into the level of citizens' trust in the state and its institutions.

4 Draft legislation available here (pp. 44 – 45): http://www.komitetpodatkowy.pl/pobierz/137.html [20. October 2014].

One of the key problems is the issue of interpenetration of institutional models between the legal systems of different countries. Each legal system regulates the issue of legal succession in the event of natural person's death, also the succession in the area of tax relations. It is necessary to answer the question whether the regulations applicable in other countries provide for the solutions which significantly differ from those applied by the Polish legislator, and whether other legal systems offer the solutions which enable the avoidance of irregularities (pathologies) present in Polish solutions. The comparative analysis would allow to determine whether regulations implemented in other countries are expanded and casuistic – as it is in Poland – or whether in other systems one may find simpler and universal solutions.

In many countries, the legal solutions concerning the heirs' succession to tax liability have a much longer history than in Poland, therefore one should believe that the solutions developed in these countries may possibly successfully address such needs. For that reason, it is worth to make them a point of reference for the analysis concerning the Polish law if not the model solutions.

The research already conducted revealed an interesting sphere of exploration and vast research problems. It is worth to deepen and focus the attention on the heirs' succession issues.

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THE PARADOX OF TAX INCENTIVES IN DEVELOPING COUNTRIES[1]

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Abstract

A number of arguments have been proposed to explain how tax incentives attract foreign direct investments and jeopardize public revenues. Unfortunately, these arguments hardly explain why some developing countries in Eastern Europe suffer from low capital inflow in recent history. This paper examines the rationales and specifics of tax systems of the region and explains the aspects that constitute decisions on investments of multinational corporations. Rather than choosing to do business in countries that offer considerable tax incentives but of greater uncertainty, managements decide on establishment in countries with lower levels of incentives but with strong legal protection and policy credibility. Since the deficiency of legal certainty in taxation is more prominent in developing countries than in developed countries, this explains the less than expected inflow of foreign direct investments and the existence of the paradox of tax incentives.

Key words

Tax incentives; legal certainty of taxation; paradox in taxation.

JEL Classification

H20, K40, H25

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1 Introduction

Developing countries, although spread throughout the globe, have many similarities, especially countries from Eastern Europe,[3] namely CEE[4] and CIS[5] countries. Some of them are important for legal certainty in taxation, based on historical and global contexts which are explained in the article. This article deals with tax incentives that have been introduced to every tax system with the main aim to increase attractiveness to foreign direct investments. Since these investments are channelized by multinational corporations[6] (hereinafter: MNC) as the primary and the most important instruments, the main intention of this article is to compare recent researches on the importance of components of tax systems on the decision-making process of this global corporate phenomena.

The theoretical and practical problem of tax incentives is the lack of FDIs, which can be easily recognised in Croatia, with many tax incentives prescribed by laws, robust both in quantity and quality, but not followed by a substantial capital inflow from investors in the last 20 years of Croatian independence.

Starting from the conclusion of the research on political determinants of tax incentives, conducted as a statistical analysis of 52 developing countries, which states that: "(F)or investors, lower levels of incentives in more democratic hosts are as attractive as higher levels of incentives in less

3 In a global context we should not ignore the importance of India or China, which will be developing world's largest investors by 2030 together with Russia and Brasil (so called BRIC countries, GDH, 2013) but this article concerns developing countries in the geographic area of Eastern Europe.

4 Central and Eastern European Countries, as defined by the OECD: Albania, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, and the three Baltic States: Estonia, Latvia and Lithuania. (Glossary of statistical terms of the OECD).

5 Commonwealth of Independent States (CIS) as defined by the OECD: "Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine" (Glossary of statistical terms of the OECD).

6 Multinational enterprises (MNE) or transnational enterprises (TNE) or corporations, though often used and defined in different contexts and for different usage, in this article are used as synonyms due to the fact that an exact legal definition is of less importance for understanding capital flow and investments worldwide (see also: Bogovac, 2014). In most parts, this article refers to MNCs, but many examples can apply to domestic and/or smaller enterprises.

democratic hosts" (Li, 2006: 64), this paper follows the path of the studies of Graham (2011 and 2014) on the importance of taxes for corporate decisions; La Porta et al. (2013) on some evidence of the magnitude of legal origins, and Bogovac and Hodžić (2014) and Bogovac (2014) on the importance of legal and economic tax aspects for MNCs' decisions on investments and financing. With the aim to find a solution for fiscal instruments that should entice not only MNCs but also domestic and smaller investors and entrepreneurs to invest more in business and take advantage of tax incentives,[7] issues regarding simplifications and usage of tax expenditures are surveyed, due to the fact that the fairness of the tax system is highly dependable on this variable.

As a basis for the determination of similarities between CEE and CIS countries, some older theories and works are explored in order to understand the historical and socio-political background of the region in Chapter 2. The global perspective of the current status of tax incentives in developing countries is further observed in Chapter 3, both from the viewpoint of the administration, as well as from the viewpoint of MNCs. Chapter 4 articulates conclusions about tax paradoxes which are then supported by an overview of recent researches on the importance of tax incentives and tax risks for MNCs in Chapter 5. These conclusions are then incorporated into the explanation of the vicious cycle of the adverse relationship between taxpayers and tax administration in Chapter 6, which leads to the final remarks and recommendations in Chapter 7.

2 Historical context

The similarities between European developing countries in terms of legal certainty of taxation are too great to be coincidental. Many legal,[8] political,

7 Once tax expenditures are in place, they are likely to benefit well-off taxpayers more than the rank and file. The well-to-do simply have more tax liability in the first instance, and so have more to gain from tax expenditures. To the extent that tax expenditures are complex and confront those who wish to claim the tax benefits with complex tasks, the most well-to-do are most likely to have the financial and technical knowledge, or the hired assistance, to take advantage of those opportunities. (OECD, 2010:26).

8 Where the idea that legal origins – broadly interpreted as highly persistent systems of social control of economic life – have significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes (La Porta et al., 2013:477).

economic and social aspects might be combined into research on the historical context of legal certainty of taxation. One of the explanations might be found in Riggs's theory of prismatic society brought again to the fore by Kregar (1991) through examples of postcomunist countries. Although this theory generally demonstrates the phenomenon of premodern societies, stressing the differences between statutory and real as illustrated in postcolonial countries, today we can recognize similarities in the conduct of the state and in the law of CEE and CIS countries:

„*The modern state has come into existence in a specific situation of the social, economic, political and cultural context of the West. In the developing countries, where the tradition is entirely different, appear forms which are only formally similar to their models. In reality their functioning carries a burden of inertion of tradition and of significance of bonds of solidarity. The state transforms into an apparatus whose efficiency is, out of a pure repression, completely questionable, and the a rule of law represents an unachieved ideal*" (Kregar, 1991:832).

For more than 40 years, foreign direct investments (including MNC) were „categorically excluded" from former state-run economies and „only limited allowance for foreign minority joint ventures" was permitted enabling moderate transfer of technology and capital (Wallace, 2002: 45-46). With the aim to improve legal and commercial systems and to reassure potential investors of the security of their investments, new laws have been enacted in 1990s. Due to the transition countries' reliance on "western" models and the lack of stability caused by "erratic changes" in legislation, it is therefore understandable that such an environment does not offer innovative legal models and at the same time makes it difficult to keep up with the changes (Wallace, 2002).

The often cited Canard's tax rule (Jelčić et. al., 2008) that "old taxes are good taxes", which is basically related to shifting the tax burden, could also serve as an additional explanation of legal uncertainty caused by constant changes in tax legislation due to the fact that every fluctuation in the law changes not only tax incidence, but also increases the fear of unpredictable costs for taxpayers, and, above all, of new tax risks if found within non-transparent

tax systems, such as those in developing countries. Therefore, the maturity of tax laws, together with the established practice of tax administration, enhances the credibility of the state, hence making it more attractive to investors.

3 Global context

MNC is the phenomena of a new era of global economic integration, recognized as the primary instrument and the most important vehicle of the foreign direct investment flow. Simultaneously, the differences in national tax legislation and practice are generally recognized as one of the important influences on international capital streams, thus on the decisions of the boards of directors regarding budgeting and finances of a corporation.

MNCs are seen by governments as desirable entities which bring capital and technology to host economies, but at the same time as a threat to the fiscal sovereignty of countries, due to their sophisticated organisational structures that enable them to implement complicated schemes of tax avoidance. Modern tax administration therefore has a dual responsibility regarding multinationals: to enact fiscal instruments, namely tax incentives, that will attract foreign direct investments, and simultaneously to introduce tax measures to identify tax risks in a timely manner and combat unwanted tax arrangements denying benefits in such cases. In addition to the harmonisation of domestic laws, general and specific anti-avoidance rules, host countries' tax administrations also need to establish relationships with taxpayers, which would prove their transparent and responsible practice. This is important not only in the field of anti-avoidance efficiency but also in the field of attractiveness of the tax system to foreign investors. MNC, or capital in general, needs a stable and trustworthy environment, not only to reduce tax risks of current and planned transactions, but also to view

tax administrations as partners in understanding and ensuring fair taxation of any future transactions that dynamic and unpredictable business contextures might generate.

Due to the supra explained differences in the historical context and the complexity of taxation issues, it is no surprise that developing countries, under the conditions of rapid globalization, lag behind the developed world in the area of legal certainty of taxation for entrepreneurs.

After being closed systems for such a long time, CEE and CIS countries, now seeking FDI, are unable to avoid the cycle of fears experienced in developed countries in the past. Although caused by different reasons and often resulting in different outcomes, depending on the socio-political actuality, these fears could be grouped systematically in four categories, as defined by Wallace (2002): (i) fears of intrusion on national sovereignty, (ii) fear of neo-colonialism and economic imperialism, (iii) uncertainty generated by foreign-based decision-making, and (iv) fears of technological dependence.

Another important aspect that will cause additional challenges for governments of CEE and CIS countries is that Eastern Europe „is the furthest along in its demographic transition, and will be the only developing region to reach zero population growth by 2030". Significant fiscal pressure caused by aging is expected to moderate economic growth in the region, decrease the saving rate, even more then the investment rate, so the CEE and CIS countries will have to attract financial capital from abroad. (GDH, 2013: 61-62).

From a global perspective, aiming to attract foreign capital, developing countries should understand decision-making processes of MNCs, especially those that relate to tax planning.

One of the researches on tax planning strategies of corporations revealed *that reputational risk* is very important[9] – next to the first-ranked *business*

9 Based on the survey responses from nearly 600 USA corporate tax executives. „The executives indicate that reputation is very important, with 70% of firms rating it as important or very important in their decision to avoid a tax planning strategy and 58% of firms rating the risk of adverse media attention as important or very important (...) among all factors explaining why firms do not adopt a potential tax planning strategy" (Graham et al., 2014: 992).

purpose, and followed by the related *risk of adverse media attention* at fourth rank. R*eputational concerns* could be considered to be a role of the management – they are agents of owners and they have to maintain the reputation and sustained development of the company – thus, avoid being labelled as a „poor corporate citizen" which might adversely affect product market outcomes" (see: Graham et al., 2014).

In addition to *business purpose* and *reputational concerns* that were found as the most important reasons preventing firms from engaging in tax planning, authors ascertained *the risk of IRS detection* as the third-ranked with 62% of the firms giving that factor a rating of important or very important (Graham et. al., 2014). Even though this factor was not the primary research interest of the authors, this result can be of great importance for this paper due to the specifics of developing countries. Risk of detection and challenge by the IRS does not differ statistically depending on the ownership of companies (public or private) and relates to the previous researches (Graham 2014).

In spite of scientific proofs and the generally accepted opinion that the scrutiny of tax authorities has a strong influence on discouraging tax avoidance, it can be accepted as an important variable under some preconditions. Firstly, it may apply to domestic taxpayers that do not have a chance to change their tax position in a short period of time, such as companies established within the country (domestic or foreign-owned firms and subsidiaries). Secondly, it affects taxpayers to the extent that the level of legal certainty, especially legal certainty of taxation, meets minimal requirements of capital investors regardless of whether they are domestic or foreign, potential or existent (Bogovac, 2014; Bogovac, Hodžić, 2014). In other words, if tax scrutiny arises from non-transparent legislation, it cannot be expected to achieve the goal of reducing tax avoidance of taxpayers who, at the same time, increase business activities.

If we put these arguments in the context of this paper, when they are combined with the legal uncertainty of taxation in Eastern European countries, it logically leads to the conclusion that such a strong motivations in the behaviour of top management must create some variations of tax planning, namely that they will avoid conducting business in an environment

that does not offer the management a chance to primarily deal with the economic substance of transactions, pay a fair portion of taxes and uphold the reputation of good corporate governance. In spite of good faith and willingness to comply with tax legislation, MNCs fear that this attitude will not be recognised by tax authorities whose non-transparent practice leads to the fear of prosecution and bad reputation. Thus MNCs will not choose to stay or to be established in a rigid tax system where they do not know what are the exact legal requirements that they have to follow if they want to comply with tax obligations and be recognized as „good corporate citizens".

In addition to that, many other variables emerged in researches as important for the decision-making process of multinational corporations[10] (Bogovac, 2014). As an additional aspect, Graham, Campbell and Puri (2011) found that the decision-making structure within a company is more complex in companies that have recently completed multiple acquisitions. It implies that the business cycle and the exact moment of making the decision might be crucial, making such analysis more complicated. Thus, it can be concluded that the decision-making process is not as simple as financial evaluations present it to be and more aspects should be considered to gain assurance in the effectiveness of fiscal instruments.

Governments should follow the example of MNCs, which as a rule invest immensely in corporate reputation, not only by investing in formal public relations, but also by investing in the education and cooperativeness of employees of tax authorities because substitute mechanisms for legal protection might be even more effective due to their substance. For example, if some legal instrument is not introduced into legislation, or even if it is introduced but not obligatory for tax authorities (e.g. opinions, rules, instructions issued by the ministries of finance), however it is well known in the business society[11] that the above mentioned opinions guarantee that all similar business-oriented transactions shall be equally treated by tax offices

10 Such as size of the market, competition, size of the corporation,volatile cash flow, interest tax shield, depreciation tax shield, industry, inflation, interest rates and assets, among others.

11 Supported by consultants and advisors. This is also known as the "golf course syndrome", the phenomenon of exchange of information between directors while socialising (Freedman et al., 2009:85).

across the country in the long-run, then it is worth more than respectable legislation with unsatisfactory law enforcement. A prerequisite for a country to have such a tax administration reputation is transparent legislation followed by the maturity of the laws and clear top-to-bottom instructions within the ministries of finance.

In addition to the unilateral and bilateral ways of controlling MNCs, the importance of supranational jurisdiction shall not be ignored, especially in the light of recent examples of EU litigations against Apple, Starbucks and Fiat (EU, 2014), making tax legislation more complex and tax uncertainty more important for international business.

As a conclusion to historical and global contexts, we can say that modern and pre-modern societies with new and constantly changing tax systems without adjustments in the approach of tax authorities, give rise to legal uncertainty. This is emphasized in developing countries where the law changes constantly in accordance with different tax abuse cases discovered in the country and in accordance with tax planning schemes elaborated by tax authorities from developed countries. Laws, which are not prepared for the majority of host country taxpayers that do not engage in such arrangements – but for the taxpayers involved (or potentially involved) in tax fraud, make the tax system puzzled and daunting. In the end, a tax system is not attractive to a MNC focused on business purposes and corporate reputation.

4 The paradox(es) of tax incentives

In accordance with the supra mentioned dual responsibilities of tax administration it is inevitable that these diametrical goals result in a sometimes deficient fiscal policy, consequently with more emphasized deficiency in developing countries. Enlargement of the gap between wanted and accomplished outcomes of fiscal instruments is also caused by other factors. These factors are as follows: (i) companies of host countries that expect to earn, learn and

grow with the establishment and future business activities of the foreign-owned subsidiary, but have a strong fear of new competition; (ii) residents of host countries that anticipate new opportunities for employment, better earnings and learning, but still feel anxiety about possible negative outcomes for legislation and natural recourses of the country, and (iii) countries that do not offer huge incentives as the host country concerned so they have a fear of losing attractiveness in comparison with „tax friendly states" (there is tension really between the states themselves rather than between MNCs and governments).

Although for (some) developing countries in Europe results of the competition for investment capital against each other and the developing world have been positive (Bogovac, Hodžić, 2014), they all turn to restrictive measures, legislative or less formal, aiming to ensure control over multinationals.[12] These countermeasures were often responses to universal instances of abuse but excessive in reality and supported, in technical means, by western tax administration colleagues, who can barely understand the historical and political background of present situations. Therefore, developing countries sometimes make replicas of separate legal measures from developed countries which often do not fit the context, thus contributing to the stagnation of the processes of modernization of public services and the economy.

All these factors form the paradox of tax incentives: though desirable, MNCs and foreign direct investments are faced with fears legalized at local, bilateral and supranational levels.

5 The importance of tax incentives and risks: evidence from the field

The opinion that taxation is important for investments is generally accepted around the globe and scientifically proven for its numerous elements in many researches and studies. A survey conducted in Croatia during 2011[13]

12 Croatia is not even close to the top of the list of CEE and CIS countries that have experienced substantial capital inflow or characteristics of favourable tax jurisdiction; however, it is recognized as a country with legal uncertainty (Deloitte, 2013).

13 The research was conducted as part of a doctoral dissertation, entitled "Legal and economic factors of taxation of multinational corporations" at the Faculty of Law in Zagreb, with the owners and top management of multinationals in Croatia.

(Bogovac, 2014) explored the entirety of legal and economic aspects of taxation, which influence decisions of MNC, identifying the importance of tax incentives, risks and costs and tax analysis in general in making strategic decisions by MNCs.

The results of the analysis showed that while making decisions about investments, the management does not consider taxation as a key factor. The majority of subjects in this study did not state it as the most important variable, and the ones that included taxes in the evaluation of the most important variables in general did not rank them high. The most important factor is *the calculation of profitability on investment*, which is not surprising given that it entails and requires the management to be business-oriented when making strategic decisions, and for a decision on investments this result seems logical. It is interesting, however, that *legal certainty* is ranked second, even before *market compatibility*. *Tax factors* were determined to be third-ranked when making investment decisions. Similar results were found for decisions on financing. Here *the simplicity and security of the tax system* and *tax allowance* are emphasized as the most important tax variables.

Additionally, the importance of *tax incentives* when making strategic decisions on investment was examined by behavioral intent. Despite the possibility of higher earnings, in the case of existence of tax incentives, the majority (70%) of respondents chose to invest in the state with *lower earnings and risks*.

Explaining the reasons for lower than expected utilization of tax incentives in practice by law makers, strategic managers confirm that there are obstacles when using tax incentives. By linking these views with the comments, it can be concluded that because of the focus on primary goals of entrepreneurs' activities (*management is primarily dealing with business issues, not tax planning*), or because of the fear of an uncertain tax system (*lack of confidence of entrepreneurs in their actual usability due to complex procedures and records*), there is a lack of understanding of the possibilities offered by the tax system in terms of tax allowances.

The results showed that the management does not want to engage more intensively in exploring the tax system but find it more important to be offered a clear tax administration framework in which they can work

and strive to do business. The most important features of a tax system are considered to be *transparency and simplicity*, *incentive for investors* and *reliability and stability*.

The impact of tax incentives is only one aspect of different countries' tax systems. Regarding tax risks, results show that MNC managers are best prepared to tolerate *the amount of the tax rate*. In contrast, *complex and unavailable procedures*, i.e. differences in instructions, opinions and procedures of tax administration, and non-transparent and inequitable tax case-law, the unavailability of court judgments and tax arguments are the tax risks and costs that they are the least prepared to tolerate when choosing the state in which they will operate.

Results point to the fact that MNC managers from an organizationally more complex corporation who are expected to be better able to engage in the management of international tax risks, are more likely to tolerate risks of *frequent and indiscriminate tax inspections* and *high penalties for tax offenses*, while they are less tolerant towards *non-transparent and unavailable procedures and processes of the tax administration*. That leads us to the conclusion that MNCs, when faced with risks that are not predictable because they originate from unequal and arbitrary actions of tax authorities, decide on doing business in other states in which they will quantify tax liabilities and secure limitation of tax risks within acceptable levels.

In conclusion of this research, it can be stated that tax incentives are less important to strategic management than the fear of a non-transparent and "enemy" tax system; therefore, tax risks are imposed as a primary aspect of strategic decision-making by MNCs in the field of taxation.

Similar results were obtained in the research conducted by Deloitte (2013) showing that the most favourable of the large jurisdictions for inward investments are the Netherlands and the UK, while Italy and Russia are viewed as the most challenging of the large jurisdictions, due to *rapid legislative changes*, *ambiguity and different interpretations over time about tax positions*. When asked to select from smaller European economies if there was another country more favourable than the major economy already rated, most respondents chose Luxembourg, Switzerland, Belgium and Ireland. CEE and CIS countries where chosen by less than 3% of the respondents while Croatia was

not mentioned. Results show that there is a consensus over the meaning of the tax perspective of challenges: "*uncertainty*, *legislative change*, and *tax authorities who are unable or unwilling to find solutions to tax issues created by commercially motivated transactions*" (Deloitte, 2013:7). This study (*also*: Bogovac, 2014) revealed the same attitude regarding *high tax rates* that are not considered a delicate issue as long as tax systems are uncomplicated and flexible. When asked about the greatest positive impact on their country's competitiveness, the first choice was *more certainty in the future of the tax system*, 25% of the respondents selected *simplification of the tax system* and third-ranked was *a very predictable and collaborative tax authority*. The study also evidences that corporate tax directors are focused primarily on *proper tax compliance* giving lower priority to *attempts of paying less tax*. *The impact of the media and interest groups*, along with increased tax scrutiny in certain countries, forced corporations to change their focus to *corporate reputation*.

These findings lead to the conclusion that *stable tax legislation* is the most appreciated aspect of tax systems. That proves the existence of the paradox of tax incentives in some countries which offer huge tax incentives but have not experienced the expected inflow of foreign capital, and explains the fact that substantial tax incentives do not necessarily mean that foreign direct investments depend solely on them.

6 The vicious circle of tax scrutiny and tax avoidance

Fiscal theory recognises several important ratios for the increase of tax avoidance: (i) extreme tax pressure, (ii) recognized unfairness of the tax system, (iii) absence of trust in reasonable public expenditures especially in the case of the growth of public administration, followed by its non-efficiency and arrogance, (iv) tax moral of individuals, social groups, in connection with specific characteristics – education, religion, nationality, economic wealth, political orientation, (v) substantial costs of tax compliance and (vi) unprofessional, unconscionable and non-objective tax administration as well as its attitude towards taxpayers (Jelčić et al., 2008: 212-216). Having in mind these ratios and characteristics of developing countries similar to the prismatic society, it can be logically concluded that doing business in an environment that recognizes black economy, nepotism and unfair

political elite as a constant – and at the same time having huge tax compliance costs and tax risks, being confronted with endless bureaucratic procedures and an unpredictable attitude of the tax administration – leads taxpayers to tax avoidance or tax ingenuity. In case of MNCs, it can be additionally interpreted that their flexibility and possibility of establishment worldwide will cause tax planning in accordance with the law contrary to the intention of the government: if financial evaluations do not differ substantially, they will simply choose another country with more legal certainty that will give them the possibility to concentrate more on their business, instead of on the tax system. In case of other entrepreneurs that do not have such choices, this environment will presumably cause tax avoidance or tax planning (while tax avoidance can be with or without intention of the taxpayers, due to the complexity and non-transparency of the system).

Eventually, tax avoidance, when recognized, offers additional reasons for the tax administration to treat all taxpayers with more scrutiny and conduct more investigations, creating a vicious circle of constant antagonism between taxpayers and tax authorities.

It is the administration's duty to introduce legislation and set the limits for entrepreneurs' activities and taxation obligations. Taxes and „the quality and quantity of services provided by government – are what policymakers can control" (Wasylenko, 1997: 42). These two variables of the fiscal policy depend on each other: enacted taxes can be quantitatively and qualitatively supported by the tax administration only if well-educated employees can rely on instructions of high-positioned colleagues responsible for proper interpretations of the law. Already complex tax systems, being further and frequently complicated by new laws without satisfactory rationales and clarifications, make tax uncertainty almost unchangeable.

This vicious circle should be broken by a systematic tax reform that will not be introduced because of the current change of government without a social consensus on the matter, or in accordance with actual experiences of western countries. If necessary, it shall be implemented because

of the change in the approach of tax authorities to taxpayers, as an upgrade that best adheres to the historical, political and socio-economical base of the given state.

7 Conclusion

The paradoxes of tax incentives in developing countries are more emphasized then in developed states. Paradoxically enough, these countries are at the same time the most vulnerable with regard to capital inflow and economic growth. Similarities of tax systems within the CEE and CIS regions come without surprise and lead to the conclusion that they need to be improved in accordance with historical and demographic development.

The two most important characteristics of non-transparent tax systems are frequent changes of legislation and a non-uniform practice of tax administration. These leads to over-regulation, tax avoidance and tax planning, followed by negative attitude and scrutiny towards taxpayers, closing the vicious cycle of the relationship between taxpayers and tax authorities. Entrepreneurs and capital in general are not interested in entering into such an environment to follow the path of those who are already within the cycle. As Enders[14] formulates it: „the danger is that uncoordinated or excessive national and international regulation – particularly if aimed at potential rather than actual abuses – runs the risk of killing the goose which lays the golden egg" (Wallace, 2002:1099). The inability to identify and quantify the tax risk in non-transparent tax systems discourages taxpayers who wish to operate within the legal framework.

If governments want to eliminate the minefield in the tax system and change the route of economic development, they firstly must offer to MNCs a stable and trustworthy tax system that will not compromise the benefits arising from other legislative and fiscal instruments. This tax system would not provide excessive or unreasonable tax incentives which would imperil the sovereignty of the state in financial or any other means. Rather, a well-designed legislative framework controlling multinationals through tax legislation

14 Mr. Thomas O. Enders, U.S. Assistant Secretary of State 1981 - 1983, statement before members of US Congress and the EU Parilament.

would provide incentives that conform with legal origins, governing legislation and economic development of the country, and are closely aligned with the capability of tax authorities to administer and control such a system.

Governments of developing countries, who would like to follow western colleagues in respect built on scrutiny and fairness in tax matters, have to find a way to make their laws simple and „old" so they can form a foundation needed to give legitimacy to the practise of the tax administration and offer a framework in which the legal uncertainty in taxation, inherent throughout history, could be fairly managed.

If, however, governments of developing countries want a more effective tax system that presents a useful part of the investment policy, it is essential to provide entrepreneurs with legal certainty of taxation in utilizing tax incentives that they can understand without investing too much additional effort in their interpretation. Tax incentives and regulations of tax benefits need to ensure that the anti-avoidance rules target disputable transactions and do not discourage other commercial outcomes of the entrepreneurs.

These findings develop a framework for better interpretation and a guide for future study, due to the many questions that still need to be solved. Firstly, researches would have to focus on legal institutes and practice in taxation that are recognised as instruments that develop trustworthiness and certainty in a tax system. Secondly, results of future surveys need to show which of the recognized legal institutes best fits the legislation of developing countries, contributing to legislative certainty in general.

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THE ISSUE OF THE APPLICATION OF ARTICLE 6 PARAGRAPH 1 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS TO TAX CASES

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Abstract

The main aim of the contribution is to analyse the contemporary possibilities to apply Article 6 paragraph 1 of the European Convention on Human Rights to tax cases.

Key words

Tax; law; taxpayer protection; European Convention of Human Rights; Ferrazini case.

JEL Classification

K33, K34

1 Introduction

Nowadays the problem of proection of taxpayers' rights becomes more and more important (Leszczyńska, 2009: 513 et seq.). This assertion is not a slogan proclaimed to uplift the spirits, but a real justification for changes in the legal environment in which the taxpayer operates. Various legal solutions introduced over the last 20 years have significantly reduced the scope of rights of a taxpayer as a citizen. Limitation of banking secrecy, introduction of systems for the exchange of information between tax administrations of various states, new techniques of surveillance of taxpayers and their

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activities are placed under the banner of reducing tax evasion, which in turn is in an obvious way justified by the ideas of equality or justice of taxation. This justification is not without importance, nevertheless it is becoming more and more apparent that aggressive tax planning is accompanied by aggressive tax audit (Brzeziński, 2014: 29 et seq.). The aim of the latter is to obtain additional budget revenue by tapping into interpretation of the law extremely disadvantageous to the taxpayer (*in dubio pro fisco*) or violating the principles of the acquisition of evidence in tax proceedings, including those related to gathering data in an illegal manner.

Reactions of the legislature, and even national tax courts, to the aggressive tax audit are insufficient, no matter what is the reason for it. Therefore, the measures to protect the rights of the taxpayer should be sought outside the norms of the national tax legislation, i.e. within the EU or international tax law (Brzeziński, 2009: 27 et seq.). Thereafter, I will focus the attention on the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "the Convention"), and more specifically, on the extensively discussed issue of the applicability of Article 6 paragraph 1 of the Convention to tax matters.

The main purpose of the article is to analyse the contemporary possibilities to apply Article 6 paragraph 1 of the European Convention of Human Rights to tax cases.

The use of protection under this provision, providing for the right to court and the right to a fair trial, is nowadays limited by the tenor of the judgment of the European Court of Human Rights (hereinafter: "the Court") in the Ferrazini case. The Court decided against such possibility. However, one can hypothesize that the Court's position on this issue is now largely obsolete and inadequate to the social and political realities. Verification of this hypothesis will be carried out primarily through the analysis of legal acts in the area of the Council of Europe, reflecting the contemporary position of the States-parties to the Convention. Incidentally, the analysis of other international conventions concluded to protect human rights will also be made.

2 The place of Convention in the system of Polish law

It is worth noting that Poland ratified the said Convention in 1993. This fact should be considered in the light of Article 91 paragraph 1 of the Constitution of the Republic of Poland – under which after its promulgation in the Journal of Laws of the Republic of Poland (Journal of Laws), a ratified international agreement constitutes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute. Moreover, according to Article 91 paragraph 1 of the Constitution an international agreement ratified upon prior consent granted by statute has precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3 Ferrazini case

The key role in the contemporary discourse about applicability of Article 6 paragraph 1 of this Convention to tax matters is played by the ruling of the Court in *Ferrazini* case (*Ferrazini v. Italy*, 12 July 2001, Application No 44759/98). In this ruling the Court approved the predominant line of case-law of the Court, according to which the above-mentioned provision does not apply to tax matters. The main argument used in support of the judgment referred to the otherwise undisputed facts from the period when the Convention was being prepared. Materials documenting the preparatory works in fact indicate that covering with that provision issues belonging in the scope of the taxation was not the intention of the Contracting States.

In the opinion of the six dissenting judges in the *Ferrazzini* case the most compelling of the arguments to be found is that Article 6, as important as it is, is nothing more than a procedural guarantee of a minimum of rights in respect of the right of access to a court and the way in which the proceedings are conducted (Lee 2010, p. 609).

This ruling and, broadly, this way of thinking was strongly criticized by the academics, called archaic and, simply, a bad one (Baker, 2000: 298 et seq.; idem, 2001 (No 6-7): 205 et seq.; idem 2001, (No 11): 360-361; Balcerzak and Zalasiński, 2002: 37 et seq.; Lee, 2010: 589 et seq.)

Nevertheless, as far as tax matters are concerned, the position of the European Court of Human Rights has not changed till now.

It should be emphasized that the Court's position, excluding tax matters from the scope of Article 6 paragraph 1 of the Convention, is not as radical as it seems at first glance. Already the results of the vote on *Ferrazini* Case (11:6) showed significant differences of opinion among the judges of the Court. Furthermore, the Court – in other judgments – takes the position that there is no obstacle to the application of that provision to tax matters where the case involves punishment or sanction. Then it would be a criminal case referred to in the wording of Article 6 paragraph 1. The concept of the criminal case in the broad meaning – involving not just the inflicting of criminal penalties, but also the application of all kinds of administrative and tax penalties – is applicable, e.g., when as a consequence of taxpayer's unlawful activities he becomes subject to an increased tax rate (Balcerzak and Zalasiński, 2001: 31-32).

4 Overview of arguments against the Ferrazini judgment

However, a fundamental question is whether today it is still not possible to take into account the standards of Article 6 paragraph 1 of the Convention in tax matters – for those cases which neither have criminal background nor even contain the element of sanction. It seems that the answer to this question may be positive.

First, the understanding of civil cases adopted by national courts does not need to be the same as the one determined by the jurisprudence of the Court. It is the natural tendency to respect and mirror the point of view of a higher court in lower court decisions. This hierarchical relationship obtains between the Court on the one hand, and the national courts of the States-parties to the Convention on the other. However, strictly speaking, in their judgments national courts are not hierarchically dependent on the Court. Therefore, it is imaginable and admissible that national courts adopt a broader understanding of a civil case than the Court, and consequently, adopt a broader interpretation of Article 6 paragraph 1 of the Convention. I do not think that this approach would be detrimental to values, infringe the principles of statutory interpretation or any other normative standard, whether ethical or legal.

Second, some interpretative guidance can be drawn from other international legal acts of a similar nature. Article 47 paragraphs 1 and 2 of the Charter of Fundamental Rights of the European Union (hereinafter: "the Charter") guarantee the right to an effective remedy and to a fair trial:

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented".

The protection based on this provision – as opposed to Article 6 paragraph 1 of the Convention – is not limited to "criminal and civil cases", but refers generally to the rights and freedoms guaranteed by the law of the Union, including those arising from tax law. While it is true that the protection conferred by Article 47 of the Charter applies only to the rights and freedoms guaranteed under EU law, nevertheless this provision indicates the universality of protection as a feature of the modern model of the protection of human and civil rights. Consequently, there is no reasonable basis to maintain the model of "universal" protection, located in the provisions of the European Convention on Human Rights, as an imperfect or incomplete one, as a result of areas of rights and freedoms in the field of taxation, administration etc. being excluded from its scope of application.

Moreover, another international agreement, i.e. American Convention on Human Rights "Pact of San Jose, Costa Rica" of 22 November 1969, states in Article 8 ("Right to a Fair Trial"):

"1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, f i s c a l, or any other nature".

This is yet another indication of the universal direction of development of the system of human rights protection and its embracing all areas of law, including tax (or fiscal) law.

Third, pertinent are the rules of interpretation of international agreements, contained in Article 31 et seq. of the Vienna Convention on the Law of Treaties (1969). Article 31 ("General rule of interpretation") states as below:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended".

It means – in short – that in the interpretation of the provisions of international agreements it is not possible to disregard the context, both existing at the time of signing the agreement and that which has emerged already in the course of the operation of the agreement. The latter context will be discussed in the next part of the article.

5 Interpretation of treatises – the base of context

If for the interpretation of the text of the Convention one pays attention – and rightly so – to the importance of materials from the legislative process, one must therefore pay attention to other elements of the interpretative context – especially those that have appeared in recent years. The Convention – irrespective of the fact that over the years it has been accompanied by several protocols – in its basic shape remains unchanged for decades. Transformation of the socio-political relations in this period makes legislative materials important as a relatively reliable source of interpretative arguments for the objective reading of the Convention. In contrast, the importance of identifying the will or declarations of intent expressed by the representatives of the States-parties to the Convention presently decreases.

Therefore, the Polish tax law literature rightly draws attention to the position taken with regard to the right to court and due process in a number of documents of the Committee of Ministers of the Council of Europe (Kazek 2014, p. 28-29). While these documents have the form of resolutions and recommendations, their importance should not be underestimated. Their significance stems from Article 54 of the Convention, which provides that nothing in the Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe. This also applies to the use of appropriate measures for the implementation of goals of the Council of Europe, including the adoption by governments of the common policy regarding particular issues and making recommendations to the governments of Council of Europe members.

Accordingly, Article 15 of the Statute of the Council of Europe (London, 5 May 1949) provides that on the recommendation of the Consultative Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters. Its conclusions shall be communicated to members by the Secretary General. In appropriate cases, the conclusions of the Committee may take the form

of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations.

6 Interpretation of treatises – context and Article 6.1 ECHR

There are several resolutions and recommendations of the Committee of Ministers of the Council of Europe where taxation has been mentioned *explicite* or *implicite*.

First, Article 1 of Resolution (76) 5 of the Committee of Ministers of the Council of Europe on legal aid in civil, commercial and administrative matters (adopted by the Committee of Ministers on 18 February 1976 at the 254th meeting of the Ministers' Deputies) states that every person who has his habitual residence in the territory of one of the Contracting Parties and who wishes to apply for legal aid in civil, commercial or administrative matters in the territory of another Contracting Party may submit his application in the State where he is habitually resident. That State shall transmit the application to the other State.

It is noteworthy that in paragraph 8 of the explanatory memorandum to the resolution it is clearly indicated that the expression "in civil, commercial and administrative matters" also includes matters related to t a x a t i o n. Second, point 1 of the Appendix to the Council of Europe Committee of Ministers Resolution (78) 8 on legal aid and advice (adopted by the Committee of Ministers on 2 March 1978 at the 284th meeting of the Ministers' Deputies) states that no one should be prevented by economic obstacles from pursuing or defending his right before any court determining civil, commercial, administrative, social or f i s c a l matters.

Third, the Recommendation No Rec(81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice (adopted by the Committee of Ministers on 14 May 1981 at its 68th Session) in its Appendix states that member states should take all necessary steps to inform the public on the means open to an individual to assert his rights before courts and to make judicial proceedings, relating to civil, commercial,

administrative, social or f i s c a l matters simple, speedy and inexpensive. To this end member states should have particular regard to the matters enumerated in the Appendix.

Fourth, the Recommendation No Rec(94) 12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges (adopted by the Committee of Ministers on 13 October 1994, at the 518th meeting of the Ministers' Deputies) defines its scope by stating that the recommendation is applicable to all persons exercising judicial functions, including those dealing with constitutional, criminal, civil, commercial and a d m i n i s t r a t i v e law matters (1.1).

Once again, Explanatory Memorandum to this Recommendation maintains that the scope of the recommendation is not confined to specific fields of law and covers also both professional judges and lay judges, except, in the case of lay judges, with regard to the question of remuneration and certain other matters such as the requirement to have proper legal training. It covers the resolution of civil and criminal cases but also a d m i n i s t r a t i v e law and constitutional law (point 11).

The above documents clearly, in my opinion, show the direction of developing human rights as far as court accessibility and fair trial in tax matters are concerned. This is, however, not the way European Court of Human Rights goes, and not the way that the national, including Polish, courts follow.

7 Conclusions

At the time the Convention was drafted a number of Contracting States did not provide for the review of **tax** decisions and broadly administrative decisions by an independent court or tribunal (Lee, 2010: 609). Hence, this might be the explanation for "tax" being absent from the wording of Article 6 paragraph 1 of the Convention. But it is evident that for many reasons the situation has changed since.

Analysis of the various documents of international law, related both to the European Convention on Human Rights and to other conventions designed for similar purpose, shows clearly the direction of the development

of the system for the human rights protection. The basic trend in this development – when it comes to the right to court and the right to a fair trial – is stretching these rights over all areas of the law, including the tax law.

It is regrettable that the conservative attitude of the courts to the interpretation of the provisions of the Convention deprives taxpayers of the benefits of the protection afforded to them under Article 6 paragraph 1 of the European Convention on Human Rights.

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APPLYING TAX STATUTE REGULATIONS TO PUBLIC CHARGES

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Abstract

This article deals with the problem of applying the Tax Statute regulation to public fees in Poland. The authors present legal regulation and analyze the case-law of Polish courts regarding such issue.

The article also contains conclusion that application of the Tax Statute to a possibly wide range of cash benefits of public character is worthy of acceptance.

Key words

Public charges; tax law; non-tax public budget charges; Code of Administrative Procedure.

JEL Classification

K34, H20

1 Prescriptive regulation

Polish tax regulations have been based on the model of partial codification. The role of a tax code is played by Act of 29 August 1997 (the Tax Statute)[2]. This law includes rules of substantive law common to all taxes and the regulation of tax procedures. The substantive regulations are contained in section III of this Act, and the procedure in section IV of the Act. Section I of the Tax Statute contains regulations which are definitions, Section II defines the tax authorities and their property, and the division 2a applies to agreements in the field of transfer prices. After the Tax Statute had come into force, a specific administrative procedure - the tax proceedings

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2 Journal of Laws of 2012, item 749, as amended.

- appeared. It is crucially based on the contents of the general administrative procedure regulated by the Law of 14 June 1960 "Code of Administrative Procedure" (Journal of Laws of 2013, item 267, as amended - hereinafter referred to in abbreviation; k.p.a.). However, it is adjusted to the specific of settling cash benefits.

One of the important problems is the scope of applying the tax regulation contained in the Tax Statute. This is a problem of great practical importance, especially when it comes to the substantive regulations contained in section III of the Tax Statute. The consequences of non-applying the regulations of the Tax Statute to a particular public charge are quite far-reaching.

In this case, proceedings relating to its dimension can be found in the code of administrative procedure. It does not include, of course, the regulation of substantive law. Typically, the fee regulation of a particular charge included in an act which concerns it (special law) is quite laconic. It does not have many institutions which on the basis of the tax law are treated as `obvious`. For example, neither Code of Administrative Procedure k.p.a. nor special laws contain a regulation concerning the obligation to pay interest in case of delayed payment of the charge. The citizens can enjoy the lack of this regulation, but at the same time in case of unnecessary payment it turns out that there are no regulations defining returning of the overpayment and the interest rate.

The scope of the Tax Statute has been regulated in its article 2. According to article 2 § 1 the regulations of this Act shall apply to:

1. taxes, fees, and non-tax state budget charges and local government budgets charges which are specified by entitled tax authorities;
2. [repealed]
3. stamp duty and fees referred to in the regulations on local taxes and charges,
4. matters of tax law other than those mentioned in paragraphs 1 and 2, remaining within the jurisdiction of the tax authorities. According to art. 2 § 2 of the Tax Statute, `Unless separate regulations say something different, the provisions of Chapter III shall also apply to charges and non-tax state budget charges, which are established or determined by institutions other than those mentioned in § 1. `It must be emphasized here that while

> in article 2 § 1. the claims of the state budget or the budget of the local government are mentioned, in article 2 § 2 the legislator legislature refers only to the claims of the state budget, which are defined or established by authorities other than the tax ones. Therefore it will not apply to the activities of local government units.

In article 2 of the Tax Statute the legislator uses terms which are defined in other regulations of the Tax Statute. The definition of tax contained in article 6 of the Tax Statute is essential. According to it `Tax is a public, free, compulsory and non-returnable charge to the Treasury, state, county or municipality, resulting from the tax code`.

The concept of tax law has been defined in article 3, § 1 of the Tax Statute. Originally it said: `The laws regulating the rights and obligations of the tax authorities and tax payers, payers and collectors, as well as their successors and third parties`. From 1 January 2003, the definition reads as follows: `Acts relating to taxes, charges, and non-tax budget charges defining the subject, the subject and object of taxation, coming into existence of the obligation of the tax, the tax base, tax rates and regulating the rights and obligations of the tax authorities, taxpayers, payers and collectors, as well as their successors and third parties`.

From 1 January 2003, the Tax Statute contains also the definition of non-tax budget charges. In accordance with article 3 § 8 they are `non-tax and non-payment charges which are the income of the state budget or the budget of the local government, resulting from public relations`.

2 The practice of adjudication before 1 January 2010

The regulation contained in article 2 should lead to the conclusion that the regulations of the Tax Statute are applicable not only to the taxes, but also to a wide range of various charges or other public benefits brought to the state budget or local government units that fit into the concept of `non-tax budget charges`.

The adjudication of administrative courts before 1 January 2010 had to raise some eyebrows. Quite a restrictive position was shaped on this issue. Applying the Tax Statute regulations was negated even to the re-zoning fee, which is charged under the Spatial Planning and Development Act (one-time

charge resulting from the increasing value of property as a result of passing a local spatial planning act) (Judgment of the Supreme Administrative Court 3rd September 2004., OSK 520/04.), charges for geodetic and cartographic services (Judgment of the Provincial Administrative Court in Opole, 26th November 2008, I SA/Op 294/11.), betterment levy (a charge paid to community for building some items of technical infrastructure, which raised the value of the property) (Judgment of the Supreme Administrative Court 20 December 2002 r. I SA 342/2001.).

A restrictive approach to the scope of applying the Tax Statute dominated in the practice of adjudication, but at the same time the courts demanded applying the regulations of the Tax Statute even to certain administrative sanctions of a financial nature (Judgment of the Supreme Administrative Court, 28th February 2007, II GSK 223/06.). No application of the Tax Statute regulations used to cause obvious problems associated with the application of the regulation concerning cash benefits mentioned above.

3 Trends in the legislation before 1 January 2010

The reaction of the legislature was introducing some explicit regulations concerning the range of application of the Tax Statute to the laws governing specific types of levies. For example, from 6 July 2004 article 24 § 6 of the Act of 11 May 2001 Law on Measures (Journal of Laws of 2013, item 1069, as amended.) says clearly that the regulations of Section III of the Tax Statute apply to official acts performed by the administration of measures and their subordinate offices. As a result, the rules of substantive tax law will apply to the charges collected under this Act, but making decisions concerning these charges will be based on the rules of procedure of Administrative Code. It was also decided in the Act of 5 July 2001 on the prices that Sections III and IV of the Tax Statute will apply to the proceedings concerning official prices or official trade margins (article 13 § 7 of the Act) (Journal of Laws of 2013, item 385, as amended.), which means in practice applying it to financial sanctions provided for by the law. The former Act of 26 February 1982 on prices (Journal of Laws of 1988 No. 27, item 195, as amended.) said nothing about this issue.

4 Public Finance Act and the scope of the Tax Statute application

The content of articles 60-67 of the Act of 27 August 2009 on public finances (Journal of Laws of 2013, item 885, as amended - hereinafter referred to in abbreviation: u.f.p.) shows the legislator's desire to extend the application of tax regulations on as big as possible circle of cash benefits. In accordance with article 67 of this Act `In case of matters relating to claims referred to in article 60, not covered by this Act, the regulations of the Act of 14 June 1960 - Code of Administrative Procedure (Journal of Laws of 2013, item 267) and the regulations of Section III of the Act of August 29, 1997 - the Tax Statute (Journal of Laws of 2012, item 749, as amended.) are applied to Article 60 of the Public Finance Act reads as follows:

"The public means that are non-tax public budget charges are in particular constituted by the following state budget or the budget of the local government incomes:

1. the amount of the grant to be repaid in the cases specified in this Act;
2. claims under guarantees and bails granted by the Treasury and local government units;
3. payments of the surplus of current assets of local government budgetary establishments;
4. payments of surplus funds of executive agencies;
5. payments of funds from the settlements of execution of pre-accession programs;
6. charges which are the reimbursement of funds allocated for the implementation of programs partly financed from European funds and other charges related to the implementation of projects partly financed from these funds, as well as the interest on these funds and of those charges;
7. the income collected by state and local government budget units under separate laws;
8. the income collected by the local government unit related to the implementation of the tasks of government administration and other tasks given to local government units in separate acts, not transferred to the state budget`.

This change resulted in the fact that in the practice of adjudication the regulations of the Tax Statute for a variety of charges began to be more widely applied (Judgment of the Provincial Administrative Court in Poznań, 7th August 2012, III SA/Po 389/12, judgment of the Provincial Administrative Court in Poznan, 5th June 2013, II SA/Po 1043/12, judgment of the Provincial Administrative Court in Szczecin, 16th February 2012, II SA/Sz 981/11.).

5 The effects of excessive basis of application of the Tax Statute

The tendency to bring the application of the Tax Statute to a possibly wide range of cash benefits of public character is without a doubt worthy of acceptance. The problem is that it was carried out by the Polish legislator gradually and in an ill-considered way. This led to a situation in which it was quite difficult to determine on what basis the act law should be applied. Establishing of the basis of its application has an important meaning due to the fact that the various regulations refer to it in a different way. Some acts refer to the whole content of the Tax Statute, some to the section III and IV, and some only to section III.

Certainly, the acts governing the specific charges constitute lex specialis in relation to article 2 of the Tax Statute. As a result, even if basing on article 2 the entire the Tax Statute should be applied to a specific charge, due to the regulation of the particular act it may be applied only in part (eg. only Section III).

The relation of article 67 of Public Finance Act to article 2 of the Tax Statute is unclear. If article 2 of the Tax Statute orders to apply its regulations in full to fees and non-tax budget charges, is this true that article 67 of Public Finance Act concerns the same charges mentioned in article 2 of the Tax Statute? This would mean that article 2 of the Tax Statute as far as it relates to at least non-tax budget charges was implicitly derogated. Actually, it would become unnecessary.

It appears that the article 67 of Public Finance Act applies only to those services which are not covered by article 2 of the Tax Statute. If article 2 of the Tax

Statute can be applied to a particular charge as a whole, then the article 67 of Public Finance Act will not lead to narrowing of the reference to the Tax Statute.

6 Application of Section III of the Tax Statute and other regulations of the Tax Statute

If all the Tax Statute is not applicable to a particular fee, the legislator refers only to section III.

Section III (not the whole regulation of the Tax Statute is only applicable to public tribute when it comes to:

- fees and non-tax charges of the state budget, determined or defined by empowered authorities other than the tax authorities (article 2 § 2 of the Tax Statute);
- Fees and other benefits, to which Section III of the Tax Statute is applied on the basis of particular act concerning those fees and benefits,
- non-tax budget charges of public law within the meaning of article 60 of Public Finance Act.

A question arises whether this reference really applies only to Section III of the Tax Statute, if the legislator uses the terminology defined in section I of the Tax Statute. In our opinion, it is not possible to apply Section III without reference to the terminology convention arising from Section I of the Tax Statute, especially article 3 containing the glossary.

The views present in adjudication of administrative courts are diversified. Provincial Administrative Court in Wrocław in its judgment of 31 March 2014˝(I SA/Wr 67/14.), concluded that in such a situation the terminology of section I of the Tax Statute should be applied.

However, the Supreme Administrative Court in its judgment of 4 July 2006 (II FSK 914/05.) came to a different conclusion, which means the necessity of popular understanding of the legal terms found in section III of the Tax Statute.

7 Summary

It should be considered that the evolution of the Polish normative regulation concerning the scope of applying substantive general tax regulations goes in the right direction. Applying them not only to taxes, but to a wide range of public charges and any payments made by the public entities to the state and local governments is logical. The Tax Statute protect the interests of the individual and provide public authorities with effective instruments of action to impose the duties. It is a pity that the process is somewhat random and rather impulsive.

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INSTITUTION OF NATURAL RESOURCES PAYMENTS IN THE SYSTEM OF FINANCIAL LAW OF UKRAINE

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Abstract

The article from the standpoint of system approach and method of structural-functional analysis studies the issue of the place of the institution of natural resources payments in the system of financial law. More narrowly it aims to solve the following: 1) to call in question and disprove the hypothesis of belonging that legal institution to the domain of tax law, 2) and in connection with this to consider juridical capability and technical appropriateness of imposing and collection of the payments by means of legal methods similar to those which are applied to regulation of taxes. Among other possible mechanisms the author proposes contractual ways of governing natural resources payments. They grant additional legal guarantees to natural resources users and contribute to reaching maximum economic effect from commercial nature management. Also the article proves their ability to provide fair distribution of rental incomes between the state and private entities.

Key words

Legal institute; natural resources payments (NRP); the system of financial law; tax law; legal nature; non-tax payments.

JEL Classification

K34, K40, H20

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1 Introduction

The aggregate of national and local taxes and duties levied as per the procedure established by the Ukrainian Tax Code constitute the tax system of Ukraine (Tax Code of Ukraine, Art. 6). The Code considers payments for land and mineral resources management, duties for using of radiofrequency, water and forest resources as obligatory national payments. Therefore the legislator includes all natural resources payments in the taxation system of Ukraine. Besides that payments for the special nature management are arranged in detail by the standards of the tax law with all methods of regulations proper to it. Thus it is possible to argue about separate group of the standards of the tax law which form the institution of natural resources payments.

Despite this we are convinced that the issue about the place of this legal institution remains open. Is it actually an inalienable structural part of the field of tax law? Should actually the standards that determine the legal structure of natural resources payments be the standards of the tax law? Is the "position" of relations concerning discharging of the NRP in the scope of operating of strict taxation policy methods and its «implicit» principle of legal non-equality of parties adequate?

To find the answers in this article the author aims to define the actual role of the natural resources payments institution in the system of financial law. At the same time we tries to confute the hypothesis of predominant majority of scholars that the natural resources payments belong to the sphere of functioning of the tax law and also to prove the fallaciousness of the modern normative approaches to regulating this category of obligatory payments. To solve the assigned questions we use the system approach to comprehend the phenomena of legal and financial reality. Application of structural-functional analysis allows us to discover nature of NRP by means of studying the characteristics of the individual components of their legal structure, their functions and interactions, and also role within relations concerning implementing the right of special natural resources management.

The issue of ontological status of the NRP institution and its place in the system of the financial law of Ukraine on the whole were left unconsidered

by the domestic researchers. Only in the works of O.A. Muzyka (Muzyka, 2004), N.Yu. Pryshva (Pryshva, 2003) and T.M. Shulga (Shulga, 2008) we can find some suggestions concerning the peculiarities of the juridical fixing of this type of duties and their comparison with other obligatory fiscal payments. At the same time they look at the payments from the perspective of budgetary law and consider them as the separate institution of public revenues. The above mentioned authors did not examine the question of their correlation within the tax and financial law. Among other scholars that made a certain contribution to the development of studying the raised problems colleagues from the Russian Federation should be mentioned, in particular, O.A. Lyapina (Lyapina, 1999), V.V. Petrunin (Petrunin, 2005), A.A. Yalbulganov (Yalbulganov, 2007). Summarizing we would like to note that till the present day the problem of the institutional form of natural resources payments was not the object of any special research in the post-soviet countries.

2 The institution of the natural resources payments: the ontological basis

During the second half of the 20th century the soviet theory of law gradually formed the conception of legal institution as a separate component of the system of law. It is worth noticing that the conception of the institution of law formed by the soviet legal science practically did not undergo any significant changes. And till the present day scholars continue to define legal institution as inwardly and outwardly separated part of the branch of law, that is logically completed and single complex of regulatory norms, that provide relatively independent and integral governing of allied public relations of certain type. (Kartashov, 1996: 73). Most theorists of law from post-soviet countries offered the definitions of legal institution almost similar in the form, and identical in the content. (Venherov, 2000: 230; Nersesiants, 2012: 431; Matuzov, 2001: 410; Oleynikov, 2009: 250; Skakun, 2009: 307).

It is also worth mentioning some features of the law institution which are distinguished by the authors. Thus, in particular, the substance of the institution is made by the range of more or less homogeneous legal rules. The institution of law is formally separated and owns relative normative

independence, stability and autonomy of functioning. It assumes formal embodiment in certain sections, chapters or other parts of normative legal acts. Every institution of law has its own subject of legal regulation. For many institutions an inalienable feature is the presence of specific juridical methods and instruments of influence on public relations. Also many institutions are characterized by their own primary ideological bases or principles. Moreover, the institutions of law contain certain legal categories proper only to them and embody specific legal structures in their content. (Kartashov, 1996, 75 p.). And the last, but not least, that the institution of law is formed in objective manner, but not made artificially; it is separated from other institutions of law – the legislator cannot arbitrarily move its regulations to the scope of other legal institutions. (Skakun, 2009: 307).

Summing up the above-mentioned doctrinal positions concerning the concept of the legal institution which were formed within the limits of the general theory of law, we can extrapolate their statements on the outlines of financial law. Accordingly, finance-legal institution can be defined as the range of the structurally isolated financial-legal rules, which form an integral complex sufficient for complete regulation of homogeneous relatively independent group of financial relations. At the same time as V.M. Vushnovetskyi notes it is necessary to take into account that basic institutions of the special part of the financial law system generally corresponds to the main sectors of the financial system. The bases for their distinguishing are features of some groups of financial relations which in their turn determine the peculiarities of certain methods and forms of accumulating and distributing monetary funds (Vushnovetskyi, 2001: 93).

As we have noted before, the legislator refers all natural resources payments to the structure of the tax system of Ukraine. This fact is one of the main technical characteristics of this category of obligatory payments since it has direct influence on the mechanism of their imposing and discharging by payers. It also determines powers of corresponding state authorities to collect duties and the character of negative legal consequences in the case when payers violate their obligations. Since payments for special natural

resources management belong to the tax system of our state it means that while imposing and collecting them authorized state bodies apply the same method of money accumulation to the budget as in the case of taxes.

Besides, payments for special use of natural resources are thoroughly governed by tax law with methods of regulation proper to it. Six of twenty chapters of the Tax Code of Ukraine are dedicated just to the questions of collecting different types of natural resources payments. Proceeding from these formal features, we can postulate the existence of institution of natural resources payments. At least we can confirm its existence in normative sense since in the tax law of Ukraine there is a considerable number of regulations that establishes the procedure of levying these payments.

These regulations are relatively isolated, and their groups presented in the chapters of the Tax Code are characterized by the unified regulatory structure. In other words, they are organized around the certain typical legal structure and reflect its internal logic by their mutual disposition. If we analyze the Code provisions we can see that they determine the taxpayer and tax agents at first, then they set the taxable object of certain natural resources payment, tax base, measure and unit of payment, tax breaks, adjustments coefficients, rates of natural resources duties, and also regulate the procedure of their calculation, terms and place of payment (Tax Code of Ukraine, Art. 262-264). It is not difficult to guess that in the base of the given regulatory material there is a typical legal structure of natural resources payment. Each chapter of the Code only specifies the typical features of the structure in accordance with the needs and requirements of the legal regulation.

S.S. Alekseyev notes, that the brightest manifestation of regulatory features and intellectual and volitional content of the legal institution is originality of the legal structure inherent to the institution. If the certain group of norms – even which is formally represented in the system of legislation or in the structure of a single act – is not united by an integral legal structure, there are no grounds in such circumstances to talk about the presence of the legal institution (Alekseyev, 1975: 123). In the case of natural resources payments we have the other situation – here is the clear typical legal structure of obligatory payment.

Speaking about the typical legal structure we gradually pass from the formal proving of institution of natural resource payments to the essential level. Next to the legal structure other essential reason for determining this institution is the principle of paid character of natural resource consumption for economic activity. It was first proclaimed in 1991 by The Law of Ukraine on Environmental Protection (The Law of Ukraine on Environmental Protection, Art. 3/10).

Legislative declaration of this principle became the consequence of transition of the Ukrainian society to the market economy, and also recognition of public natural resources as the Ukrainian people ownership. Since then the state ceased to be a legal owner and almighty possessor of natural resources. It became obliged to the people to introduce adequate economic mechanisms of nature management which would allow to redistribute profits from use of natural resources among all people of the country. Furthermore, introducing of pay-principle of commercial natural resources management became the first serious step for stimulating efficient nature management, sustainable development and protection of environment for present and future generations as it is declared in Rio de Janeiro Declaration on Environment and Development from the 14th of June, 1992 (Rio Declaration on Environment and Development, Art. 3).

Implementation of the examined principle surely provided for imposing of the system of obligatory payments in various industries of natural resources exploitation. It also should be noted that the pay-principle along with other principles of environmental protection embodied their content in peculiar functional mechanism of natural resources payments. This category of payments differs considerably by the set of its functions from other taxes and duties that form the present day tax system of Ukraine. The levying of natural resources payments aims not only to satisfy fiscal interest of the state (accumulation of funds into its budget system) but also implement the range of other functions: regulative, stimulating, redistributive. They are unique for natural resources payments and are not characteristic in such combination for other taxes and charges. The special functional character of payments is another argument in favour of their governing by means of corresponding independent legal institution.

It should be stressed, that substantive dimension of existence of NRP institution is more interesting for us than its formal side since it brings us closely to the issue about the criteria of determining the branch which this institute belongs to. Generally, in the theory of law the criteria of distinguishing institutions are considered to be the subject and the method of legal regulation. The subject of financial-legal institution can be only some to a certain extent independent part of the branch subject of the legal regulation that is integrated by a certain characteristic which is substantial for this body of financial relations. In the case with relations concerning the payment of natural resources duties such substantial characteristic to our mind is the complex of essential properties of these duties, their legal nature. Properties of the subject of natural payments institution have objective nature, do not depend on the will of the state or private individuals and are derived from the social and economic laws which function in the field of natural resources management.

Instead the method in contrast to the subject of the legal regulation is the juridical criterion of construction of the system of financial law and its division into institutions. The method depends to a great extent on the subject and is determined by it. The method is also formed under the influence of authority and experience of the legislator who besides of objectively formed means of regulation can "artificially" establish his own ways of legal governing in the legislative provisions. (Oleynikov, 2009: 247). The legislator can modify these ways using them in various combinations. The above mentioned makes the subjectivity of the method. It distinguishes the method from the subject of legal regulation, characteristics of which are relatively stable and beyond the will of the state. (Malko, 2001: 411).

Taking into consideration variability of the method of legal regulation, its partial subjectivity, and sometimes its pure political nature legal scholars concluded that the main criterion of distinguishing institutions is just the subject of legal regulation, a certain type of social relations.

Vyshnovetskyi V.M. emphasizes that the main role in forming the special part of the financial law belongs not to juridical criteria (that is the legal methods) but to financial relations which finally serve as substantive ground for integrating legal norms that regulate these relations into some financial-legal

institutions. (Vyshnovetskyi, 2001: 83). The above said is completely applied to the institution of natural resources payments. Thus the existence of the qualitatively different group of financial relations which function in the field of paid natural resources management objectively require separated legal governing. And at the same time the presence of such group creates the necessary material precondition for emergence of institution of natural resources payments.

Prof. Alekseev S.S. notes that concerning each legal institution it can be established key system-making factor which determines separation of the given complex of regulatory provisions. Most frequently this is the aggregate of peculiarities of certain social relations or in other words peculiarities of the subject of legal governing. (Alekseev, 1975: 136). In our case the legal nature of NRP plays the role of such system-building factor. If we analyze modern system of financial law we can see that the very legal nature of some payments serve as sufficient ground for dividing this branch of law into several legal institutions. For instance, when payment is a tax by its features, relations concerning its collection belong to the subject of tax law. In opposite case they are governed by the institution of non-tax revenues of the budget. If payment relations arise between the state and private law entities and develop on the principles of equality of parties, economic equivalence and freedom of the agreement it is the field of functioning of civil or commercial law.

Thus the main criterion that determines the branch of law which NRP institution belongs to is their legal nature that is complex of essential characteristics which allow to differentiate considered payments from other elements of the fiscal system of Ukraine. Legal nature of duties for special natural resource consumption is the main substantive core of examined institution and must determine the methods, tools and ways of their legal regulation.

3 Legal nature of natural resources payments

The representatives of domestic and Russian legal science according to their approaches to natural resources payments can be classified into two groups: those who are disposed to their tax nature, and those who consider them as obligatory non-tax payments.

It should be noted that most authors prove tax nature of natural resources duties proceeding first of all from formal characteristics of their legal structure, methods of their imposing and collecting. Sometimes there are also reasoning which are based on the ways of normative regulation of the given payments. For instance Gracheva E.Yu. and Sokolova E.D. consider charges for management of fauna and water biological resources, ecological, forest and water duties as federal taxes since they are fixed in the Tax Code of the Russian Federation. (Gracheva, Sokolova, 2000: 104). Practically the above mentioned authors speak about tax essence of these payments following in this case exclusively normativism approach. They do not analyze inner essence of examined payments. Ukrainian researcher Synakevych I.M. maintains that pollution charge has all characteristics of ecological taxation basing his assertion directly on the fact of inclusion of the given payment by Ukrainian legislation into the tax system of the country (Synyakevych, 2000: 139). On this point many other scholars stay in the captivity of legal positivism. (Savchenko, 2001: 96-99; Rassolov, 2001: 190-191; Bryzgalin, 2004: 327).

No less numerous in financial and legal sciences are those who support non-tax nature of payments for commercial consumption of natural resources. Though there scholars also often include natural resources duties to the category of non-tax payments guided rather "by intuition" than by scientific reasoning. In other words they do not formulate their own clear and consistently proved standpoint about the subject of the dispute. For example without presenting proper proofs other authors consider NRP and ecological duties among non-tax budgetary revenues. (Voronova, 2006: 282; Kucheryavenko, 2001: 261-268). In particular T.F. Yutkina emphasizes such function of natural resources payments as redistribution of supplementary rental income which arises in the process of natural resources consumption

and chooses it as the main criterion of differentiation of the given payments from common taxes (Yutkina, 2002: 339-340). However from our point of view it is insufficient argument since the state can use taxation mechanisms for rent redistribution as was the case in the USSR where the natural rent was collected through the gradual increase of turnover tax rates.

In our opinion Prof. Khimicheva N.I. is more close to the truth in solving the problem of correlation between natural resources payments and taxes. In particular she says that non-tax payments of obligatory nature in contrast to taxes are characterized by a certain level of recompense or reward since their collection is conditioned by granting to the payer certain rights of property use or other material benefits. Summarizing N.I. Khimicheva remarked the following "notwithstanding the inclusion of the given payments into the tax system of the state on the basis of a number of common formal characteristics we also consider them within the tax system but never identify them with taxes." (Khimicheva, 2004: 307).

It should be admitted that the above mentioned standpoint appeals to the author of this article but we would like to develop it further and make more radical conclusion on this ground. We do not consider natural resources payments as taxes as well. However we can say more – they require legal governing beyond the tax legislation. They demand quite different legal methodology and regulatory tools. On the next pages we try to explain why.

We are inclined to qualify already mentioned characteristic of *individual recompense* as distinctive property of natural resources payments. The presence of only this feature of natural resources payments allows excluding them from the list of taxes. In financial and legal literature tax is mostly considered to be non-purposeful, non-compensative, irrevocable, non-repayable, unconditional and obligatory kind of payment which comes from individuals and legal persons to the budget of correspondent level in order to finance tasks and functions of the state and local government (Voronova, 2006: 209; Kucheryavenko, 2001: 84-104). The representatives of financial law science almost do not discuss about non-compensative character of taxes. Paying tax the person does not receive any property or other benefits directly; here

one can speak only about the so-called "indirect reward or consideration" of tax in the form of prospective capability of the payer to use benefits which are created as a result of state activity.

Quite different situation occurs with natural resources payments. While discharging them the payer individually receives the right to use public natural resources, which are not belong to him, or continues to implement such right early granted to him. In other words he like the state practically through the relations of NRP paying is in the conditions of property exchange and receives certain material benefits. In the process of paying NRP the payer fills the State Budget and provides the rent or profits of the state from the management of the natural resources which are in the ownership of the whole nation. The state on the other hand enables the payer to use such resources and receive certain benefits though sometimes unequal to the amount of the payment for corresponding natural resources consumption. Often such benefits greatly exceed the incomes of the state received from management of public natural resources: for example when the payer has oil or gas extracted from high-flow-rate wells he receives the excess profits. Therefore in relations of paying natural resource duties there is mutual material interchange between state and payer and therefore features of *individual recompense* as inherent property of the given payments. It does not occur when individuals or legal entities fulfill their obligations on paying taxes for the common public benefit.

Individual recompense of natural resources payments also determines their bilateral character which consists in presence of reciprocal rights and obligations of the payer and the state, which arise both within financial relations (concerning discharging of natural resources duties) and within relations connected with special natural resources management. The payer contributes the pay for using those natural resources which are governed by the state to its budget. At the same time the state is under obligations to enable the payer to use corresponding natural resources. This is its lasting counter obligation. Instead taxes are unilateral fiscal charges and therefore any new rights of the payer in relation of the payment of the tax do not arise.

Paying of the NRP presents juridical condition for the payer to implement his right to licensed consumption of natural resources. Instead taxes are characterized by absolute unconditional nature of their paying. Levying of tax does not provide any additional benefits, rights or preferences for the tax payer, his legal status remains unchangeable. In the case of natural resources payments their transferring to the budget is the obligatory condition for further enjoying the right to use certain natural resources. Strictly speaking the Tax Code so defines the notion of duty (as opposing to the tax) namely: "Duty (fee or contribution) is a compulsory payment to the appropriate budget charged from payers of dues *on condition they obtain special benefit*... (Tax Code of Ukraine, Art 6). It should be noted that all natural resources payments except of ecological tax fixed in the Code under such terms as duty, fee or payment. Thus in contrast to the taxes which are absolute payments NRP have conditional character.

The above mentioned points to another difference between taxes and payments for commercial nature management which consists in measures of legal responsibility for violating the paying procedure. Thus tax legislation provides series of exclusively financial sanctions for improper or overdue transferring of taxes to the budget. They are penalties, fines, sales of the mortgage property and so on. At the same time the violence of terms and amounts of certain natural resources duty provides applying various measures of legal responsibility. Here it is possible to apply both financial measures and sanctions which are fixed within other fields of law. Among them, for instance, there is temporary suspension of the right of natural resources management, abatement of licenses and other permissions for certain kinds of economic activities. The given sanctions have administrative-legal nature.

Specific character of natural resources payments also consists in the ways of regulation grounds of their exactions. Thus the detailed characteristics of the subject, objects and the basis of charging NRP as a rule is defined outside the tax legislation by the regulatory acts which predominantly govern issues of nature management. At the same time legal structure of the tax and all its components is established by tax law exclusively.

The another peculiarity of legal structure of duties for commercial consumption of natural resources is that their paying does not depend on income or profit of natural resources user and as V.V. Levkovych rightly noted is not connected with the results of economic activities of the payer (Levkovych, 2001: 276-280). This feature is not proper to taxes.

Equally the feature of proportionality or "partial equivalence" does not characterize the taxes but belongs to natural resources payments. The rates of NRP include volume of actually consumed natural resources, their quality, composition and conditions of their withdrawing from the environment. Though such equivalence is of somewhat conventional character since the rates of natural resources payments are determined in unilateral procedure that is equivalent between the amount (rate) of payment and the volume of managed resource is established by the state. However, here the state is not able to act only as a sovereign determining freely the rates of payments. In the case of the NRP the state is guided first of all by the data of economic appraisal of natural resources, their market value, rental productivity. All this are taken into account by the state when it in the process of exercising ownership on behalf of the nation establishes ratio of distribution of profit received from natural resources exploitation between public funds and private users.

In contrast to the taxes duties for the special nature management can be charged in kind, for example, while implementing production sharing agreements.

The aim of taxes as a rule is maximum fulfillment of the budget, therefore concerning natural resources payments (especially ecological duties) the state is quite often interested in reducing of revenues from the levying of these payments since it affirms efficiency of their motivating mechanisms (e.g. reducing levels of emissions and discharge of pollutants)

Besides that taxes are paid irrespectively of existence of some direct juridical connections between the state and the tax payer. At the same time in the case of natural resources duties we find out direct legal relationship between the state or its authorized body and the payer concerning nature management, which in fact provides natural resources manager's obligation to pay corresponding duties as its necessary component.

Finally it should be noted that natural resources payments have compensating function – their main purpose is to recompense in monetary equivalent certain part of losses of the society in the public natural resources which have been consumed individually by private person in order to provide stable development and welfare of the future generations. The purpose of taxes is to some extent different and consists first of all in satisfying current needs of the state in financial resources in order to accomplish its routine functions.

Taking into account the above mentioned we have sufficient reasons to suppose that natural resources payments can scarcely be considered as taxes. Key properties of natural resources payments which confirm their non-tax nature as we defined earlier are their individual recompense (or consideration), conditionality of charging, bilateral character of payment obligation and presence of specific compensating function.

4 The regulation of natural resources payment by the Tax Code is destructive…

In the previous chapter we proved the non-tax character of NRP. Earlier we stated that just the non-tax nature is the main criterion which determines the branch the institution of natural resources payments belongs to and must be considered when the choice of means of their legal governing is made. Consequently logical conclusion can be drawn that including of relations on paying of natural resources duties into the subject of tax law contradicts with their essence. Tax law and its methods is inadequate "environment" for these relations. The institution of natural resources payments is not a component of tax law of Ukraine. After all the Tax Code ne is not proper "place" for regulating natural resources payments. Presence of the given payments in the scope of tax law operation is destructive for a number of reasons.

In the market economy conditions the implementation of the right to use public natural resources for commercial purpose mostly takes place on contract basis. The parties of such agreements are the state represented by its bodies and private enterprises. Legal category of the agreement requires

even minimum equality of parties, which, in particular, appears in their right to determine mutual manner way the essential terms of the agreement. In our case among the essential terms of the agreement the key role is sure to have the payment for natural resources management. The amount of payment should have to be the subject of negotiations between parties. If such term is not subject to discussions, as currently the state insists on this, governing natural resources payments by the provisions of the Tax Code, then it refuses to accept the rules of game and follow the principles of contractual relations.

The unilateral determining of conditions of NRP by the state do not allow to guarantee certain economic conditions of natural resources management for individuals. They are deprived ability to influence in any legal way on the defining rates and procedure of charging payments. There is distinct etatist approach of the state to the governing financial and legal relations with natural resources managers. Refusal of the principle of equality completely destroys contractual regime of exercising the right of commercial nature management, avert prospective investors of corresponding industries of economy. The most persuasive proof of negative consequences of such approach of the state is that for two decades Ukraine did not manage to attract foreign companies with considerable volumes of capitalization for developing of deposits of hydrocarbons and mining other minerals. We are not even talking about the water industry and forestry, where the level of rental income is much lower, and administrative risks remain the same.

Besides this at the level of tax legislation there is actually no possibility to solve the problem of differentiating the rates of natural resources payments adequately to the situations in which the right to use natural resources is implemented. The rates variation and existence of branching scale of corresponding rates of duties is objectively caused by extraordinary number of kinds and qualitative variety of natural resources and considerable difference of their consuming value. Fair from the economic point of view distribution of rent is possible only upon determining individual rates of payments in each peculiar case. Moreover rates that are already determined in the Tax Code very often require prompt variation in relation

to ever changing conditions of using natural resources. It is no secret that it is impossible to reach this end by adopting new tax rules since it is complicated by lengthy legislative procedures. In addition if the state settles the issues unilaterally there is no opportunity to consider economic interests of consumers completely and in proper way. Actually fixing of the rates of given payments in the Tax Code causes the inertness of legal structure of natural resources payments and eventually will lead to the imbalance in distribution of rental incomes between the state and natural resources managers.

Here we chose the most challenging example. The size of this article does not allow considering other problems which natural resources users confronted because of strict and rigid tax rules which are determined by the state. But even the given example is quite sufficient in order to argue about urgent necessity to shift from administrative and tax regulation of paid nature management to contractual ways of determining mechanism of natural resources payments.

We suppose that parties (state and private persons) can agree not only the rates of payments but also such components as the form of payment, terms of paying, progressive or regressive scale of rates depending on the economic and physical characteristics of natural resources, corrective coefficients based on worldwide economic trends of natural resources market, allowances on abiding or over-fulfillment the standards in the field of environmental protection and other issues of particular character, which can not be fully counted in the tax regulations.

Shift to the contractual basis of governing natural resources payments is possible only after "removing" them from the scope of tax law, liberalization of rules concerning their levying and collection, guaranteeing of participation of interested companies in developing mechanisms or technicality of payments. All mentioned, in its turn, requires fundamental changes of corresponding normative approaches. We are strongly convinced that the prime mover and at the same time initial stage of such changes is the recognition by the legislator the fact that the institution of natural resources payments belongs to the sphere of non-tax budgetary revenues of the state.

5 Conclusions

The institution of natural resources payments is the aggregate of financial-legal regulations, which govern the procedure of imposing and charging payments for commercial use of public natural resources and also application of measures of responsibility in case of infringing obligations by the payers. The reason to distinguish the institution of natural resources payments is the specific subject of legal regulation that is the system of financial relations in the field of paid natural resources management. In addition the existence of examined institution is proved by the presence of typical legal structure of natural resources duties components of which are reflected today in the certain chapters of the Tax Code.

However the crucial substantive criterion of branch belonging of natural resources institution is their legal nature that is the combination of essential properties which allow differentiating them from other obligatory payments of the fiscal system of Ukraine.

Natural resources payments have non-tax nature based on their property of individual recompense (consideration), conditional and bilateral character, and also specific compensatory function. These features allows theoretically "to move" the institution of natural resources payments from the sphere of tax law to the general institution of non-tax budgetary incomes.

Similar "transfer" at the practical level allows changing the existing regulatory approaches to the governing natural resources payments, extend possibilities to determine their rates and other components in contractual procedure and contribute to fair distribution of rental incomes between the state and natural resources users. This is more inclusive approach according to which both the state and private persons actively participate.

However at the given moment we can just state "failure" of means and methods of tax law to govern adequately legal structure of natural resources payments, which causes the irregularities in relations between the state and the private users and finally distort the economic mechanism of commercial natural resources management in Ukraine.

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MANDATORY CHARACTER OF SELECTED LOCAL FEES

Rafał Kowalczyk[1]

Abstract

Self-government units´ fees are classified as public levy and are become a greater source of income for municipality budget. This is why there is a greater interest in doctrines and practice of issues which are connected. One of these issues is the problem of mandatory character of fees. The problem is so complex that the normative structure of these fees is very differential and the legislator does not apply uniform wording. The betterment levy is the main focus of the analysis, for its structure allows for the conclusion that it is an optional fee. However, the optionality should be supported by certain conditions that are the result of actions (omissions) and pursue of public interest.

Key words

Fee; mandatoriness; optionality; revenue; budget; municipality.

JEL Classification

K34, H20

1 Introduction

When analyzing the structure of self-government units´ revenue, attention is drawn to a large amount of public income which is not comprised of taxes. When classifying public fees as a type of regulatory tribute, they should be treated as public revenue within a larger category of public resources (Act no. 885/2009 on Public Finances, Art. 5). Income from the mentioned public fees is a considerable contribution to each municipality budget, although many differences in the legal nature attract attention, especially if they are

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to be summarized with tax income. Special attention should be brought to the problem of mandatory character of income from public fees. There is no other similar interpretation problem in regard to taxes that fill a municipality's budget because all are mandatory income and municipality authorities do not possess tools that enable them to resign from administering and collecting these fees. How should the administration and collection of self-government units´ fees (known as public fees) be interpreted, and is there a division of mandatory and optional fees? The answer to this seemingly simple question is not all that easy if we take a closer look at the normative structure of these fees as well as other provisions that regard the collection of public revenue and regulations that are applied in the public finances sector.

Among municipality fees, those with the greatest fiscal importance have been chosen for analysis, i.e. the betterment levy and the re-zoning fee. The mentioned fees are collected if real estate value increases – the betterment levy is based on the Public Finances Act of August 21, 1997 (Act no. 518/1997 Real Estate Management Act), while the re-zoning fee is based on the Spatial Planning and Land Development Act of March 27, 2003 (Act no. 647/2003 Spatial Planning and Land Development). The problem with mandatory character of fees seems not to exist in the light of other fees which comprise the municipality budget, which will be further discussed. Unquestionably mandatory fees include the liquor license fee, which is collected based on the Act on upbringing in sobriety and counteracting alcoholism of October 26, 1982 (Act no. 1356/1982 on Upbringing in Sobriety and Counteracting Alcoholism), occupancy of the right of way charge, which is based on the Act on Public Roads of March 21, 1985 (Act no. 260/1985 on Public Roads), or the fee for removing trees and shrubs, which is based on the Nature Conservation Legislation of April 16, 2004 (Act no. 627/2004 on Nature Conservation Legislation). The questionability of the optionality of the fees that were mentioned in the beginning is supported by legal norms, which regulate fees and further solutions should start with this analysis.

The charge for occupancy of the right of way is compensatory in nature for occupying a lane of a road that is maintained by a public entity. According to Art. 40, paragraph 3 of the Act on Public Roads, a fee is charged for occupying a lane, which is described in provision of Art. 40, paragraph 1.

The fee for the removal of trees and shrubs is coercive and compensatory in nature and its purpose is to counteract excessive environmental impact on the one hand, and compensate the impact on the environment. The provision of Art. 84 paragraphs 1 of the Nature Conservation Legislation provides that fees shall be charged for the removal of trees and shrubs[2].

Liquor license fee is assumed to be a prohibition fee and the equivalent of the incurred expenses for the fight against alcoholism, at once. Art. 11, paragraph 1 of Act on upbringing in sobriety and counteracting alcoholism and drug addictions provides that municipality collects fees for liquor licensing.

According to the provision of Art. 36 paragraph 4 of the Spatial Planning and Land Development Act, the voyt, burgomaster and mayor administer the re-zoning fee in cases where statutory conditions have been fulfilled, i.e. a change or legislation of an area development plan, increase in real estate value due to the area development plan, and sale of real estate within 5 years from the date the area plan comes into effect.

The act on Real Estate Management provides that municipality executives may collect a betterment levy[3] if there is an increase in real estate value due to its subdivision (Art. 98a), consolidation for division (Art.107), or availability of technical infrastructure (Art.146).

The above mentioned provisions enable us to see that the legislator composes issues regarding the mandatory character of public fees in different ways. Nevertheless, the wording in most cases regulates charging mentioned fees. There is only one situation of the above mentioned examples where the legislator uses wording that may suggest optionality of fees, i.e. the betterment levy, which collection is supported in most cases. Making use of grammatical interpretation and assuming the legislator's rationality, municipality entities normally have the freedom to choose whether they administer the fee or not. This proposition is supported by many rulings applied law practice and common courts of law and administrative courts alike. We can say that jurisprudence is dominant and this is confirmed by the following solutions:

2 The act provides for an alternative provision in the form of replanting or planting other trees; the decision is made by the authority that issues a license for tree or shrub removal.

3 The situation in Art. 107 (consolidation for division) provides that the legislator applies the imperative, which suggests an exception from other situations where the betterment levy is administered and collected.

„The establishment that is defined in Art. *98a paragraph 1 of the Real Estate Management Act provides that the betterment levy for an increase in real estate value due to its subdivision is not mandatory. Although it fulfils the condition of an increase in real estate value due to its subdivision, administrative bodies have the possibility to choose a certain legal consequence. Applying the statutorily granted competence to choose a particular solution, the body should bear in mind that the choice should not be whichever since the body does not have to administer it. This type of decision cannot be equated with arbitrariness and requires a given situation to be assessed."* (Court of Appeal: I ACa 1291/13).

„The executive body of the municipality has no obligation to administer the betterment levy in each case where there is an increase in value of divided real estate. Before proceedings for the imposition of this levy are initiated, the body must also take into regard the disbursement of fund from the municipality budget to pay the certified property for completing a valuation survey." (Voivodship Administrative Court: II SA/Gl 753/13).

The legal doctrine also emphasizes the optional nature of the betterment levy (Lorek, 2010: 23, Bończak-Kucharczyk, 2013). The above mentioned rulings and the view of the doctrine are completely legal, but only with the support of grammatical interpretation of the Real Estate Management Act. Is it possible to come to the same conclusions when analyzing the nature of the betterment levy from the view of public law? The second fee chosen for analysis, the re-zoning fee also raises questions. If the re-zoning fee is mandatory and the betterment levy is a similar type of fee and both fees may be administered given the condition of an increase in real estate value due to specific actions carried out by public administrative bodies, then it seems that the obligations of involved persons should be identical in both cases if the above mentioned condition is fulfilled (increase in real estate value). The provisions of other legislative acts do not solve the legal issue. When analysing the problem starting within the highest levels of the hierarchy of legal norms, one must begin with the Constitution (The Constitution of the Republic of Poland of April 2, 1997) and the European Charter of Local Self-government (European Charter of Local Self-government of October 15, 1985).

Financial economy policies of local self-government units have been standardized in Art. 9 of the European Charter of Local Self-government.

According to the Charter, local societies have the right to possess their own sufficient financial resources, within the national economy policy, which they may spend within the scope of their powers. Accordingly, the provision in Art. 167 paragraph 1 of the Constitution of the Republic of Poland assures local self-government units to share public revenue according to their assigned tasks. The provision in Art. 168 should also be mentioned at this point, for it assures local self-government units the right to set taxes and local fees within the scope of the act. None of the cited provisions directly answers the question that was set forth at the beginning. They rather refer to assuring local self-government units financial autonomy, yet are understood as the decentralization of public financial resources. However, the cited provisions affect a very important power that local self-government units possess, that is revenue control (Niezgoda, 2012.). The Constitution and the European Charter of Local Self-government alike emphasize the local self-government units' power to decide about revenue. This concerns setting tax rates and fees, which comprise the revenue of the unit as well as the freedom to dispose of due revenue. A supplement to these solutions is provisions of the Act on Municipality Self-government, which predict in Art. 51 paragraph 1 that a municipality independently manages the financial economy based on the budget act. However, the provision in Art. 54 of the Act refers to other acts within the scope of municipality income sources. Although the above cited state law does not directly deal with the mandatory character of municipality public revenue, it is possible to interpret the principle of financial autonomy of municipality, which is extremely crucial for the problem at hand. Autonomy may be interpreted in this instance as the possibility to resign from revenue assuming actions based on and within the scope of the law.

Moving on to provisions connected with the financial economy, let us first focus on public finances. The definite majority of provisions from the Act on Public Finances regulate principles of making public expenses, however in view of the issue at hand, a fee classification within public income is important. In accordance with Art. 5 of the Act, public income includes, among others, public finances, which in turn include fees and other public liabilities. At this point solutions must be omitted or whether the re-zoning

fee and betterment levy are classified in the fee category or other public budget liabilities. In accordance with the provision of Art. 254, paragraph 1, item 1 of the Act, during the execution of local government units, setting, collection and payment of the income of local government budgets proceeds based on and within the terms of applicable provisions. As emphasized in literature, income that is collected different sources poses an obligation for the budget executors to apply extra effort in order to collect all due financial resources from each source so that they are collected in the proper amount, but also on time (Sawicka et al, 2010: 696). However, we must remember that the above cited principle shall only apply to income that has been budgeted at the municipality level. Therefore, if the municipality budget does not provide for the receipt of the betterment levy, for example due to the lack of an appropriate provision of the municipality council on the rates of the betterment levy, then the mentioned provision will not be applied and so using it in order to determine whether a fee should be administered and collected is pointless.

In addition, the act on local government units (Act of November 13, 2003) does not contain provisions that regard the obligation to administer and collect selected fees. The act only mentions in a vague manner where the income of local government units comes from, listing public fees among others. It does not, however, contain any guidelines as to the administration and collection of the fees.

The last act that deserves to be empanelled is the act on liability for public finance discipline violation. This act comprises of a collection of provisions that are dedicated for proceedings in the case of public finance violations and includes a closed list of such violations. Firstly, it is worth noting that, based on Art. 3 of the Act, it is applied for defining, determining and collection or paying customs duties and tax and fee liabilities, which is express in Art. 2 § 1 item 1 and 3 of the Tax Ordinance Act of August 29 1997, which includes the income of the national or local government units' budget, including default interest, granting tax allowances and exemptions in this regard. In the scope of the re-zoning fee and the betterment levy, there is a doctrinal dispute that has been going on for year, but also the dispute within law practice whether administrative procedures or the above

mentioned tax ordinance shall be applied[4]. Without going submitting to controversy about the legitimacy of the use of one of the procedures, it should be noted that administrative procedure is applied in both, the determination and collection of fees, in the current state of affairs. Therefore, the provisions of the Act on public finance discipline violation may be applied in terms of set fees (Act of December 17, 2004).

In accordance with Art. 5 paragraph 1 item 1 and 2 of the Act, violation of the public finance discipline is not defining receivables to the treasury, local government units or other entities in the public sector, or the establishment of such receivables in an amount that is lower that it results from a correct calculation, or failure to collect or claim debts of the Treasury, local government units or other entities in the public sector, or the collection or inquiry for lower receivables that result from correct calculations. Is mandatory character (or optionality) significant in this case in view of responsibility? An affirmative answer is appropriate. First of all, if mandatory character of the betterment levy and the re-zoning fee is assumed, then the above empanelled provision differentiates the legal situation of persons that are responsible for administering and collecting these fees. If we assume the mandatory character of the betterment levy, the condition for investigating anyone's obligation would be adopting a resolution by a municipality council that the discussed fee is binding within the municipality. If the municipality council shall not adopt a resolution, which introduces the obligation for administering the betterment levy, then there is no entity which may be accused of violating the public finance discipline, for the municipality council it is not within the subjective scope of liability, and the charge mentioned above may not be presented to municipality executive because there is no legal basis of the fee amount.

A separate issue is the problem of optionality of administering and collecting fees by an executive body. If there is no resolution from the decision-making body, which is the basis for administering fees, then the question arises whether this type of levy may be applicable based on provisions of the Real Estate Economy Act. In my opinion, there is no such possibility; the

4 The act provides for an alternative provision in the form of replanting or planting other trees; the decision is made by the authority that issues a license for tree or shrub removal.

provisions of the Act regulate basically all essential components of the betterment levy, but there is no provision that grants an executive body with the competence to indicate an applicable rate of the betterment levy in a municipality. All provisions of Art. 98, 107, as well as 46 of the Act present a condition for municipality council resolutions which concern the rate of the betterment levy.

Next, we should consider whether the body must or could administer the betterment levy based on the circumstances of the above-mentioned resolutions. The wording of the provisions within the Real Estate Management Act must be noted, for there is no doubt that the formations reveal optionality of the fee. Consequently, if the literal interpretation is chosen, then no liability for violating the public finance discipline is assumed, and if the resolution that establishes rates and fees is in force, the executive body does not impose the betterment levy. Doubts arise in regard to this, for is it possible to seek a lack of accountability since the situation at hand presents an executive authority that does not impose the betterment levy despite conditions for its application have been fulfilled. In my opinion, the only case in which the unlawfulness of omitting the fee must be ruled out (except situations described in Art 60 and 61 of the Act of Public Finances) even though conditions for its application have been fulfilled, is the economics of the procedure and if there is a possibility of benefiting the self-government units´ budget. Therefore, if the executive body is able to conclude that the rate of the fee is higher than budget income from the betterment levy after a preliminary assessment, then it would be irrational to conduct such proceedings. Contrary to taxes and other public charges, the executive authority may consider the validity of establishing and collecting this fee as the decision-making body should consider the merits of introducing the betterment levy in a municipality.

In this case, is it possible to omit the establishment of a re-zoning fee without the decision-making and executive bodies bearing consequences[5]. Based on the prefixation, the re-zoning fee is a mandatory provision in theory, and so it must be determined there is objective evidence for its administration.

5 This refers to not issuing a ruling on imposing the re-zoning fee, as opposed to benefitting from the possibility to apply the provisions of the Act on Public Finances.

One example is a growth in real estate value, which is based on the evidence of a certified property valuer. Therefore, does lack of evidence mean resignation of the discussed municipality income? It seems that this is the case, especially if it is known ahead of time that as a result of changes or the adoption of a new local development plan, there will be no changes in the intended use of property, which may result in the growth of real estate value.

Moving on to the conclusion, we must note that the adoption of the optionality of the betterment levy and, at times, the re-zoning fee, is within the limits of actions that are based on and within the scope of the law. Wherever a decision-making body prefers not to apply the betterment levy, we must treat this as the use of an explicit right from the provisions of the Real Estate Management Act, but from the support of the legal system as well. Whether it will be caused by legal, economic or social conditions, it is a decision-making body's explicit prerogative. Situations where this type of resolution is valid, the problem that is taken into consideration may be seen in the view of the executive's activities. If the administration and collection or only the collection is omitted, it is the result of the municipality council's relevant resolutions and is based on the provisions of the Act on Public Finances (within the scope of applying credits regarding public receivables), then this activity is fully legal and may be evaluated based on statutory criteria and those that result from the ruling. In a situation that is based on the provisions of the Act on Real Estate Management, however, where administered fees are voluntary, it seems that this kind of activity may be acceptable if it is supported by at least two conditions: economics of proceedings (the cost of administering and collecting fees would be higher than its income), and that the executive does not affect the general legal principles. It all depends on whether the omission is justified by general conditions (i.e. the willingness to interest investors) or is the result of indiscrete individual actions (the solution for body recognition is supported), rather than arbitrariness and should be treated as a law violation in the latter case. It is impossible to forget the general principle, which states that public entities have been obliged to implement public activities, and so, in order to execute these activities they must dispose of financial resources. That is why the depletion of these resources may adversely affect the quality of activity.

Hence, the situation of resigning from due revenue, in addition to the conditions described above, should be preceded by weighing up the advantages and disadvantages that result from voluntary resignation of public revenue.

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THE INTERACTION OF TAX LAW AND ADMINISTRATIVE LAW IN REGULATION OF INFORMATION SUPPORT OF TAX ADMINISTRATION

Kirill Maslov [1]

Abstract

The issues of interaction between tax law and administrative law are considered in the article. The author analyses the legal nature of relations between ax administration and other authorities in the state. The author concludes that such relations should be regulated by the administrative acts and interdepartmental (inter-agencies) agreements.

Key words

Tax law; administrative law; tax administration; agreements; interaction.

JEL Classification

K34, K23

Tax law, being the part of financial law, and administrative law are legal entities closely related. Although they have a large number of areas of overlap, they do not mix each other, do not lose their legal specificity. This fact causes the necessity of identification both general aspects and specific features of the subject of regulation of tax and administrative law. Inattention to such questions can provoke the situations, when the legislators choose incorrect mechanisms of legal regulation of tax and administrative relations.

The interaction of tax and administrative law is caused by the following circumstances.

Financial and administrative law are the branches of public law.

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Their nature determines the prevailing mandatory method of legal regulation in these branches of law. The similarity of the method of legal regulation is shown in considerable number of the principles common to tax and administrative law[2].

Procedural forms of realization of powers of tax authorities and other administrative authorities are considerable common. For example, field audit and inspection are the forms of tax control as well as the forms of public (administrative) control (supervision) by other authorities. Mechanisms of tax and administrative responsibility have considerable number of common features. Some scientists, who are ignoring the specifics of tax relations, consider that tax responsibility is only the variety of administrative responsibility.

The mechanisms of appealing against the actions and decisions of tax authorities and other public authorities have rather similar principles and procedure. The obligatory pre-trial procedure of appeal against actions and decisions of tax authorities is called "administrative" by scientists. The tax authorities, which are part of the system of bodies of executive power, are the main party of tax relations. The relationship of the tax authorities and other authorities have a clear influence on interaction between tax authorities and powerless participants of tax relations.

However, both tax relations and administrative relations have their own specifics, its unique features, which cause the existence of the specific principles and means of legal regulation. There are border areas of social relations, which legal nature is difficult to be defined. Delimitation of tax and administrative relations in such areas is very important to avoid the use of legal mechanisms which are not adequate to the essence of relations.

One of such areas, where administrative and tax law show both their similarity and differences, is the information support of tax administration. The largest volume of information relevant to the tax administration is transferred to the tax authorities directly by taxpayers, tax agents and other powerless participants during the process of implementation of their obligations established by tax legislation. Such relations are traditionally considered

2 For example, the presumption of innocence, restriction of powers of administrative bodies with the law.

as the subject of financial law (more exactly - tax law as its sub-branch) (Karaseva, 2005: 18, Vinnitskiy, 2002: 10).

Tax authorities are also entitled to receive the necessary information from the executive bodies and other divisions of the tax service (Art. 82, 84, 85, 93.1 of the Russian Tax Code (TC RF)). Some scientists believe that such relations are the subject of financial law. So, V. I. Stupakov uses the concept of financial regulation of information activities of the Federal executive authorities and defines it as "the regulation by financial law of Federal financial authorities activity in the areas of collection, use, analysis, dissemination of information, organization of information systems, ensuring exchange of information between the Federal agencies in order to ensure financial activities, financial control and the necessary and accurate financial information" (Stupakov, 2006: 8-9).

Some scientists make proposals to define the bodies which have information significant for tax administration, as the "agents of tax control". Such scientists offer to fix the list of such bodies' rights and responsibilities as participants in tax relations in the Tax Code (Alipchenkov, 2008: 13). Such a proposal is difficult to accept, because, in our opinion, it does not take into account the nature of the relationship between tax administration and other authorities. Agents of control are the bodies and organizations, empowered to verify the behavior of other persons in a controlled area, in particular, through reclamation of various documents, implementation of other measures of coercion, and are obliged to inform competent authorities about violations revealed as a result of such inspections. However, we believe that the bodies representing the information to the tax administration[3], cannot be called the "agents of control". The public bodies receive such information as a result of realization of functions in its own specific sphere of management, tax control is beyond the scope of their activities, they do not have the authority for the implementation of tax control and application of coercive measures, stipulated by the tax legislation. Relations for information provision tax authorities by other public authorities are closer to the subject of administrative law, rather than tax law. Such relations are based on common principles of interaction of public authorities in all spheres of public administration.

3 Although they are also able to report a potential violation of the legislation.

The procedure of information supplement of tax administration differs from the information exchange between other executive bodies only by the essence of the transferred information. So it is hard to include these rules in the system of tax law. These rules must comply with the overall logic of the administrative-legal and information-legal regulation, because he regulated social relations are primarily administrative and connect with the taxation only by its object. The use of financial and legal regime to such relations will not provide their ordering. Thus, relations associated with the organizational support of government activities appear between not-submitting authorities (coordination relationships). Appropriate means of legal regulation of such relations due to their nature and status of the subjects is the administrative contract, which "is an act of a multilateral character, expressing the coordination, integration, interaction of contracting entities will. It is used as a regulator of social relations regulated by all branches of the law"(Demin, 1998: 14-15). Therefore, the mechanism of a public contract may be used (and is used, but not widely) in the studied relations. The existence of agreements between executive authorities about information exchange does not exclude the necessity of special rule in tax legislation, which would oblige the authorities to provide the information to the tax administration. The TC RF in art. 6 set quite clear rules which don't let use of normative legal acts that limit the powers of tax authorities or change the duties and responsibilities of any persons, established by the Code. Such changes are inevitable in the text of each of the normative act or agreement, describing information exchange with participation of tax authorities[4]. It is expedient to consolidate provision for the powers of tax authorities to obtain information from any public authority with reference to the interdepartmental agreements, which will regulate the procedure for exercise of such authority, in TC RF. Procedural regulation of interaction of the tax administration with other bodies in many European countries is carried out on the basis of agreements. In Estonia the tax service received the data about the objects of state land tax from local authorities, because of existence of agreement between authorities. Conversely, Center of motor vehicles registration offer the local authorities the data about cars, which

4 At least because the current version of the tax code provides the possibility for tax authorities to conclude agreements only with the police and customs authorities.

are the object of local taxation (Martinez-Vasquez, Timofeev, 2005: 36). The existing regulation of administrative relations in financial and legal acts lead to gaps and collisions in the Russian legislation. Responsibilities of Federal authorities to provide information to the tax authorities are badly regulated in TC RF. Such obligation is set only to customs, investigative bodies and internal affairs bodies. The obligations of state off-budget funds had unreasonably removed from TCRF since 2010. Information interaction with off-budget funds allows the tax authorities to identify discrepancies in reports, which are send to multiple authorities by taxpayers. Only a small list of authorities, which are obliged to provide information to the tax authorities, is set in TC RF. Such gaps can not be regarded otherwise than defect rules. Much greater number of public authorities has the data that can be used in the implementation of tax administration.

Information is about to be committed tax offences with a high probability can be identified by the authorities performing state and municipal control (supervision) in various fields of activity. The absence of regulations obliging many governments to submit to the tax administration information about to be committed tax offences, should be recognized dangerous legislative gap. Agreement on information cooperation have been concluded by the tax service also not with all of the control bodies, and the agreements generally do not provide for the exchange of information about the identified potential violations of tax legislation.

There are defects in the agreements on cooperation between tax service with other bodies. Firstly it is the absence of uniform adoption. Some of them are assignd as agreement, other adopted by joint orders of the two departments, and others are realized in the form of letters. We believe that in order to standardize the forms of documents, documents that regulate interdepartmental cooperation and are assigned by two or more bodies should be made exclusively in the form of agreements.

The second problem concerns the lack of the uniform principles of information presentation in agreements. Terms of submission of most of the required information to tax administration by regional authorities and local self-government are not set in any regulations or in the relevant Standard agreements on information exchange. The existence of feedback is very important In the exchange of information. However, not all the agreements

foresee the possibility and mechanism of joint verification of the correctness of the submitted data and their further correction. Sometimes agreements contain general provisions about monthly reconciliations with the identification of the causes of discrepancies and their subsequent elimination. The development of electronic technologies in public administration should be adequately reflected in the provisions of procedure of interdepartmental information sharing in TC RF. The tax code in paragraph 11 art. 85 directly provides for the responsibility of several authorities (but not all of them) to transfer the information to tax administration routinely in electronic form. But TC RF does not set rules for using the tax authorities of such electronic documents in tax disputes, protection against distortion. With regard to operative information from the authorities in the absence of special rules it is provided (item 5 tbsp. 931 of the Code) the possibility of representation in electronic form only those documents that are initially drafted electronically according to the established formats. Paragraph 4 art. 82 and p. 4 art. 101 ban on the use of evidence obtained in violation of the Code. So for legalization in tax disputes all electronic correspondence it is necessary to prescribe a general rule in art. 30 of the TC RF, that the procedure for obtaining tax authorities information from all state bodies is determined by law, as well as by interdepartmental agreements. Discovery of documents (information) on the taxpayer, a payer of levies, and tax agent, or information on specific transactions is described in art. 93.1 of the TC RF. This article does not exclude its application to receive information by the tax service from public authorities, though, indeed, it is insensitive to the specific nature of such relations. Thus, the provisions of this article are not applicable to the planned exchange of information. Ban on discovery outside the framework of the tax audit information not related to specific transactions, established in art. 93.1, aims to eliminate excessive administrative pressure on business, but not adequate with the essence of the relations between the public authorities. The norm of this article, which prevents direct receipt of information by the tax authority, not administrating the source of information, is not relevant for public authorities. The order of elimination of existing contradictions between art.93.1 of TC RF and tax service agreements on information exchange is not fixed in legislation. Thus, there are a lot of authorities having the information that

is explicitly stated in the Russian Tax Code as significant for tax administration. However, the composition of these bodies is not systematized their duties on self-submission of information to the tax authorities are not provided legally. Despite the existence of various levels of regulation[5], responsibilities of Federal authorities on presentation of a rather large volume of information necessary for the tax administration are not legally set.

The Russian Federal tax service on the basis of the analysis of the provisions of the tax code and regulations, establishing the functions of public authorities, should develop a list of public authorities possessing significant for tax administration information. The agreement on information cooperation specifying the duty to present necessary information should be assigned with the every authority from that list.

It is necessary to fix the list of mandatory information that should be exhaustively defined on the basis of the analysis of norms of the tax code in the standard agreements of the tax service with the authorities. Taking into account the administrative and legal nature of these relations, the Russian tax code should not install an independent rules of interaction of these bodies. It should only secure the evidentiary value of the received information with the references to inter-agency agreements.

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5 TC RF, Government regulations, agreements.

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

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Abstract

The rulings of the CJEU concerning the taxable person's right to deduct the input value-added tax recommended the purposive interpretation. In this respect, it is necessary to investigate whether the taxable person was acting in good or bad faith when purchasing goods or services. The concept of good faith and its protection provided by the CJEU is not a normative concept arising under EU laws and national laws of individual Member States. The aforesaid rulings of the Court of Justice changed the case law of the administrative courts in Poland.

Key words

"Good faith"; taxpayer's right to deduct an input VAT; rulings of the Court of Justice of the European Union.

JEL Classification

K33, K34

1 General

Ten years after Poland's accession to the European Union, it is worth reviewing case law in terms of the Community conforming interpretation of national law. It is worth emphasizing that the administrative courts

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in Poland should apply the interpretation conforming to European legislation (Mudrecki, 2011: 382) *id est,* friendly to this law, on a day-to-day basis when reviewing the legality of administrative decisions and individual tax interpretations.

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. This is proven by the abundant case law of the Court of Justice of the European Union (hereinafter CJEU), among others, and in the case of von Colson and Kamann, where the Court of Justice held that national courts, when applying the provisions of national law, and most notably laws adopted to perform a directive, are required to interpret national law in the light of the wording and purpose of the directive in order to achieve an outcome as referred to in the third paragraph of Article 249 of the EC Treaty (Decision in case No 14/83, ECR, 1984, p.1891.). The aforesaid formula expresses the obligation to interpret the applicable national law to achieve an outcome consistent with the objective pursued by a directive, the so-called Community conforming interpretation of national law, in the light of the wording and purposes of the directive. The courts should, when applying national law, interpret this law in a way that ensures compliance of this law with Community law. Further, when the courts consider the provisions of national law to be contrary to EU law, they are obliged to apply the provisions of EU law as the basis for their rulings and at the same time refuse to apply the provisions of national law. This is a consequence of the principle of the primacy of Community law over national law (Decision in case No 14/83, ECR, 1984, p.1891).

The court should, when interpreting national law, presume that through the realisation of the implementation of the directive, the Member State has the intention to perform it in whole. The starting point is always the linguistic interpretation. When this is insufficient, it is necessary to refer to the function and purpose of the legal norm. As for EU law, the reference to systematic and purposive interpretation is almost a standard. The fundamental aim of systematic interpretation is to ensure the conformity of norms of separate legal systems (i.e. Polish law and Community law) and to inspire the authority that applies national law to choose such an interpretation outcome

that renders EU law the most effective. Consequently, the national court should interpret applicable national law in a way that considers the wording and purpose of the provision of EU law. In contrast, the purposive interpretation of EU law requires, to a greater extent, consideration of the purposes of specific legal solutions over the literal wording of such provisions. The Community conforming interpretation of national law is to be made within the court's discretion and as far as it is possible to achieve the objective pursued by the directive. This interpretative obligation, however, does not exist if such interpretation were to lead to the denial of national law or its refusal, *id est,* to the *contra legem* interpretation. In those circumstances, there arises the obligation not to implement domestic law that is contrary to EU law; hence, the primacy principle is applied, and the domestic norm is replaced with the national, pro-EU norm (Decision in case No 14/83, ECR, 1984, p.1891).

The case law of the Court of Justice of the European Union plays a crucial role in shaping the Community conforming interpretation of national law. The CJEU is competent to interpret treaties, *id est,* the primary legislation of the European Union. The second competence of the Court that pertains to the interpretation of law is the construction of legal acts by institutions, authorities or organizational units of the European Union. This applies to any and all legal acts of EU institutions. Most frequently, the interpretation applies to regulations, directives and decisions, together with non-binding opinions and recommendations, as these may be essential for the interpretation and application of the law by state authorities. The interpretation of the CJEU is actually the binding interpretation of EU law (Siennicki, 2013: 211-213).

A crucial role in evaluating the correctness of the implementation is played by the Court of Justice of the European Union, in holding that the Member State has failed to fulfil one of its obligations under the Treaties and that it is obliged to take measures to ensure the enforcement of the Court's judgments.

The Court of Justice of the European Union does not only have the jurisdiction to determine the non-consistency of national laws with EU law. It may also charge the Member State violating its obligation a lump sum

or a specific financial penalty after the entry of the Lisbon Treaty into force, and as early as the decision stage regarding non-compliance of national law with EU law (Mudrecki, 2011: 232-233).

Moreover, the CJEU has jurisdiction to reply to requests for preliminary rulings submitted by national courts. The courts, the rulings of which are not final and absolute, may and the courts of final instance should submit preliminary references to the CJEU if they believe that a decision on the reference is necessary to enable them to render judgments (Art. 267 of the Lisbon Treaty). The CJEU contributes to the settlement of a dispute, but it does not adjudicate in a specific case. This refers to a specific legal cooperation through which the national court and the CJEU contribute directly and jointly to reach a particular decision (Mudrecki, 2011: 232-233).

2 Good or bad faith in the case law of the Court of Justice of the European Union

One of the fundamental constructive characteristics of value-added tax is the neutrality principle, whereby a taxable person cannot be levied with this tax, as it is a consumer tax that affects the final recipient, who is not subject to VAT. The taxable person has the right to deduct input tax arising from the invoice issued by a supplier of goods or services from any due value-added tax. This matter becomes more complicated when goods or services originate from unknown sources. This raises the question of whether it is possible and under what circumstances the taxable person's entitlement to an input tax refund may be restricted.

Recently, the Court of Justice of the European Union has greatly concerned itself with this issue.

In the judgment of the Court of 21 June 2012 in joined cases C-80/11 and C-142/11 Mahagében kft versus Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága and Péter Dávid versus Nemzeti Adó-és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága, the CJEU held that Articles 167, 168 (a), 178 (a), 220 (1) and 226 of Directive 2006/112 must be interpreted as precluding a national practice, whereby the tax authority refuses the taxable person the right to deduct the VAT,

finding that the taxable person is liable to pay the VAT due or paid in respect of services supplied to him on the ground that the issuer of the invoice relating to those services, or one of the issuer's suppliers, acted improperly, without the authority establishing that the concerned taxable person knew or should have known that the transaction relied upon as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply (SIP *LEX No 1165797, www.eur-lex.europa.eu).*

Furthermore, the CJEU held that Articles 167, 168(a), 178(a) and 273 of Directive 2006/112 must be interpreted as precluding a national practice, whereby the tax authority refuses the right to deduct on the ground that the taxable person did not satisfy himself that the issuer of the invoice relating to the goods in respect of which the exercise of the right to deduct is sought had the status of a taxable person, that the taxable person was in possession of the goods in question and was in a position to supply them, and that the taxable person had satisfied his obligations with regard to declaration and payment of VAT, or on the ground that the taxable person is not in possession of, in addition to that invoice, other documents capable of demonstrating that those conditions were fulfilled, although the substantive and formal conditions laid down by Directive 2006/112 for exercising the right to deduct were fulfilled and the taxable person is not in possession of any material justifying the suspicion that irregularities or fraud has been committed within that invoice issuer's sphere of activity.

The circumstances of these cases provided that the construction service was carried out and rail foundations were supplied, but any transactions made prior to the performance of the contract had demonstrated that those services and goods had come from an unknown source. The grounds for the judgment emphasize that in accordance with developed case law, the right of the taxable person to deduct VAT when the taxpayer is liable to pay the VAT due or paid in respect of goods and services provided constitutes the basis for the common system of value-added tax established by the EU legislature (see, *inter alia*, judgments of 25 October 2001 in case C-78/00 Commission versus Italy, ECR, p. I-8195, paragraph 28; of 10 July 2008 in case C-25/07 Sosnowska, ECR, p. I-5129, paragraph 14; of 28 July 2011

in case C-274/10 Commission versus Hungary, not yet published in ECR, paragraph 42 - thesis 37 of the grounds for the judgment). The Court has stressed on several occasions that the right to deduct laid down in Article 167 *et seq*. of Directive 2006/112 constitutes an integral part of the VAT mechanism, and, as a rule, it is not restricted. In particular, this right immediately applies to the entire tax on taxable transactions (see, *inter alia*, judgments of 21 March 2001 in joined cases C-110/98 to C-147/98, Gabalfrisa SL and Others, Rec. p. I-1577, paragraph 43; of 6 July 2006 in joined cases C-439/04 and C-440/04 Kittel and Recolta Recycling, ECR, p. I-6161, paragraph 47; of 30 September 2010 in case C-392/09 Uszodaépítő, ECR, p. I-8791, paragraph 34; and Commission versus Hungary, cited above, paragraph 43 - thesis 38 of the grounds for the judgment). The aim of the system of deductions is to completely free the entrepreneur from the VAT due or paid as part of the entrepreneur's entire business activity. The common VAT system ensures, to the extent of the tax burden, the neutrality of all kinds of business activities, irrespective of their purpose or outcomes, provided that, as a rule, these activities are levied with VAT (see, *inter alia*, judgment in joined cases Gabalfrisa and Others, paragraph 44; judgment of 21 February 2006 in case C-255/02 Halifax and Others, ECR, p. I-1609, paragraph 78; Kittel and Recolta Recycling, cited above, paragraph 48; judgment of 22 December 2010 in case 438/09 Dankowski, not yet published in ECR, paragraph 24 – thesis 39 of the grounds for the judgment). The issue of whether VAT is that is owed from any previous or subsequent transactions with respect to the sale of goods is paid to the State budget does not affect the taxable person's right to deduct the input tax (see order of the Court of 3 March 2004 in case C-395/02 Transport Service, Rec. p. I-1991, paragraph 26; judgment of 12 January 2006 in joined cases C-354/03, C-355/03 i C-484/03 Optigen and Others., ECR, p. I-483, paragraph 54; case Kittel and Recolta Recycling, cited above, paragraph 49 – thesis 40 of the grounds for the judgment). It should also be remembered that preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112 (see case Halifax and Others, cited above, paragraph 71; judgments of 7 December 2010 in case C-285/09 R., not yet published in ECR; paragraph 36; of 27 October 2011 in case C-504/10 Tanoarch,

not yet published ECR, paragraph 50). In this regard, the Court has already held that Community law cannot be relied upon for abusive or fraudulent ends (see, *inter alia*, the cited above judgment of 3 March 2005 in case C-32/03 Fini H, ECR, p. I-1599, paragraph 32; Kittel and Recolta Recycling, cited above, paragraph 54 – thesis 41 of the grounds for the judgment). Therefore, the domestic administrative and judicial authorities should refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied upon for fraudulent or abusive ends (see, *inter alia*, the cited above judgments in case Fini H, paragraphs 33 and 34; in joined cases Kittel and Recolta Recycling, paragraph 55; judgment of 29 March 2012 in case C-414/10 Véleclair, not yet published in ECR, paragraph 32 – thesis 42 of the grounds for the judgment). The taxable person who knew or should have known that, by the purchase of goods or services, the taxable person was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of Directive 2006/112, be regarded as a participant in that fraud, irrespective of whether or not the person profited by the resale of the goods or services as part of the transactions (see Kittel and Recolta Recycling, cited above, paragraph 56 – thesis 46 of the grounds for the judgment). Whereas, the refusal to allow the taxable person who did not know and could not know that as part of the transaction the supplier committed a fraud or another prior or subsequent transaction made by such taxable person was vitiated by VAT fraud to exercise the right to deduct is contrary to principles of this right to deduct, as discussed in paragraphs 37-40 of this judgment (see similar judgments in case Optigen and Others, paragraphs 52 and 55; in joined cases Kittel and Recolta Recycling, paragraphs 45, 46 and 60 – thesis 47 of the grounds for the judgment). The implementation of the non-fault liability would go beyond the scope necessary to protect the interests of the State Treasury (see similar judgments of 11 May 2006 in case C-384/04 Federation of Technological Industries and Others, ECR, I-4191, paragraph 32; of 21 February 2008 in case C-271/06 Netto Supermarkt, ECR, p. I-771, paragraph 23 – thesis 48 of the grounds for the judgment). Since the refusal to exercise the right to deduct is an exception to the fundamental principle, *id est,* the existence of such right, the tax authority is obliged to legally establish on the basis

of objective evidence that the taxable person knew or should have known that the transaction relied upon as a basis for the right to deduct was connected with fraud committed by the issuer of the invoice or by another trader acting earlier in the chain of supply (thesis 49 of the grounds for the judgment).

Similar considerations referred to the conclusion of the response to the preliminary ruling in case C-80/11. In particular, it was proved, according to the case law of the Court, that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, may be able to rely on the legality of those transactions without risk of losing their right to deduct the input VAT (see judgment of joined case Kittel and Recolta Recycling, paragraph 51 thesis 53 of the grounds for the judgment). On the other hand, it is not contrary to EU law to require traders to take every precaution which could reasonably be required of them to ensure that their transactions are not connected with the fraudulent evasion of VAT (see similar judgment of 27 September 2007 in case C-409/04, ECR, p. I-7797, paragraph 65 and 68; Netto Supermarkt, cited above, paragraph 24; judgment of 21 December 2011 in case C-499/10 Vlaamse Oliemaatschappij, not yet published in ECR, paragraph 25 – thesis 54 of the grounds for the judgment). Moreover, pursuant to Article 273, the first paragraph of Directive 2006/112, Member States may impose obligations other than those set forth in the Directive if they deem it necessary to ensure the correct collection of VAT and to prevent evasion (thesis 55 of the grounds for the judgment). However, despite the fact that this provision gives Member States some margin of discretion (see judgment of 26 January 2012 in case C-588/10 Kraft Foods Polska, not yet published in ECR, paragraph 23), according to the second paragraph of this article, this right may not be relied upon in order to impose additional invoicing obligations over and above those obligations laid down in Chapter 3, "Invoicing," title XI, "Obligations of Taxable Persons and Certain Non-Taxable Persons" of the Directive, and in particular Article 226 (thesis 56 of the grounds for the judgment). Furthermore, the measures that the Member States may adopt under Article 227 of Directive 2006/112

in order to ensure the correct levying and collection of the tax and for the prevention of fraud must not go further than it is necessary to attain such objectives. These measures may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT (see Gabalfrisa and Others, cited above, paragraph 52; in case Halifax and Others, paragraph 92; judgment of 21 October 2010 in case C-385/09 Nidera Handelscompagnie, not yet published in ECR, paragraph 49; Dankowski, cited above, paragraph 37 – thesis 57 of the grounds for the judgment). With reference to the measures that are at issue in proceedings conducted by a national court, it should be noted that the VAT Act does not impose any specific obligations, and the only matter set forth in Article 44 (5) is that any tax obligations of the taxable person specified in the invoice as the purchaser may not be challenged if the taxable person acts with due diligence with respect to the event that results in the tax obligation, considering any circumstances of supplying goods and services (thesis 58 of the grounds for the judgment). In the light of the foregoing, according to the case law discussed in paragraphs 53 and 54 of this judgment, the determination of precautions which could reasonably be required of the taxable person who intends to exercise the right to deduct VAT to ensure that the transactions at issue are not connected with fraud committed by the trader acting earlier in the chain of supply depends primarily upon circumstances of the discussed case (thesis 59 of the grounds for the judgment). If there is evidence to suspect any irregularities or infringement of the law, a prudent entrepreneur should, as the case may be, request information about the trader from which the entrepreneur intends to purchase goods or services to ensure the reliability of the trader (thesis 60 of the grounds of the judgment). However, the tax authorities may not generally require the taxable person who intends to exercise the right to deduct VAT to investigate whether the issuer of the invoice for goods or services to which such deduction refers is a taxable person, is in possession of the goods in question and is a position to supply them, and has satisfied all obligations regarding declaration and payment of VAT in order to ensure that traders acting earlier in the chain of supply do not commit any fraud or irregularities. Additionally,

tax authorities do not generally require the taxable person to be in possession of documents capable of demonstrating that these conditions have been fulfilled (thesis 61 of the grounds of the judgment). As a rule, the tax authority is obliged to carry out any necessary investigations of taxable persons to detect any irregularities and infringements of the VAT law or to punish any taxable persons who are guilty of such irregularities or infringements (thesis 62 of the grounds of the judgment). Pursuant to the case law of the Court, the Member States are required to check taxable persons' tax returns, accounts and other relevant documents (see judgments of 17 July 2008 in case C-132/06 Commission versus Italy, ECR, p. I-5457, paragraph 37; of 29 July 2010 in case C-188/09 Profaktor Kulesza, Frankowski, Jóźwiak, Orłowski, ECR p. I-7639, paragraph 21). It follows that by imposing on taxable persons the measures listed in paragraph 61 of the present judgment, in view of the risk that the right to deduct may be refused, the tax authority would, contrary to those provisions, be transferring its own investigative tasks to taxable persons (thesis 65 of the grounds of the judgment).

It should be emphasized that the aforesaid interpretation of the law applies to the circumstance when in earlier links of the chain of transactions the goods or services came from an unknown source. The CJEU protects those taxable persons who made the transaction in good faith, and when the transaction between the taxable person and the trader does not raise any objections. However, if the taxable person does not want to lose the right to deduct the input tax, he must act with due diligence. In particular, the tax authority is obliged to prove that the taxable person knew or should have known that he was taking part in a transaction connected with fraudulent evasion of VAT. The interpretation proposed by the CJEU is highly purposive. The CJEU, in its decision, referred to the taxable person's good faith and absence of fault. The terms in questions do not appear in the provisions of Directive 2006/112, nor do they appear in national laws of individual Member States of the European Union. Therefore, the proposed interpretation of laws is not of a normative nature. Tax law is covered by public law and, in the author's opinion, the taxable person's objective attitude towards the circumstances of the transaction may not affect the occurrence of the tax obligation.

The CJEU continued the presented case law in its order of 6 February 2014 in the case of Marcin Jagiello versus DyrektorIzby Skarbowej w Łodzi, case number C-33/13. This order indicates that the Sixth Council Directive 77/388/EEC of 17 May 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 must be interpreted to preclude the taxable person from being refused a deduction of the value-added tax due or paid for the goods received by him on the basis that considering fraud or irregularities committed by the issuer of the invoice for this case, it is recognized that such transaction did not actually take place by said issuer, unless it is proved that, on the basis of objective evidence and without requiring checks of the recipient of the invoice which are not his responsibility, that the taxable person knew or should have known that that transaction was connected with VAT fraud, a matter which is for the referring court to determine (LEX No 1446626, www.eur-lex.europa.eu).

The above-cited ruling was made under the preliminary reference of the Regional Administrative Court in Lodz (Poland) that referred to the fiscal fraud. In the grounds for this order, the arguments included in the judgment of 21 June 2012 in case C-80/11 and C-142/11 were used.

The CJEU adopted the analogous position on the right to deduct on the basis of the so-called "dummy invoices" in the judgment of 31 January 2013 LVK - 642/11 Stroj trans EOOD versus Direktorna Direkcija "Obžalwane i uprawlenijenaizpylnenieto" – Warnapri Centralnouprawlenijena Naciona lnataagencijazaprihodite, case number C-642/11. This ruling emphasized that Article 203 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax should be interpreted in the following manner:

The value-added tax entered by a person on an invoice is payable regardless of whether a taxable transaction actually exists;

It cannot be inferred from the fact that the tax authorities did not correct, in a tax adjustment notice addressed to the issuer of that invoice, the VAT declared by the latter, when those authorities have acknowledged that the invoice corresponded to an actual taxable transaction.

Furthermore, the CJEU expressed the opinion that principles of tax neutrality, proportionality and protection of justified expectations must be interpreted in a manner that does not preclude the recipient of an invoice from being refused the deduction of input VAT because there is no taxable transaction, even though the VAT declared by the latter was not adjusted in the tax adjustment notice addressed to the issuer of the invoice. However, if, in the light of fraud or irregularities committed by the issuer of the invoice or in earlier links of the chain of transaction relied upon as the basis for the right of deduction, the transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring checks of the recipient of the invoice which are not his responsibility, that the recipient knew or should have known that that transaction was connected with VAT fraud, a matter which is for the referring court to determine (SIP LEX No 1258555, www.eur-lex.europa.eu).

The CJEU adopted the analogous position in the judgment of 31 January 2013 LVK - 56 EOOD versus Direktorna Direkcija "Obžalwane i uprawlenijenaizpylnenieto" – Warnapri Centralnouprawlenijena Nacionalnata-agencijazaprihodite, case number C-643/11. This judgment provides that EU law must be interpreted as meaning that Articles 167 and 168(a) of Directive 2006/112 and the principles of tax neutrality, legal certainty and equal treatment do not preclude the recipient of an invoice from being refused the right to deduct input value-added tax because there is no actual taxable transaction, even though the value-added tax declared by the latter was not adjusted in the tax adjustment notice addressed to the issuer of that invoice,. However, if in the light of fraud or irregularities committed by the issuer of the invoice or in earlier links of the chain of transaction relied upon as the basis for the right of deduction, the transaction is considered not to have been actually carried out, it must be established, on the basis of objective factors and without requiring of the recipient checks of the invoice which are not his responsibility, that the recipient knew or should have known that that transaction was connected with value-added tax fraud, a matter which is for the referring court to determine (SIP LEX No 1341351).

The discussed judgments considerably change previous case law regarding the value-added tax. They protect those taxable persons who have been victims of dishonest traders. However, should the CJEU's opinions be considered the exception to the rule, or the general rule, which must be followed by national courts and tax authorities? If the latter solution is adopted, there is the real risk that the efficiency of one of the most significant taxes considerably decreases.

3 The influence of the CJEU's rulings on good and bad faith on the case law of Polish courts.

Generally, each decision of the CJEU emphasizes that the final assessment concerning the possibility of limiting a taxable person's right to deduct the input VAT is made by the national court.

Has the change of the CJEU's opinions therefore altered the case law of the Polish administrative courts and affected the practice of the tax authorities?

It should first be noted that there were difficulties in transforming the Community conforming interpretation of national law presented in the CJEU's judgments. So far, the Polish tax law has not provided for such a normative concept as good and bad faith. Therefore, it has been necessary to refer to solutions based in civil law to clarify this concept. In the judgment of 19 March 2014, case number I FSK 576/13, the Supreme Administrative Court held that good (bad) faith should be construed as a taxable person's specific knowledge (awareness) at the moment of making a VAT taxable transaction. This means that any and all factual circumstances concerning the criminal or fraudulent acts of the trader or related persons that occurred or came to be known by the taxable person following the transaction should not affect the assessment of the taxable person's good faith. Indeed, it could hardly be supposed that the taxable person was aware of the fraudulent nature of the transaction on the ground that some months or years following the transaction there occurred or he became aware of circumstances, on the basis of which the taxable person could be aware of any fraudulent acts of the trader or related persons (SIP LEX No 1458725).

Moreover, in the beginning, the Polish administrative courts revoked decisions of tax authorities since they did not investigate in tax proceedings whether the taxable person who purchased goods or services was exercising good or bad faith and had acted with due diligence when entering into and executing specific contracts. An example of such a solution is the judgment of the Supreme Administrative Court of 6 September 2012, case number I FSK 1315/11 (SIP LEX No 1218333), in which a legal view was expressed that since the refusal to exercise the right to deduct is an exception to the fundamental principle, *id est,* the existence of such right, the tax authority is obliged to legally establish on the basis of objective evidence that the taxable person knew or should have known that the transaction relied upon as a basis for the deduction was connected with fraudulent acts of the supplier or another trader acting earlier in the chain of supply.

The Supreme Administrative Court, in another judgment of 13 March 2012, case number I FSK 260/12 (SIP LEX No 305255), held that in order to prove that the taxable person acted negligently in the transaction, and that if he had acted with due diligence, he would have avoided any fraudulent acts of the supplier, it is not sufficient to refer to the broadest possible knowledge that in the scrap metal business such situations frequently take place. It is necessary to unequivocally specify activities that the taxable person neglected, and that if the taxable person had conducted and considered such activities, he would have been in a position to assert that the challenged invoices were issued by the trader that officially made the transaction, but the actual supplier of the received goods was another trader.

Subsequently, the case law of the administrative courts drew attention to whether the facts of the case were identical with the findings of facts of the CJEU's judgments discussed in section II of this article. Furthermore, each case individually assessed whether or not the taxable person's right to deduct the input tax due to his good faith would be protected. Hence, the case law of the administrative courts is highly diversified and is affected by findings of fact in specific cases.

The Supreme Administrative Court, in its judgment of 14 March 2013, case number I FSK 429/12 (SIP LEX No 1339484), held that the national administrative authorities and courts should refuse the right to deduct when

such a decision is established on the basis of objective evidence that this right is exercised for the purposes relating to fraud or abuse. It is contrary to the principles of the right to deduct to refuse the taxable person to exercise this right if the taxable person did not know and could not know that as part of the transaction, the supplier committed VAT fraud, or another action taken before or after the action taken by that taxable person was in violation of VAT law.

The Supreme Administrative Court, in its judgment of 28 February 2013, case number I FSK 2108/11 (SIP LEX No 1311045), took a much stricter stance on taxable persons. The Supreme Administrative Court held that possession of a licence for trading in fuels by a business entity is undoubtedly an essential form of information for a taxable person purchasing fuels from such licensed seller that such entity should be considered reliable if the license holder was positively verified by the regulatory authority in licensure proceedings. The failure to verify whether the supplier is reliable[2] and licensed to trade in fuels is considered the claimant's negligence in transactions with that supplier, and if the claimant had acted with due diligence, he should have known that the issuer of the challenged invoices was unreliable and – in acting without licensure – had committed a punishable act.

In each of the cited judgments, the Supreme Administrative Court referred to the interpretation included in rulings of the CJEU discussed in paragraph II of this article. The analysis of the judgments of the Polish administrative courts reveals that rulings of the Court of Justice considerably affected the rulings of Polish courts and significantly changed their case law. In particular, the tax neutrality principle that grants taxable persons the right to deduct the input tax was considered a priority. In order to restrict the right to deduct, the tax authorities should investigate whether the taxable person acted in good faith when purchasing goods or services, and whether the taxable person's business partner did not take part in fraudulent activities.

It should be emphasized that final decisions as to whether the taxable person should be protected with regard to the right to deduct the input tax are made by national courts in each individual case.

2 Proof of the company's registration in the National Court Register and its registration as a VAT payer.

4 Summary

The case law of the Court of Justice of the European Union plays a significant role in the harmonization of the value-added tax. In particular, it affects the method of interpretation of tax law through the restriction of linguistic interpretation towards increasingly essential systematic and purposive interpretations and the consideration of the primacy of the Community conforming interpretation of national law as the principle.

The rulings of the CJEU concerning the taxable person's right to deduct the input value-added tax recommended the purposive interpretation. In this respect, it is necessary to investigate whether the taxable person was acting in good or bad faith when purchasing goods or services. The concept of good faith and its protection provided by the CJEU is not a normative concept arising under EU laws and national laws of individual Member States.

The aforesaid rulings of the Court of Justice changed the case law of the administrative courts in Poland. In tax proceedings, the tax authorities, on the basis of objective circumstances, should determine whether the taxable person acted with due diligence in transactions. The case law of the Supreme Administrative Court concerning this issue is highly diversified and is affected by circumstances of a given case. It should not be forgotten, however, that it is the national courts which finally settle any disputable issues.

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TAX SOVEREIGNTY AS A FUNDAMENTAL CHARACTERISTIC OF TAX LAW SYSTEM

Viktoria Raritska[1]

Abstract

Nowadays, tax sovereignty is a very popular concept of tax law. There is a lot of attention to its external aspects and problems of its limitation by the sovereignty of other states in science. However, the issue of the internal aspect of tax sovereignty and its importance for taxation still remains unexplored. Therefore, this contribution deals with the identification and description of tax sovereignty as the crucial element of the system of tax law.

For this aim it uses the following scientific methods as dialectical, systemic, comparative, and method of logical analysis.

The primary purpose of the contribution is to confirm the hypothesis 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. It seeks to do so by describing of the legal nature of tax sovereignty, its substantial features and the role of tax sovereignty in the system of tax law.

Key words

Tax sovereignty; tax law system; protection of the taxpayer's rights; nation's sovereign obligation; tax rights of the state.

JEL Classification

K34, H80

1 Introduction

State and taxpayer are two main subjects of tax relations. The most important issue of tax law system is the problem of optimal ratio of their legal

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status in taxation. While this item causes the vagueness of tax law system, it is essential to consider the modern opinions of the role of these subjects in taxation, their corresponding tax rights and obligations. There are a lot of books and articles in scientific journals concerning the state's rights and taxpayer's obligations in tax relations. But tax sovereignty concept doubts given in them provisions about the dominant position of the state in tax relations, their authoritative and unilateral nature. These make the research of the internal aspects of the tax sovereignty and analysis of its impact on the system of tax law sufficiently important.

Therefore, the purpose of the article is to investigate the legal nature of tax sovereignty, determine its substantial features, characterize the role of the taxpayer in incipience of tax sovereignty and explain the significance of tax sovereignty in the system of tax law.

The fundamental issue of the research is to confirm the hypothesis 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.

It seeks to do so by applying of general scientific methods and special methods of investigation such as dialectical, systemic, comparative methods and method of logical analysis.

2 Legal nature of tax sovereignty

The legitimacy of the state as a formal institution is substantiated by the people's refusal of their freedoms and an agreement to submit to government in exchange for the protection of their guaranteed rights.

The person has voluntarily abandoned her natural liberty in order to organize the political community and take advantage of the political order. Created in accordance with the following purposes a sovereign state was endowed with obligatory power of special management and enforcement.

The term "sovereignty" is derived from the French "souverainete" and has its literal connotation the "supreme power". It also means independence and autonomy of the state in its internal and external affairs, full political supremacy of its legislative, executive and judicial powers on the corresponding territory (Krutskih, 2007: 596).

Sovereign state is the one which possesses three core elements: "territory, people, and a government" (Fowler, 1995: 33). In possessing them, a sovereign state should display internal control and supremacy, along with external independence from other states (Spruyt, 1994: 38-39). The state is a peculiar specific subject whose features become apparent in the entirety of the political and economic governance, together with the integrity of the sovereign's power and the power of the owner. So, its legal personality is universal (Dreval, 2008: 71). The enlisted above reasons impel the state to act only in the interests of society without which it is impossible to satisfy the person's private interests on the one hand and to ensure the integrity and stability of the nation, social strata, the state and society as a whole on the other.

As state is endowed with the sovereignty, it has the complex sovereign rights closely connected with it. These rights include the right of the state to determine the government and polity, to adopt, change and abolish the laws, to settle disputes and therefore to award and punish (Hobbes, 1996: 134-135).

As the 20th century has come to a close, the sovereign state stands as more than a nation with internal control and external independence regarding people, territory and government (i.e. the possessor of a series of rights to exclude and control). The sovereign is also the locus of a duty and an obligation to protect and promote the welfare of its citizens (Ring, 2009: 3). The mentioned citizen's welfare manifests itself in providing public services – health and education, economic opportunity, good governance, law and order, and fundamental infrastructure requirements (transport and communications) (Potter, 2004: 2). So, such sovereign responsibilities now accompany state's sovereign rights. In fact, the redistribution of the priorities of domestic and foreign policy of the state has already occurred. Actually, the ratio of the status of the state's interests and the interests of the individual was reviewed. The current meaning of the state and the person as diametrical opposites of legal relations was changed due to the fact that they are in close, constant interrelation.

This is no coincidence, that finding of a compromise between public and private interests, between liberty and power allows state to be the most

effective. Consequently, the appearance of a democratic constitutional state is the result of such compromise, as it is the best form of contentment of interests of the individuals and society (Kovalchuk, 2012: 1-2).

State's ownership of the sovereign rights and responsibilities to its citizens is substantiated by the social contract theory. It attempts to explain why and how people organize into political societies, exchanging personal autonomy and independence for greater certainty and security. It describes life without the state as "solitary, poore, nasty, brutish, and short" and laying out of the "laws of nature" which will remain unfulfilled in the state of nature because they "are contrary to our naturall Passions, that carry us to Partiality, Pride, Revenge, and the like," such that persons submit all of their rights to the sovereign in order to ensure their fulfillment (Hobbes, 1996: 89, 117).

The above mentioned theory of the social contract is laid the basis for the formation of state sovereignty. It is also a basic premise of the relationship between community members that they will share the burden of funding their common government. Taxes are the way in which those community members are, at least initially, obliged to share that burden. More particularly, taxes are a compulsory contribution levied by government to raise funds to be spent for public purposes (public services), including the support of the government (Harris, 2010: 8). Therefore, the basic obligation of the community members is their participation in funding the government. Fundamental justification for such a tax obligation lies in capability of the authorities to provide the community members with the proper services in exchange for levying taxes on them (Vdovichena, 2008: 91). These circumstances are an essential part of the concept of the most reliable governance of the national community. It is also a basis for effective management of the community of nations, establishing of which is caused by total globalization in all spheres of life.

Provided by the society state's power to manage and force on its territory suggests, that the basis of tax legal relations between the state and the taxpayer is a compromise, tax and legal character of which is substantially investigated by R.O.Havrylyuk. The scientist observes that compromise is an indispensable condition of the existence and development of society. One of the most common types of it is the tax legal compromise between

the state and society. This compromise guarantees a natural combination of fundamental features of society and the state – private interest, private property on the one hand and the public interest, public ownership – on the another (Havrylyuk, 2008: 153). It is due to the fact that with the gratuitous transfer of private property the taxpayer awards the state with the special complex powers. They include the power to determine the sources of the budget supplement, rights to adopt the rules of dissemination of tax jurisdiction and define the means of compelling and control in order to ensure the property interests of the state, supremacy to establish the basic principles of the tax system and to define the role of the taxpayer in it. All this powers are combined by the general integrating category of tax sovereignty. As the tax is a necessary condition for the existence of the state and society, it becomes a connecting element between them in tax relations. Therefore, together with the devolution of the power to the state in order to ensure public needs, the taxpayer actually grants it with the tax sovereignty.

Tax sovereignty as a component of tax system of the state is realized through the rights of the state to decide the issues of collection of taxes, to determine the objects of taxation, the groups of taxpayers and the scope of tax liability etc (Vdovichena, 2008: 90-91). Moreover, 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. This creates an internal aspect of tax sovereignty which reveals the nature of the relations between the state and society (Potter, 2004: 2).

Consequently, it includes three types of services which reflect the most important function of the state. One of them is the provision of security. This means creating a safe and secure environment and developing legitimate and effective security institutions. In particular, the state is required to prevent cross border invasions and loss of territory; to eliminate domestic threats or attacks on the national order; to prevent crime; and to enable its citizens to resolve their disputes with the state and their fellow citizens.

Another major political good is to address the need to create legitimate effective political and administrative institutions and participatory processes and ensuring the active and open participation of civil society in the formulation of the state's government and policies.

The last type of supplied by state political goods includes medical and health care, schools and educational instruction, roads, railways, harbours and other physical infrastructure, a money and banking system, a beneficial fiscal and institutional context in which citizens can pursue personal entrepreneurial goals, and methods of regulating the sharing of the environmental commons (Potter, 2004: 4).

So, the financial resources are needed for realization of state sovereignty and therefore, providing the society with the services. The main source of the increasing of their scale is taxation. As a taxpayer pays taxes, he is entitled to receive certain services from the state. But in this case, the recipient of such services are not separate individuals or even groups of individuals but society as a single entity. This fact allows us to call these services public (Vdovichena, 2008: 89).

Consequently, the tax liability between the state and the taxpayer is characterized by particular contrary contentment from both the payer and the state. The nature of the liability in which tax obligation is performed is manifested through satisfying of the public interests. So, it eliminates the gratuitousness of the tax liability (Polishchuk, 2007: 61). Counter-retribution from the state to the taxpayer is revealed through providing of the socially significant services to the taxpayer and non-occurrence for him adverse legal consequences in the form of liability for breaking the tax laws. Such description of tax liability reflects the legal position of the state and the taxpayer in tax system. It is due to the fact that the taxpayer endows the state with tax sovereignty. Thus, state has not only the rights on taxation, but also the obligations, which correspond to the taxpayer's rights. Such rights and obligations of the subjects of tax relations are inherent elements of tax sovereignty and reveal its impact on the tax law system.

3 Substantial features of tax sovereignty

Collection of taxes as a legal compulsory appropriation of the property is an essential element of tax sovereignty which is an integral element of the state sovereignty. Thus the above mentioned sovereignty has qualities of state sovereignty with regard to its specific features.

The unity of government as a substantial feature of the tax sovereignty indicates the existence in the state of an unified system of state authorities. They constitute the supreme state power and are endowed with exclusive jurisdiction in the tax area. Such power is sufficient for adequate adjustment of the tax system of the state. Dispensation of the power between its different structures allows to establish the optimal conditions for the discharging of taxpayer's obligations and to avoid the possibility of applying to him of the different rules in similar situations. Moreover such bodies include not only the tax authorities but also state legislatures, as adopted by them special system of rules is a legal form of realization of tax sovereignty of the state. The part of them that determines the functioning of the tax system, establishing and collecting taxes forms the national tax laws. It regulates the relations between this state and the people, which are imposed by the corresponding tax liability as a result of their relationship with the State. This is justified by the indissoluble connection between the tax sovereignty and state sovereignty, for which each country shows the greatest restraint. This is due not only to the fact that taxes are an important component of the financial system, but also those that they are established, changed or abolished of state's legislative body. Thus, the right to adopt legal acts in the field of taxation is an integral feature of government through which the tax sovereignty is realized.

Inalienability of tax sovereignty is also important feature of it and allows us to clarify its nature. It means inability of random alienation of legitimate and legalized power because sovereignty stands as an element of legal capacity of the state, a precondition of its responsibilities. If the state once have received the tax sovereignty from the society it can not further pass it to someone else. Due to its specific legal nature sovereignty can not be alienated. The powers of the state in the field of taxation can be passed to anyone but sovereignty – never.

Another important feature of the tax sovereignty is its unlimitedness. At the same time, the limitation of this power with other legal authority is also possible. In no case we are not talking about the absoluteness of the power and its independence from the material conditions of life or its independence from the principle of morality. Legal independence does not

mean actual independence (Ushakov, 1963: 23). This feature also means the universality of the government. It lies in binding nature of state decisions for the people, organizations and even for the state itself. It also should be noted that this feature of tax sovereignty has slowly lost its previous meaning due to the processes of globalization. Nowadays tax sovereignty is limited not only by the taxpayer's rights in tax relations but also by the tax sovereignty of other states.

Special place among the attributes of the tax sovereignty takes supremacy of the government on taxation. This feature indicates the role of state power in determining of the tax system, the place of the taxpayer in it and his responsibilities, tax jurisdiction of state authorities. This inevitably led to the forming of the tax law system of the state that objectively due to its special internal order.

However, supremacy of the government does not mean its absoluteness on its territory and over its taxpayers. It should be noted, that tax sovereignty exists due to the taxpayer. As he is a transmitter of tax sovereignty, state must realize it in taxpayer's interests. Absolute nature of sovereignty would mean a tyranny of relevant government. Therefore, tax sovereignty must be limited by the interests of the taxpayer, the legal system of the state and the exercised within certain limits power, as well as by international commitments.

The power of the state is the only sovereign political power in the field of taxation, because its source is the nation. Possibility of the existence of another similar power which would determine the system of tax law which dependent by the system of social relations in the accumulation, distribution and redistribution of public funds is excluded.

On the other hand, the absoluteness of tax sovereignty of the state is limited by the sovereignty of other states. Sovereignty is deeply embedded in world affairs as it provides an arrangement that is conductive to upholding certain values that are considered to be of fundamental importance. These include international order among states, membership and participation in the society of states, co-existence of political systems, legal equality of states, political freedom of states, and pluralism or respect for the diversity of ways of life of different groups of people around the world.

Sovereignty acknowledges the value of international legal equality; i.e., the equal status between independent states (Potter, 2004: 8). In order to define appropriate standards of tax competition organization for the Economic Cooperation and Development (OECD) is signaling a major conceptual shift away from the conventional view that equates sovereignty with complete state autonomy over tax matters. The OECD's work evidences an emergent vision of sovereignty that entails positive obligations or duties of nations in exercising the power to tax. It is considered as a nation's "sovereign duty" to other nations under an implied social contract. This view of sovereignty could have powerful implications for national taxation. Recognizing ourselves as parties to a global social contract would require reassessment of the conventional standards of tax policy design.

Instead of focusing on national tax policy as appropriately reflecting only or even primarily the needs and wants of national constituents, a global social contract would require national policy to reflect outward as well, to consider the needs and wants of the worldwide community (Christians, 2009: 101-102).

It is due to the fact that the application of the state's right of tax sovereignty and at the same time, the real ability of this country to limit its own tax sovereignty, expresses the formal equality and freedom, which indicates the presence of the tax sovereignty of the state and the possibility of its limitation. At the same time the application of the principle of formal equality to the parties of tax relations create the conditions for achieving adequacy of their interests concerning the public finance, improvement so the legal basis of consensus between them and ensuring the principle of fairness. The essence of the referred principle consists in elimination of inequalities between the states, the taxpayers and between a particular taxpayer and certain state (Harris, 2010: 96).

While no one enjoys paying taxes, most recognize that taxes are the price we pay for the essential infrastructure and services provided by state and local governments. In a free and prosperous society, citizens will generally comply with tax levies as long as certain criteria are met.

As equity and fairness are an essential attributes of a good tax system the American Institute of Certified Public Accountants recommends such dimensions which can be considered in determining of tax equity and fairness.

First of them is the exchange equity and fairness. It means that, over the long run, governmental agencies provide adequate public goods and services to meet the needs of taxpayers and their families. Exchange equity does not mean that, during a specific period, the amount of taxes paid by a particular taxpayer will exactly correspond with the value of the tax benefits directly or indirectly received. Tax revenues must be pooled to fund essential shared services, such as education, defense, health care, public safety, social services, and even tax administration. Substantial amounts of tax revenue must be invested in long-lived assets, such as airports, bridges, highways, schools and public buildings. This investment in infrastructure will benefit not only today's, but also future taxpayers. Although individuals may not currently need to use all of the facilities or services offered by governmental units, the lack of such facilities or services could have a negative impact on their quality of life. For example, the presence of a police or fire department is reassuring, even if you never need to call them.

Exchange equity also allows for the sharing of pooled resources with others in return for the promise of future benefits if and when needed.

The second dimension is the process equity and fairness. There are three key aspects to process equity and fairness. First, political processes give taxpayers an opportunity to influence how and to what extent they are taxed. Second, tax systems include safeguards that permit taxpayers to challenge the taxes assessed. Third, tax administrators are expected to treat taxpayers with respect (AICPA, 2008: 4-5).

So, relations in course of taxation are based on the equality of it parties and assume the mutual connectedness of their rights and obligations. Their content is formed on a parity basis (agreement tax liabilities) or blanket order - by mandatory rules, compulsory for compliance by the parties, but not volitional acts of a public person. It is due to the fact, that taxation does not include such elements of government as domination of one party

of relations over another, adoption of unilateral state acts, which are obligatory for execution by the other side, legal dependence of the volition of one party from another (Polishchuk, 2007: 60-61).

So, mentioned features of tax sovereignty reflect its dependence on the taxpayer and his relationship with the state and provide the balance of their interests in taxation. They indicate the influence of its concept on the system of tax law.

4 The role of tax sovereignty in the tax law system

The content of particular internal tax sovereignty depends on the achieving in tax system of a balance of public and private interests and the prevailing role in it of the society or the state. Nowadays, the undoubted statement is that civil society and legal state can not be identified with situations in which the private interests are absorbed by the public ones. However, private interests can not be completely outside of the public interest and be opposed to them. Similarly, it is impossible to reject the necessity of existence of the public interest as the elements of the social and legal reality. Indeed, in a democratic state the public law eventually directs its efforts in order to ensure the rights and interests of an individual.

Civil society and legal state are considered as equal components of legal society. So, the legal nature of society does not include the domination of civil society over the state, as the state over the society, and provide their "balance" through the differentiation of functional spheres of their activities (Hetmantsev, 2011: 53). Due to such circumstances legal norms is organized in a way that they do not restrict the independence of the person, but rather ensure her autonomy (Maksimov, 2010: 30-31).

Tax relations that mediate the movement of tax payment into the ownership of state, relations for compensation of tax payments, relations associated with an excessive obtaining of funds collected as tax payments by the state, relations on interest payment for the untimely tax rebates are tax relations between the state and the taxpayer that have obligatory nature. It is manifested in the fact that they are active relations which have relative and monetary nature, are provided with the measures of state compulsion, based

on the principle of cooperation and equality of the parties, do not assume the subordination of one party to the other, are of compensatory nature and are regulated by the obligatory, technical, legal techniques and methods (Polishchuk, 2007: 64). But how to ensure the actual implementation of such tax relations, if the state is constantly seek in any ways to fill up the budget and the main source of it is taxation? Aspiring to maximize its own income, the state anyway misprises the interests of the taxpayer in connection with what the taxpayer finds himself at a disadvantage which causes imbalance of state tax system. In this regard, the science is actively working on protection of rights and interests of the taxpayer.

Taxpayer as a transmitter of tax sovereignty of the state is an equitable subject of tax relations. Therefore he is a person having the ability to demand to be treated in a manner which will improve – objectively or subjectively – his position in a society, economy or law. It inevitably leads us to the conclusion that rights (to a certain degree) have their roots in commonly shared values and require to be protected. The concept of taxpayer protection means: "written or unwritten rules that are intended to protect taxpayers against tax levying by tax authorities, which tax levying could be illegal from the point of view of taxpayers".

However, this definition seems to be too narrow, focusing on challenging inappropriate behavior of the tax administration, and mainly the financial aspects of this behavior. One can construct a wider definition of taxpayer protection, involving some non-fiscal aspects of relations between taxpayers and tax authorities. For example, being able to demand from tax authorities the information that is necessary for a taxpayer to make proper decisions concerning his life and activity is widely acknowledged as a taxpayer's right. It would be difficult to say that taxpayer protection does not cover this area. The same argument can be formulated when administrative fines are imposed on a taxpayer. One should consider them not only from the perspective of tax liability, but also as consequences of the improper behavior of the taxpayer. It is rather indisputable that the taxpayer has the right not to be fined in an excessive way. Hence, the law should protect the taxpayer against it. And this becomes a matter of taxpayer protection (Brzeziiiski, 2009: 18-19).

The necessity of taxpayer's rights protection in taxation due to the fact that the relationship between the state on one side and the taxpayer of the other is initially formed on the principle of inequality of their rights and legitimate interests, their legal status in such relations.

However, to oppose the rights and legitimate interests of these subjects is not necessary, as there is an indispensability of observance of the certain balance of rights and legitimate interests of the public or private nature in the area of taxation. This is important due to the fact that tax relations are founded on the interest of public and obligated entities in each other, as taxes and fees are financial basis of the state, which is directly connected with the interests of the taxpayer in respect with the imposition of the tax burden on them.

Content analysis of tax relationships suggests that fiscal (tax) authorities under the protection of the public interest, having regard to the obligation subjects of power, enforce their obligation to pay compulsory fees. However, subjects are required to apply to interim measures should be implemented only to the extent that the state needed to protect their tax rights and legitimate interests. The responsibility placed on the obligated entities, should be aimed at stimulating the latter to the full and timely payment of taxes (Popov, 2011: 5).

Thus, the existence of the tax sovereignty in the state affirms on existence not only the state's rights on formation of the tax law system, acceptance of tax legal rules, determination of the principles of taxation, consolidating of its own control proxies with respect to the taxpayer, but also a number of duties to society in the interest of which the state functions.

On the other hand, the government has to protect its tax sovereignty. States' sovereignty is constantly threatened when taxpayers and/or jurisdictions decide to develop unfair tax practices such as: transfer pricing, triangular transactions (treaty shopping), exemption from or substantial reduction of foreign companies' income taxation, privileged tax regimes, absolute guarantee of banking secrecy, thin capitalization of companies, etc. So, important are developed be the domestic tax laws and international treaty anti-avoidance rules which have the practical effect of neutralizing the violation of the sovereignty of States tax (Avila, 2012: 4). The necessity of adoption

of such rules encourages the states to tax cooperation. The prospect of it inevitably raises questions regarding the plausibility of such cooperation, the scope and best context for such cooperation, and the normative principles upon which it rests. There are nonetheless several core goals that are at risk when a nation-state makes the decision to surrender some measure of its tax sovereignty. Specifically, nation-states risk losing the functional dimension of tax sovereignty (the ability to raise revenue and exercise some fiscal control through the tax system) and certain normative goals (the democracy defining aspects of tax sovereignty – accountability and legitimacy). Therefore, the state must express the greatest distance in resolving the issues of tax sovereignty and the high validity taken in this regard decisions. This is based on the fact that the tax sovereignty is the ground of the system of tax law, which is an objectively caused by the internal organization of the rules of tax law system.

Due to the fact that the taxpayer plays a leading role in the promotion of tax rules and collection of taxes for public purposes, he is the single source and factual and legal transmitter of tax sovereignty of the state. Therefore, he as no one else is interested in fulfilling of his tax obligation, which, although generally accepted compulsory unilateral character generates the corresponding taxpayer's rights. The social basis of the taxpayers' rights to pay the tax is his and his family specific natural needs in satisfying of their public interest that is able of providing only the state or other public formation. Community member is free to make a choice between being able to pay taxes legitimately established and therefore obtain further opportunity to fully realize himself as the owner and personality and the ability to avoid paying taxes by using the same methods and techniques of legitimate (as well as illegitimate), thereby condemning themselves to enforcement taxation (Havrylyuk, 2004: 101). So, tax relations between the state and the taxpayer is a reflection of tax sovereignty of the state and its substantial features. It is due to the fact that they determine the tax system of the state and its system of tax law.

5 Conclusion

The ability of the state to ensure the accumulation of the financial resources indicates how much it is independent in decision-making during carrying out its policy within its territory. As a result of conclusion of a social contract the state has received the power to determine its role in taxation and so, it was endowed with the corresponding rights and obligations, its own tax sovereignty.

It is evident from the article that tax sovereignty means state's right to determine the system of taxation and the system of tax law. The substantial features of tax sovereignty are unity of government, inalienability of tax sovereignty and inability to its limiting by the other authority. Special place among this attributes takes supremacy of the government on taxation, which indicates the role of state's power in determining of the tax system, the place of the taxpayer in it and his responsibilities, tax jurisdiction of state authorities. However, supremacy of the government does not mean its absoluteness on the territory of the state and over its taxpayers, as one of the basic objectives of tax sovereignty is ensuring of the taxpayer's rights and their protection.

Such legal nature of tax sovereignty suggests the specific character of tax relations between the state and the taxpayer, which are the equal subjects of taxation. In this regard, the tax sovereignty of the state is limited not only by the indirect influence of the international community, but also by the interests of the taxpayers.

It is apparent that the basis of the tax sovereignty is the necessity to ensure state functioning in order to provide public interest, ensuring equality, justice and non-discrimination between the subjects of tax law - the state on the one hand and the taxpayers as the transmitter of state's tax sovereignty on another. So, this fact has confirmed the hypothesis 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.

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THE INFLUENCE OF THE EUROPEAN UNION ON THE ADMINISTRATION OF INDIRECT TAXES IN THE CZECH REPUBLIC

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Abstract

The enlargement of the European Union in 2004 brought many changes with the increase in international trade being one of them. This change had to be reflected in tax legislation of new member states, including the Czech Republic. This article provides a brief summary of the most important impacts of the European Union's legislation in the field of indirect taxation and especially excise duties on the laws of the Czech Republic. I will also deal with procedural issues in the approval of new legislative proposals in this field within the European Union.

Key words

Indirect Taxes; European Union; Tax Harmonisation.

JEL Classification

K34, H20, H87

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1 Introduction

The enlargement of the European Union in 2004 brought many changes with the increase in international trade being one of them. This change had to be reflected in tax legislation of new member states, including the Czech Republic. This article provides a brief summary of the most important impacts of the European Union's legislation in the field of indirect taxation and especially excise duties on the laws of the Czech Republic. I will also deal with procedural issues in the approval of new legislative proposals in this field within the European Union.

This text was prepared within the project "Správa spotřebních daní a cel" (The Administration of Excise Duties and Customs), No. MUNI/A/0909/2013, carried out at the Masaryk University, Faculty of Law, in 2014.

2 The position of tax law in the system of financial law

Financial law regulates primarily financial affairs of the government and financial relationships between the government and companies and citizens.

Tax law as a traditional part of financial law contains substantive and procedural legal norms that govern individual taxes and tax administration. It is important to note, however, that tax law in connection with the growing globalisation of the world economy or national memberships in international organisations is increasingly connected with other legal disciplines, e. g. European law or public international law.

3 Tax harmonisation

The process of alignment of national tax systems of Member States with the EU common rules is called "tax harmonisation". The goal is not to create a uniform tax system. The process of harmonisation currently aims mainly to establish common tax bases. Harmonisation of tax rates as the next phase of the harmonisation process is more complicated because it faces reluctance of Member States. It is seen as interference in the national sovereignty of Member States. Tax rates are an important instrument of fiscal policy and their harmonisation may cause a significant threat of budget revenue loss

in those cases where revenue form a particular tax accounts for a substantial part of the total tax revenue. The only measure that has been adopted within the harmonisation of tax rates in the European Union are the minimum tax rates of value added tax and excise duties.

4 Indirect taxes harmonisation

Cooperation between Member States in the field of taxation results from relevant Articles of Treaty establishing the European Economic Community[3]. These Articles relate to indirect as well as direct taxes. However, the Treaty makes it clear that the priority area is the adjustment of indirect taxes. Only Article 98[4] was dedicated to direct taxes; it contains a prohibition of relief from direct taxes in cases of exports to another Member State. The other Articles of the Treaty relate only to taxes on consumption of goods, i.e. value added tax and excise duties. Any Member State shall not impose on the products of other Member States any internal charges of any kind in excess of those applied to similar domestic products. If taxed goods are delivered to another Member State where it will be consumed and taxed, the tax paid in the original Member State may be refunded in the amount collected in that state. Finally, Article 99[5] of the Treaty must be mentioned; it represents a basis for the harmonisation of indirect taxes in order to allow functioning of the Single Market. The harmonisation of indirect taxes has also become a tool that prevents distortions of competition. The European tax legislation can only be adopted by a unanimous decision of the Council after consulting the European Parliament and the Economic and Social Committee. With current 28 Member States of the European Union, these procedural provisions, slow down the process of tax harmonisation. One can therefore ask whether these provisions are sustainable in the future because of the increasing globalisation and digitalisation of the world trade

3 One of the Treaties of Rome which were signed in Rome in 1957, due to changes made by Maastricht, Amsterdam, Nice and Lisbon Treaties was renamed the Treaty on the Functioning of the European Union.

4 Currently, it is provided in the Article 112 of the Treaty on the Functioning of the European Union.

5 Currently, it is provided in the Article 113 of the Treaty on the Functioning of the European Union.

on the one hand and the budgetary importance of taxes on the other hand, tax measures will have to be implemented more quickly to ensure competitiveness of the European economy which is the very objective for which the European Union was founded.

The harmonisation of indirect taxes at the European level is seen as one of the fundamental measures that arises from the fact that the primary purpose of the European integration is the development of trade without unnecessary administrative burden. As presented by Terra and Wattel (2008): "The initial focus of the harmonization of indirect taxes shows that EC basis consist in the free trade zone" (Terra, Wattel, 2008).

When talking about the impact of the harmonisation of indirect taxes at the European level we should first define indirect taxes. According to the OECD classification, indirect taxes are included in the category 5000 Taxes on goods and services, which is further divided into General taxes (category 5110 includes sales taxes and value added taxes), Taxes on specific goods and services (category 5120 includes excises, energy or environmental taxes and customs duties) and Taxes on use of goods (category 5200 includes e.g. road taxes or toll). At the European level, the harmonisation concerns mainly two areas, the harmonization of value added tax and excise duties.

The harmonisation of value added tax is based on the tax neutrality principle, i.e. "the tax burden is completely independent of the length of the production or distribution chain. The application of value added tax, contrary to the cascade system of turnover tax, does not distort competition in the market..." (Nerudova, 2011) In other words, neutrality of value added tax is achieved when the share of the tax in the price of particular goods or service is the same regardless of the length of the distribution chain. The amount of tax depends on the tax rate, which does not violate the principle of neutrality.

In the area of harmonisation of excise duties, the principle of country of consumption of the goods was chosen. According to this principle, the excise goods should be taxed in the country of consumption to avoid distortions of market prices. Only in this way it is guaranteed that the goods subject

to excises originated in different Member States will be sold in the Member State of destination without price difference resulting from different excise rates in individual Member States.

Harmonisation in the area of indirect taxes is ensured, with certain exceptions, by directives which each Member State is obliged to implement within a specified period. If the directive is not transposed into the national law within the specified period, the Member States are incurring risk not only of sanctions by the European Union but also risk that tax payers would obtain direct effect of the directive. Important part of the harmonisation represents also the Court of Justice of the European Union, which interprets the European law and ensures its uniform application across all Member States.

4.1 Value added tax

Revenues from value added tax account for a significant part of national budgets of individual Member States. In the Czech Republic, the value added tax revenue is the second most important income item of the state budget (after social security contributions).

The First Council Directive on VAT No 67/227/EEC introduced value added tax as a general tax on consumption in all Member States. The tax was set as a percentage of price of goods or service. The system of the value added taxation is simple and neutral which was one of the objectives of this type of tax. Its application to similar goods is the same in each Member State regardless of the length of the production and distribution chain and its amount is known in advance even in the case of international trade.

The Second Directive No 67/228/EEC defined the most important tax terms as the object of taxation, the taxable person or the place of transactions. Member States could decide on their own which goods or services will be subject to the basic rate and which to the reduced rate. For the first time, the application of the zero tax rate was limited. The Directive also brought one of the generally recognised principles of neutrality, i.e. identical domestic and imported goods should be subject to the same tax rate. The Directive has also allowed Member States to apply even more special anti tax fraud provisions.

Until the end of 2006, i.e. also for the period of the Czech Republic`s accession to the European Union, The Sixth Directive, No 77/388/EEC, was the most important European legal act. This Directive, which has been amended many times, set down rules for the tax base determination and the use of the reduced tax rate on selected types of goods or services. The rules of territoriality, according which the place where goods are taxed is determined by value added tax, was also set down by this Directive.

The Sixth Directive, as amended, had an impact on the Czech law because it was transposed by the Act No 235/2004 on the value added tax. However, the harmonisation process with the European legislation took place earlier. Transposition of not only this Directive into the Czech law led to complications and future complications can be expected as well. Whelanová (2008) summarises these complications at the general level; they consist:

- In the lack of clarity and complexity of the European legislation,
- In the excessive use of references,
- In the gradual substitution of directives for directly applicable regulations,
- In the problematic translation of the European legislation into the Czech language.

While preparing Value Added Tax Act amendments the Ministry of Finance uses, in my experience, also other language versions of the European legislation to better understand the meaning of certain provisions. However, this approach has resulted in differences between the Czech legislation and the official Czech translation of the European legislation.

Because of the enlargement of the European Union, development of trade and increased digitalisation on the one hand and the lack of clarity of the Sixth Directive on the other, the Sixth Directive has been substantially revised and replaced by a new Directive No 2006/112/EC on the common system of value added tax (so called Recast) which is the new source of the harmonisation of value added tax in the European legislation from 1st January 2007. The most significant change brought by this Directive, is, in my opinion, the minimum level of standard tax rate of 15 %. A reduced tax rate, if applied, should be at least 5 % and an Annex to the Directive defines goods and services to which the reduced tax rate may be applied.

During the accession process new Member States had the possibility to negotiate an exemption and to extend the list of goods and services subject to the reduced tax rate. If the exemption has not been agreed, it is not possible to unilaterally apply the reduced tax rate. The Ministry of Finance faced this fact during the preparation of an amendment to the Value Added Tax Act, when they intended to move baby napkins into the reduced tax rate. Since the Czech Republic has not negotiated the exemption mentioned above, it has not been possible to apply the reduced tax rate to this type of goods. The Directive does not prohibit use several reduced value added tax rate to Member States, if the condition of the minimum rate is met. Although it is an exceptional situation, since the Member States usually use only two tax rates, the Czech Republic has decided to introduce a second reduced tax rates on e.g. books, medicines or baby food with effect from 1st January 2015. Since the term "baby food" can include relatively many commodities and some of them are not included in the Annex of the Directive with reduced rate commodities, the amendment to the Act had to define what is meant by "baby food". Unlike the minimum tax rate, the Directive does not set a maximum tax rate, so it is on the decision of each Member State what tax rate will be set in the national law.

There have been new types of fraud identified in the intra-community and international trade. The media often talk about the so-called "carousel fraud" and the value added tax evasion is estimated at billions of CZK annually just in the Czech Republic. The principle of such fraud is, e.g. a multiple reselling of goods, its fictitious export or transport to another Member State and the related application of a refund of value added tax in the Member State of export. The export in this context must be understood also as a transportation to another Member State. Another modus operandi is, e.g. an import of goods to one Member State, its release into the customs regime of free circulation and its subsequent transport to another Member State. If an importer/declarant declares that the goods are intended for consumption in another Member State, the releasing Member State cannot collect the tax. However, the fraud consist in the fact that the goods are not transported to the other Member State, they are resold multiple times which creates tax arrears. Member States can fight against the above mentioned fraud

in accordance with the Directive by introducing the reverse charge mechanism. Basically, it is a regime of shift of tax liability in the international trade from a supplier of goods or a provider of service from another Member State or a third country to a domestic recipient of goods or service. This system is also advantageous for foreign tax payers because it is not necessary to make a registration as a domestic taxpayer. However, this system cannot be used without any limitation. It is always necessary to gain an approval from the European Commission with an identification of goods or services the reverse charge mechanism should be applied to in the particular Member State.

Currently, the Czech Republic uses the reverse charge mechanism for:

- Delivery of gold to a taxpayer,
- Delivery of scrap and waste,
- Transfer of emission permits to a taxpayer, and
- Supply of building or assembling operations.

The mechanism is used mainly for goods or services prone to fraud. Recently, the Czech Republic tried to extend the reverse charge mechanism to other commodities, especially to the fuel. These efforts, however, met a resistance from a part of the Czech business community and also an opposition from some Member States. Due to increasing problems with tax evasions in all Member States, it is possible that this effort will be successful in the future. In my opinion, the introduction of the reverse charge mechanism on fuel would be a very effective tool in the fight against tax fraud.

4.2 Excise duties

Similarly as in the case of the value added tax, the excise duties are harmonised at the European Union level. Because the excise duties have a significant impact on the functioning of the European Single Market the harmonising legislation in this area was adopted in the early 1990's. The harmonisation of excise duties is similar to value added tax harmonisation, especially as regards the form of directives. These directives, with regard to the fact that only certain types of goods are subject to excise duties, can be separated into several groups.

The first group consists of horizontal directives which lay down general rules for production and treatment of excise goods. The second group consists of structural directives, which provide lists of excise goods and, finally, the third group consists of approximated directives which set the minimum rates of excise on specific goods.

Directive No 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products belongs to the first group. By the approval of this Directive, the harmonisation process in the European Union has been started. This Directive set down the rules on the production, holding, movement and monitoring of products subject to excise duties in general and also identified types of goods which the Directive was applied to (mineral oil, alcohol, including beer and wine, and manufactured tobacco). The horizontal directive also stipulated that the structural and approximated directives would define the structure and the rates of particular excises.

The basic directive was, after several amendments, replaced by Directive No 2008/118/EC concerning the general arrangements for excise duty. The aim of the new legislation was a response to changes in the international trade resulting particularly from the development of communication technologies. The new horizontal directive basically rephrased articles of the previous directive and simplified amendments, which had become very confusing over time. The adoption of the new directive caused a reduction in the administrative burden, especially in the area of movement of excise goods within the European Union. At the same time as the adoption of the Directive, the implementing regulation as regards the computerised procedures for the movement of excise goods was adopted (Commission Regulation (EC) No 684/2009). This resulted, in my opinion, in a very interesting combination of directly applicable law of the European Union and the directive which has to be transposed into the national legislation of each Member State.

In relation to the Czech Republic`s accession to the European Union in 2004, the horizontal directives were transposed into the Act No 353/2003 Coll., on excise duties. The basic principle for excise duties taxation is that the liability to declare and pay the excise is moved as close as possible to the place

of consumption. In this context, I see the biggest benefit of horizontal directives in the definition of the excise duty territory of the European Union and the movement of excise goods within the European Union. The excise goods are under the duty suspension arrangement from the time of their production or importation from the third countries that means a postponement of the liability for payment of excise duty. Due to the high taxation burden, the legislation should react to a possibility of tax fraud. To sum it up, the horizontal directives consistently defined the range of traders who are authorized to excise goods treatment under the duty suspension arrangement, with the fact that the detailed rules for these traders can be provided by each Member State in their own national legislation. From the beginning of my interest in excise duties, I am convinced that the Czech law on the excise duty is problematic from the point of view of effective management of excise duties. There is a permit (authorisation) to act in the Act No 353/2003 and at the same time there is a legal obligation to issue the permit by the customs administration when all requirements set down by the Act are fulfilled. Although the permit itself is a vital component of the excise duties administrations, the legal requirements for its issuance were set down vaguely. Because of the high tax rate and quite a long distribution chain I am of opinion that only economically stable businesses should be granted the permit. But this is not allowed by the current text of the Act No 353/2003. The Supreme Administrative Court declared a similar opinion in its decision (Supreme Administrative Court 5 Afs 84/2012).

Structural directives and directives on the minimum excise duties rates applied to particular goods represent an extensive set of legislations which are very often amended (Council Directive 92/83/EEC, Council Directive 92/84/EEC). These directives not only follow tax policy goals but very often contain regulation extending into other areas, such as e.g. health or environmental protection. The revised directive on tobacco from 2014 is an example (Directive 2014/40/EU). As follows from the preliminary provisions of this Directive, tobacco products are not considered ordinary commodities. In the view of their particularly harmful effects on human health, health protection should be given high importance and tobacco

excises should contribute to the reduction of smoking prevalence among young people. Member States should transpose this Directive no later than 20th May 2016.

The transposition of structural directives and directives on rates was implemented into the Czech legislation also by the Act No 353/2003 Coll., on excise duties. Personally, I consider this way unfortunate. A large number of directives which should be implemented gradually into the legislation bring complications with the approval of amendments. There are situations that one act is amended by several amendments at one date. This act becomes unclear and, in my opinion, it is only matter of time when the act will have to be revised completely. This revision should consist of replacing the existing act by several new ones, which will regulate particular areas, similarly as e.g. in Slovakia.

5 Conclusion

The European legislation concerning indirect taxes is very complicated, and for both individuals and Member States, often incomprehensible. The process of approval of a new legislation is already problematic when the agreement of all Member States must be reached. This situation is often used by some traders to commit tax fraud. Even though we can see some progress in this area, I believe that without the removal of administrative barriers in the process of the approval of European and national legislation, it will not be possible to simplify and humanise the system of indirect taxes and, concurrently, enforce the effective fight against tax fraud.

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THE NEW CONCEPT OF TAXATION OF TRANSFERS OF REAL ESTATE IN THE CZECH REPUBLIC

Šárka Faltová [1]

Abstract

In this year 2014 civil law was recodified, which influenced the tax law, among other things, legislation and stressed real estate transfer tax. The paper focuses on an analysis current new and past legal status of the Real estate transfer tax in the Czech Republic.

Key words

Acquisition; property; real estate; tax; transfer.

JEL Classification

K34, K40

1 Introduction

The theme of this paper is the transformation of the Act of the Real Estate Transfer Tax, in connection with the recodification of private law in the Czech republic this year. Although this is an article on tax law topics, I am placing it here, because in my opinion tax law is part of the financial law. I think so because the tax and financial law is historically and socially closely associated, moreover, many of the existing legal textbooks ranks taxes in the fiscal part of the financial law. In this spirit, I also attended a lessons of financial law. But some experts in financial law say that that tax law fulfilled its criteria including social acceptance, so the tax law is an independent

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legal branch. This view hold such. prof. Babčák, the legal representative of the Košice university, prof. Etel, legal representative of the Bialystock school or doc. Radvan from Masaryk University. Also Anglo-American law has its own "tax law" separate legislation (Radvan, 2008: 303).

The recodification of the civil code brought many changes in Czech law. The new civil code, which along with the law on commercial companies and cooperatives replaced the „old" commercial code represents the most significant change of the existing legislation. So, it was necessary to establish by comprehensive legislation in many laws.

One of the laws, which received a completely new legislation, was Act no. 357/1992 Coll. on inheritance tax, gift tax and real estate transfer tax, as amended. This transformation is strongly bound to the transformation of an income tax - in present an income tax contains the inheritance tax and gift tax. Due to the substitution of law no. 357/1992 Coll, on inheritance tax, gift tax and real estate transfer tax, as amended, this provision was repealed. The last of these three transfer taxes - real estate transfer tax - was subsequently revised to the new law, which is the Act no. 340/2013 Coll, tax on acquisition of immovable property. This tax on acquisition will be emphasized in this paper.

The aim of this paper will be verified the hypothesis that transformation of real estate transfer tax was really necessary or not. The methods will be an analysis of new legislation of the tax on acquisition and also synthesis with the previous legislation of property transfer tax.

At the very end of the article I will sum up the findings, which I will evaluate and reflect in the context of evaluation research hypotheses posed, therefore, whether the new legislation of real estate transfer tax was reasoned or not.

1.1 The Inclusion of the Acquisition of Immovable Property Tax System in Czech Republic

Tax on acquisition of immovable property (hereinafter referred to as "TAIP") is a property transfer tax, a taxpayer pays it directly on the basis

of their income from transfer of ownership of immovable property (Pelc, 2009: XII). However, the law also refers to the taxpayer for the transferee of property rights in immovable assets in other cases.

The law is clear that TAIP is imposed primarily to the property owner and the tax amount is derived from the value of the property. The concept of property is the key word for all property taxes, in Czech law but is not defined by a single definition. The synthesis of modifications in various pieces of legislation, it can be a general definition of the term to which property is considered as a valuable cash values that bind to a particular entity (Radvan, 2007: 2). Another conceptual element for transfer tax is transfer. We understand the unilateral movement of assets within the meaning of changes in the person of the owner, property taxation if it is TAIP transfer or transition to the new owner (Radvan, 2007: 235). There is a noticeable difference from property taxes that attaches to the ownership of property in a state of „rest" (Bakeš, 2012: 228).

The distinguishing element between the tax on the acquisition of immovable property on the one hand, and the inheritance and gift tax on the other hand is a paid transfer. Furthermore TAIP, unlike the other two can only apply to immovable property. The tax burden is borne directly by the taxpayer, the obligation to pay the tax can not be converted to anybody else.

As mentioned above, the designation of a tax on the acquisition of immovable property as a tax seems a bit inconsistent. TAIP, as well as additional transfer tax, is paid only once, occasional, non-purpose and mandatory transfer to the state budget, therefore exhibits elements of „taxes". But with an obligation to pay a fee for land registration. Hence considerations about the accuracy TAIP designation as a tax.

The taxes are only applicable to the taxation of properties – subjects are immovable as well movable properties. Between property taxes moreover belong road tax - as well as tax, gift tax and inheritance taxes on movable properties, immovable properties are also taxed by the tax on immovable properties (Radvan, 2006: 16).

1.2 Specifications for Consideration of Tax Resulting from the Transfer of Immovable Properties

Income arising from the transfer of immovable property is a property tax as a direct integral part of the tax system in our country. Purchases, sales, exchanges, settlement of ownership, acquisition of property at auction, foreclosure, foreclosures, prescription of or in connection with the assignment of the claim - just these terms under the jurisdiction of paid transfers and ownership rights to immovable things to different owners, belongs to the subject of the tax. The obligation to pay tax is the taxpayer derived, depending on what form of acquisition of the property in question. Mostly this person is a transferor-seller and buyer is guarantor, in this case. However, the law in other cases[2] identifies the taxpayer acquirer. In that case there is no guarantor institute. Similarly, in a situation of transition - the taxpayer becomes the acquirer, the guarantor is not. For the tax base is used a term acquisition value. This value can be reduced by deductible expenses, such as eg. costs for expert evidence. The acquisition value can be agreed price, observed price, special price or it may be comparative tax value. Comparative tax value represents 75% of the target value (based on the prices of real estates in the same place and in the same time, that takes into account the type, location, purpose, condition, age, equipment and engineering parameters immovable) or observed prices. The observed price is the price according to expert opinion and special price applies at auction, expropriation, in the context of insolvency, in relation to the estates, the cancellation of a court settlement of ownership, with a stake in the real estate commercial corporations, etc.

Regarding TAIP rate, that is 4 % and is linear. The law also allows exemptions from TAIP in a relatively wide range of cases, of course, for compliance with all legal conditions. Summary of two other structural elements taxes, which are paying a tax administration, is that subject to the general regulations in the Tax Code. Specific conditions, in particular the relevant facts from which it follows to file a tax return, but already defines directly

2 Eg. investment in real property business corporations, acquisition of immovable property by expropriation, acquisition of the business establishment, the cancellation and settlement of ownership, acquisition of immovable property on the basis of securing transfer of rights.

TAIP law. And finally - the tax arising from the transfer for consideration of immovable property continued to be the most profitable of transfer taxes and form a stable part of the public budget.

1.3 Summary of Reasons and Goals of the New Law

The aim of this short subsection is to state the reasons which led the legislators to create new act of tax on acquisition of immovable property. The objectives of the new law included the adaptation to changes in private law - in particular the establishment of the new concept of immovable property in the new civil code, as well as expansion of the tax base in cases of transfer of interests in commercial corporations, for which there is a change in the controlling entity. Also, reduce administrative complexity for taxpayers and tax administrators and update the tax exemption was one of the main objectives of the new Act. These should be reflected primarily in higher efficiency of tax collection. The original intention was also to tax contributions to commercial corporations, according to statistics it should double revenues from this tax. But finally taxation of investment in commercial corporations is not included in TAIP.

2 The New Concept of Taxation of Transfer of Immovable Property

The reasons for creating a new tax law on acquisition of immovable property referred to in the previous chapter and I find sufficiently justified. Binding of the new civil code was so direct and indisputable that without the creation and subsequent adoption of this or at least similar arrangements which taxes the transfer of ownership rights to immovable things would not only was failure of collection to the state budget, and could lead to a distortion of legal certainty . It is because it would not be possible apply the previous property taxes on the new civil code.

2.1 Tax Act of Acquisition of Immovable property

And how does it differ from a new law TAIP previous law on real estate transfer tax? In particular, the definition of the structural elements, the changes are reflected in addition to the tax rate, appropriation and payment

of all other elements. The law TAIP inherently follows the previous modification of property transfer tax under the act of inheritance and gift tax on the transfer, but is in many ways also different. In the original bill should be a tax shift or transfer of ownership to the acquisition of immovable things, therefore, that the primary taxpayer was to be the acquirer. This did not happen, as amended by the Act bears the primary tax liability still selling, but if the buyer agrees to the contrary.

The most significant changes are due to the reintroduction of the principle of superficies solo cedit in the civil code reflected in the specification of the subject TAIP - subject to the tax is now included acquiring ownership of real things, the right to build the acquisition of assets in the Trust Fund. Another significant change has undergone structural element - the tax base. It now provides acquisition value, as in this paper, discussed in more detail in sec. 1.2. Interesting is also updated at the same time reducing tax exemptions, the tax increase to a minimum of 200 CZK or the ability of the taxpayer to deduct from the tax base to cover the costs of an expert. Lawmakers promise these changes will simplify the entire tax agenda for consideration of the acquisition of ownership rights to immovable things and also higher efficiency of tax collection through minor administrative and financial demands on taxpayers and the tax administration.

In the original bill TAIP reckoned that the change of the controlling entity taxing commercial corporations. Such prevent circumvention of the tax increase should provide a collection of this tax by roughly 9 to 16 billions CZK. Finally, the provisions relating to the taxation changes the controlling party commercial corporations were dropped from the bill. It would be more than intersting to know the real reasons that ultimately led the legislators to remove the tax changes on the person controlling the corporation.

3 Conclusion

This paper aimed to test the research hypothesis - that the strain of the previous forms of property transfer tax was necessary or not. From the previous chapters show that due to extensive changes in private law is new or at least modified form of burdensome taxes paid transfer of property is really

necessary. The previous real estate transfer tax, led by the Act no. 357/1992 Coll, nn inheritance tax, gift tax and real estate transfer tax, as amended, was not possible to apply on the new civil code. The same problem also occurred on the property tax, which taxes the gear closely related. The need for approving new adjustments referred to the tax laws is more than obvious, after all, a new civil code of the property newly called immovable properties, reintroducing the principle of superficies solo credit as well as brings many other concepts, whether new or modified meaning. Failure to adopt new laws and amendments to tax law in response to the new civil code would lead to the impossibility of collecting taxes. If there is no concept of property there cannot be the property transfer tax or property tax. This state would come not only an important and stable revenues of the state budget, but it would also expenses associated with additional legislative process and administrative demands on the awareness and training of officials at the time of the general depression in the tax system.

The new tax law on the acquisition of immovable property should simplify the agenda for consideration of transfer of immovable properties and should reduce the administrative and financial requirements on taxpayers and tax administrators.

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ON CODIFICATION OF TAX LAW STATUTES, ITS SIGNIFICANCE AND NECESSITY

Elena Chernikova[1], *Yulia Gorosh*[2]

Abstract

The subject of the given article was inspired by the monograph "Codifications" written by a famous French lawyer and civilist Remy Cabrillac, as well as the intensification of processes of change in both European and Russian law (including their codification), and the objective need for the scientific analysis and improvement of the quality of legal regulation of tax relations in the light of modern economic environment.

Key words

Tax; tax law; tax relations; tax code; codification.

JEL Classification

K34, K40

1 Introduction

Just like Remy Cabrillac, the authors of the given article are nation-oriented lawyers, striving for the **preservation of national legal cultures and traditions relevant to the state and society's urgent needs**. In terms of legislation, the ease of adopting other countries' innovations implies completeness of their legal implementation on the one hand, and

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monitoring the efficiency of their application in the local regulatory mechanisms on the other. To understand the essence of any phenomenon, one should consider its dynamics, its historical perspective.

Codification is not just one of the forms of rationalization of law, but it is also **a legislator's reaction to the need for legal clarity of social relations regulation**. As a rule, the process of codification is triggered either by the crisis of the sources of law, caused by their uncontrolled proliferation and appearance of difficulties and discrepancies in law enforcement; or signals that the state has reached a certain phase of up or downturn in the economy.

Despite our passion for 'codes' and 'codification', there are no doctrinal works on the institute of codification in Russia.

2 Legal basis of taxation in the Russian Federation: historical perspective

At present, there are nineteen codes in Russia, and **the Tax Code** is one of those that have been enacted in the period since 1994.

The legal basis of taxation in the Russian Federation goes back to 1992, when a whole set of laws regulating specific kinds of taxes was adopted, as well as the law "Concerning the Fundamental Principles of the Taxation System in the Russian Federation", which determined the general principles of the development of the system of taxation, taxes, fees, duties and other regulatory charges[3].

In our opinion, no one has yet described this process better than one of the originators of the Russian system of taxation, Dmitry Chernik: "In the course of the Russian economic reform of the 90s the tax law was developed - within the shortest period of time and with a mark of haste and incompleteness …". But according to the professor and the first head of the State Tax Inspectorate in Moscow, a new and more coherent (compared to the Soviet period of 1990-1991) structure of the Russian Tax Law started developing in 1992 (Chernik, 1997: 218).

3 E.g. payments to the Superannuation Fund, Medical Insurance Fund, Employment Fund and Social Security Fund.

Over the next six years the tax law went through the periods of clampdown, repeal of the measures taken before, then clampdown again, but to a lesser extent. Thus, the legal regulation of the given period can be characterized as lacking stability and clarity and, therefore, the abundance of changes in the rules of the "game with the state", modification of Russian taxes, resulting in the low level of fiscal performance and growth of tax law violations. All of this served as an objective urge for the introduction of the Russian Tax Code. Subsequently, the enactment of this codified statute had a direct impact on the future perspectives of the system of taxation.

The academic literature of that period noted that the code was to be "…a comprehensive document, determining the relationship between the state and tax payers, the taxing functions and powers of the federal and regional authorities. It should also eliminate the shortcomings of the existing system of taxation, preserving its accumulated positive practice at the same time. The Tax Code is called to create a unified complex system of taxation in the country, to remove the accumulated discrepancies between laws and by-laws, to identify clearly the functions, powers and responsibilities of all tiers of authority involved in the realization of tax policy, introduction and abolition of taxes, duties and tax relieves". (Chernik, 1997: 228-230).

Being in complete agreement with this position, we should also note here that creating a codifying statute aimed at the regulation of tax relations, one should take into account the whole range of economic, administrative and legal components of the regulatory impact.

3 The Russian Tax Code, its current structure and impact

The first part of the Russian Tax Code was enacted in 1998 (Federal Act No. 146-FZ of July 31, 1998); the second part was enacted in 2000 (Federal Act No. 117-FZ of August 5, 2000).

In brief, the structure of the given codifying act is the following: the first part contains 7 sections, 20 chapters and 142 articles, and is, in fact a general part. The second one consists of 4 sections, 31 chapters and 398 articles, and is specific by its content, as it is called to regulate federal, regional and local taxes and duties, their particular types and tax regimes.

There are no sections or articles addressing the questions of powers and responsibilities of all tiers of authority (federal and regional bodies) in terms of realization of tax policy, introduction and abolition of taxes, duties and tax relieves in the Code whatsoever.

In our opinion, it is not quite right due to the following.

Tax relations are subject to tax and legal regulation. The power and proprietary nature of the legal tax relations determines impermissibility of impairing either of the sides' interests in favour of the other side (Karaseva, 2012: 51). At the same time, fighting tax evasion remains one of the global goals of the modern stage of economic development of any state.

Here is a brief genesis of the legal nature of **taxation as a legal and financial category**.

"A tax is a part of citizens' wealth that they are enforced to give to the state and local legal and social authorities for the satisfaction of collective needs" (Nitti, 1904: 240).

By tax one should also mean mandatory payments of a certain part of property for the satisfaction of social needs (Lvov, 1888: 285).

Taxes are a form of manadatory appropriation of part of the citizens' property by the state (Gorbunova, 1996: 178).

A tax is a specific financial instrument, a totality of financial relations, used by the state as one of the ways to redistribute national income (Tsypkin, 1973: 49)

Thus, being a compulsory monetary contribution to the state or local authorities in the amounts determined by law and expected to be made within a predetermined timeframe, a tax in all countries is an instrument of state regulation of economy. Taxes should not be of fiscal character only. The economic processes in a state are regulated with the help of tax policy, which is called "to strive for harmonization or optimization of taxation" (Chernik, 1997: 3).

There is a proposition in the Constitution of the Russian Federation obliging each citizen to pay taxes. It is enshrined in Article 57 of the Constitution that everyone is to pay the taxes and duties as determined by law.

Constitutions of many countries enshrine paying taxes as a constitutional obligation. Thus, Article 53 of the Constitution of Italy stipulates that every citizen is to take part in the state spending in accordance with his or her possibilities, and the system of taxation is of progressive character (Maklakov, 1996: 254). Article 30 of the Japanese Constitution fixes that the population is subject to taxation in accordance with the law (Maklakov, 1996: 297). Article 13 of the Declaration of the Rights of Man and Citizen of August 26, 1789, which is part of the Constitution of France, stipulates that taxation is necessary to supply state authorities and public administration; it is to be distributed equally among all citizens in accordance with their means (Maklakov, 1996: 137).

The emphasis on obligation and enforcement in the nature of taxation predetermines the clarity, stability and consistency of statutory regulation. Like no other, tax relations need high-quality legal regulation. **Shortcomings of the tax law lead to and are directly connected with violation of citizens' rights and freedoms, as well as decreased fiscal performance.**

Citizens' understanding of the tax law, their perception of its statutes as regulatory and not fiscal, has an impact on the performance of their constitutional duties and the replenishment of the state budget, and, therefore, the improvement of the quality of life of the society.

Keeping in mind Adam Smith's definition of a tax as a burden, imposed by the state in the form of a law, stipulating both its size and payment scheme (Smith, 1935: 341-343), the clarity of tax statutes acquires great importance for the regulation of tax sphere.

4 The role of Russian courts in the tax law enforcement and development

As it has already been noted above, the Russian Tax Code is quite an extensive legislative act, which causes difficulty in its implementation both for taxing authorities and tax-payers. Unfortunately, the discrepancies existing in the tax law have not been completely adjusted with the adoption of the codifying act. For this reason, courts in Russia play a significant role in the harmonization and development of the practice of enforcement

of law (including the right-conferring practice). There is no section of subordinate acts in the Russian tax law, addressing the enforcement of the Tax Code or regulating the process of interaction between tax authorities and tax-payers, which could help to prevent the disputes between them. There are almost no procedural provisions in the Russian Tax Code, regulating the interaction between the tax authority and the tax-payer, which leads to the appearance of disputable situations and violations on both sides. Lack of legal regulation of the tax procedures appears to be a serious problem for the Russian tax law. In this respect, one should note **the role of the Supreme Courts of the Russian Federation and the Constitutional Court of the Russian Federation in the development of legal propositions in the tax sphere for the creation of the right-conferring practice**. Staying neutral to both sides of tax disputes, courts develop the proposition that takes into account mutual interests and respects both public and private interests. So far, legal regulation of the tax sphere has been developing by the following scheme: the Tax Code plus the right-conferring court practice. Legal regulation is effective when it is relevant to social and economic needs of the society. In our opinion, the search for new tax units relevant to the economic environment, as well as the achievement of the goals of replenishing the budget and relieving a conscientious tax-payer's burden are directly dependent on the development of the institute of tax administration, which requires regulatory support of its procedures. As we see it, **the rules of procedures should be enshrined in separate legislative acts, explaining and supplementing the Tax Code application**. Otherwise, it is likely that the balance will shift in favour of tax authorities, worsen the tax administration situation, tax climate on the whole and damage the process of developing relations between the state and tax-payers.

With our country's historical background in mind, as well as the approaches of the French doctrine, it doesn't seem right to estimate the Code as a new legislative act repealing all the previous ones.

Substituting the tax law of the Russian Federation, and mainly the law "Concerning the Fundamental Principles of the Taxation System

in the Russian Federation", with the Tax Code has not become a revolution, but followed the evolutionary way, which has not resulted in the major overhaul of the system of taxation.

In terms of legal theory, a code is the result of codification, i.e. it is a form of integration of legal rules regulating a particular social sphere, but diffused in various sources, into one coherent whole. It is the goal that matters here, i.e. reaching legal clarity by eliminating legal uncertainty caused by the fragmented character of the sources of law. As we see it, **codification is called to systemize the legislation that had developed over history, with no aim of repealing everything that had existed before**.

In this respect, as a positive example one could think of the Arbitration Procedural Code of the Russian Federation. Over the period of 1992-2004, three codes have been enacted (1992, 1995 and 2002), and the latest one has preserved all the well-tried categories and institutes of the previous editions, as well as some norms of the pre-revolutionary procedural, civil and trade laws. At the same time, the given legislative act is relevant to modern local economic environment and takes into account the Russian and foreign trends in the regulation of commercial litigation.

Any rule-of-law state strives for perfect legislation. In this respect, it seems better for the tax law to develop along the way of systematization.

Russia has a wide and long experience in systematizing legislation. For instance, the Complete Collection of Laws of the Russian Empire includes the laws of the Russian State and Russian Empire for the period of 1649-1913.

5 Conclusion

To systematize the Russian tax law, it is important to determine its principles. One couldn't do without scientific and methodological support here, as scientific rationale could allow one to correlate the needs of law and economy, as well as reveal the social, cultural, technical and informational possibilities of the effective law enforcement.

To conclude, just a few words about **the principles of systematization of tax law**, which seem to be of highest importance to us.

Based on the functional purpose of systematization, i.e. legal clarity and assurance of simplicity of law enforcement, we would like to name the following principles – without interpreting their meaning here: **the principle of scientific rationale for the systematization; the principle of constitutionality and legality of tax rules; the principle of objectivity and necessity for systematization; the principle of continuity and objectivity of implementation**.

Everything set forth above is not intended to be treated as absolute truth, but to call for scientific inquiry and discussion. The authors presented the key points of the article at the XIII International Research and Practice Conference "Contemporary Issues of the Theory of Financial Law" that took place in September 2014 in Brno (the Czech Republic). Experts in financial law from Russia, Belorussia, Poland, Czech Republic, Slovakia and Hungary took part in the conference. The results of the conference will be published as a collection of monographs.

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SYSTEM OF FINANCIAL LAW
SYSTEM OF TAX LAW
Conference Proceedings

Assoc. prof. JUDr. Ing. Michal Radvan, Ph.D. (ed.)

Published by Masaryk University, Brno
Publications of the Masaryk University No. 515
(theoretical series, edition Scientia)

Editional board: J. Kotásek, J. Bejček, V. Kratochvíl,
N. Rozehnalová, P. Mrkývka, J. Hurdík, R. Polčák, J. Šabata

Print: Point CZ, s.r.o., Milady Horákové 890/20, 602 00 Brno
1st edition, 2015

ISBN 978-80-210-7827-7

This book is a collection of participants' conference proceedings of the XIII[th] International Scientific Conference "System of Financial Law" organized by *Masaryk University, Faculty of Law and Information* and *Organization Center for the Research on the Public Finances and Tax Law in the Countries of Central and Eastern Europe*. The conference was held from September 28 to October 1, 2014 in Mikulov, Czech Republic.

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ISBN 978-80-210-7827-7

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